SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	**CAPITAL CASE** **S093803**
vs.	
ROPATI SEUMANU,	
Defendant and Appellant.	

SUPREME COURT
FILED
JUL 31 2007
Frederick K. Ohlrich Clerk
Deputy

Alameda County Superior Court No. H24057A

The Hon. Larry J. Goodman, Judge

APPELLANT'S OPENING BRIEF

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DEATH PENALTY

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	)	
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APPELLANT'S OPENING BRIEF

STATEMENT OF APPELLATE JURISDICTION

This case is properly before this Court on automatic appeal following a judgment of death. (§§ 1237, 1239(b).)[1]

[1] Unless otherwise indicated, all code references are to the Penal Code.

STATEMENT OF THE CASE

In an information filed on June 19, 1997, and amended on June 19, 2000, the District Attorney of Alameda County accused appellant Ropati Seumanu, Jay Palega, Tony Iuli, and Tautai Seumanu of the murder of Nolan Pamintuan.[2] Special circumstances for murder in the course of kidnapping for robbery (§ 190.2(a)(17)(B)) and robbery (§ 190.2(a)(17)(A)) were alleged against all defendants; personal use of a firearm (§12022.5) was alleged against Ropati, while arming allegations (§ 12022(d)) were alleged against the other three defendants. (6CT 1441-1445.) Kidnapping for robbery (§ 209(a)) was charged in a second count, with enhancement allegations against Ropati for infliction of great bodily injury (§ 12022.7(a)), and arming allegations (§ 12022(d)) against the three other defendants. (6CT 1445-1447.) Finally, in count 3, the four defendants were charged with robbery with the identical GBI and arming allegations against Ropati and the other three respectively. (6CT 1447-1449; 8CT 2000-2001.)

On July 25, 1997, the defendants were arraigned on the information. At this time, the District Attorney filed a notification that the People were seeking the death penalty against Ropati Seumanu. (6CT 1465-1471, 1474.)

On April 26, 2000, Tony Iuli withdrew his not-guilty plea to the murder charge, entered a plea of guilty to the crime of voluntary manslaughter, and admitted the arming allegation. Iuli also pled guilty to simple kidnapping for count 2, and to second-degree robbery for count 3. The arming allegations on these counts were dismissed. His term was stipulated to be 16 years and 8 months, to be imposed, however, only after he testified for the prosecution in the guilt and penalty phases of Ropati's trial. (7CT 1895-1897, 1901-1910.) On May 15, 2000, Jay Palega entered into an identical plea disposition on identical terms. (7CT 1934-1951.)

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[2] Because Ropati and Tautai share the same last name, they will be referred to by their first names for purposes of clarity.

On June 5, 2000, a motion to sever the trials of the remaining two defendants was denied. (7CT 1967.) Tautai Seumanu's motion to strike the special circumstances, on the grounds that they did not apply to him insofar as he was under 16 years old at the time of the commission of the crime, was granted. (7CT 1967; 1RT 19-20.) At this point, Tautai indicated that he would be willing to plead guilty as charged, whereupon the court informed him that he faced a maximum sentence of 28 years to life, and that the court believed that this case warranted that punishment. (1RT 20-23.) On June 19, 2000, Tautai entered pleas of guilty to all counts as charged and admitted the arming allegations. (8CT 2002-2004, 2008-2023.)

On July 11, 2000, the information was formally amended to excise Tony Iuli, Jay Palega, and Tautai Seumanu. In addition, personal use clauses (§ 12022.5) alleged against Ropati were added to counts 2 and 3, while the great bodily injury allegations (§ 12022.7) were stricken. (8CT 2118-2119, 2120, 2123-2126.) Trial began that day with the commencement of jury selection. (8CT 2119.)

On July 17, 2000, Tautai Seumanu was sentenced to an aggregate term of twenty-eight years to life. (8CT 2134.)

On September 14, 2000, jury selection was completed. (10CT 2481.) On September 18, opening statements were given and the prosecution began its case-in-chief (10CT 2487-2488), resting on October 5, whereupon the defense began its case-in-chief. (10CT 2581-2582.) The defense rested on October 10. (10CT 2586.) The prosecution's first closing argument took place on October 16 and 17 (10CT 2608-2610); October 18 saw the defense closing argument, the prosecution's final closing, court instructions, and the submission of the case to the jury. (10 CT 2612.) On October 19, the jury returned verdicts of guilt for first-degree murder, kidnap to commit robbery, and first-degree robbery. Both felony-based special circumstances were found true; and the personal use allegations attached to each count were found true. (11CT 2707-2711.)

The penalty trial began on October 23, 2000. (11CT 2720.) The prosecution rested on October 25, 2000 (11CT 2725), while the defense rested on October 26. (20RT 4118.) Final arguments were presented on October 30 (11CT 2742); instructions were given and the case submitted to the jury on October 31 (11CT 2744); on November 1, the jury returned a death verdict. (11CT 2796.)

On November 7, Tony Iuli was sentenced to a determinate term of 16 years and 8 months in prison. (11CT 2803, 2813-2816.) On November 9, 2000, Jay Palega was sentenced to a determinate term of 16 years and 8 months in prison. (11CT 2829, 2834-2837.) On December 12, 2000, Ropati Seumanu was sentenced to death. (11CT 2880-2881.)

STATEMENT OF FACTS

GUILT PHASE

Prosecution Case

1. The Murder of Nolan Pamintuan

Lorena Hurtado and her brother Luis were in their house on East 13th Street, between Hancock and Monticello in Hayward shortly before midnight on May 17, 1996 when they heard a gunshot blast coming from the direction of Hancock to the north. Lorena ran to the window while Luis ran out onto the street. They both saw a dark-colored van with its lights off accelerating south on East 13th toward Monticello before turning right. (6RT 1647-1651, 1655, 1665-1667; 7RT 1688.)

Luis ran back up the street and found a man lying on the ground on his back where 13th deadended into Hancock. The man was bleeding and making noises as though trying to breathe. Louis yelled back to his sister to call 911 because someone had been shot. (6RT 1653, 1667-1668; 7RT 1678, 1679-1680, 1685, 712; 15RT 3264.)

By the time the police and paramedics arrived within minutes of the 911 call, the man was dead. The first officer on the scene noted that the man's hands, with fingers curled in, were raised above his head. He was wearing a sweater-vest, t-shirt, and blue jeans, but he was shoeless, wearing only socks. There was nothing at the scene or on his body to identify him. (7RT 1677-1678, 1679-1683, 1693-1694, 1724-1730.) An autopsy the next day showed that the man died from a shotgun blast to the chest, which virtually destroyed the heart muscle and tore up the lung. (7RT 1698-1699, 1701-1704, 1707; 8RT 2012.)

Nolan Pamintuan and Rowena Panelo were to be married on the afternoon of May 18, 1996 at St. Catherine's Church in Burlingame. The night before, there was a rehearsal at the church and a rehearsal dinner at Jake's Dragon, a restaurant in Daly City. Nolan went back to Rowena's in-law apartment, and left her at about 10:30 or 11 p.m. to stay at his father's apartment on Huntwood and Folsom in Hayward. (7RT 1735-1738, 1747; 8RT 2180-2182.) Nolan never appeared there, but his father, Lope Pamintuan, found Nolan's Acura the next morning at 9:30 a.m. parked on Folsom near the apartment. The steering wheel had been secured by "the club," but, oddly, the driver's door, though closed, was unlocked. Lope then called the police. (8RT 2187-2190.)

Officer Keith Bryan took the missing person's report and obtained a photograph of Nolan from Lope. While Bryan canvassed the neighborhood, he was called to meet Detectives Cardes and Cooper on Folsom near Nolan's Acura. The photograph Bryan had of Nolan matched the post-mortem photo the detectives had of the body found the night before on East 13th and Hancock. Bryan went to up to the apartment to inform the family. Nolan's brother Paul identified the photograph of Nolan's body. (9RT 2332-2333, 2335-2337.)

Photographs from the rehearsal on May 17 showed Nolan wearing a sports jacket and shoes. In addition, he had been wearing a Gucci watch on his right wrist and an engagement ring on his right ring finger, neither of which was with his body. (7RT 1681-1682, 1736-1739.) Also not found was the Movado watch,

encased in a black box, which Rowena had given to Nolan that evening as a wedding present, and on the back of which she had the date of their wedding, May 18, 1996, engraved. (7RT 1734-1735, 1739.)

Before they discovered Nolan's identity, the police recovered the van seen by the Hurtados. At about 12:30 a.m. on May 18, a resident of a house on Minerva near Etta, which was not far from East 13th and Monticello, went outside to grab a smoke and noticed a green van parked on Etta with its motor running. He went to bed assuming that someone had left the vehicle for only a few minutes, but when the witness went out the next morning at 6 a.m., the van was still there with its motor running. The police were called. There were punch and pry marks under the driver door handle, while the ignition had been removed completely. The doors were unlocked. (7RT 1774-1776, 1782-1787, 1793; 15RT 3264.) The engine went off as the police were processing the car. (8RT 2103.)

It was soon discovered that this 1995 green Plymouth Voyager had been stolen the night before, sometime after 9:30 p.m., from the carport of an apartment at 2037 Aldengate Way. The van had three rows of seats. The front row consisted of individual seats for the driver and passenger, while the middle and back row were bench seats. There was also a normal front driver and passenger door, and then a sliding panel door behind the latter. The babyseat, which the owners of the van had in place on the middle bench seat, was now turned over on the floor when the police found the van on Etta. The Hurtadoes were brought to Etta at 8:30 a.m., and identified the van as the one they had seen the night before. (6RT 1658, 1660, 1670-1671; 7RT 1755-1762, 1767-1769, 1792-1794; 8RT 2117; 9RT 2331; 10RT 2521-2523, 2525; 15RT 3265.)

The police found blood stains on the Plymouth van, mostly near the front passenger door and the middle bench seat. Samples from these stains were, several years later, tested for a DNA profile, which matched the profile of Nolan's blood. (8RT 2103, 2105-2111; 15RT 3247-3250.) The easier forensics were developed by May 23, 1996. The van was dusted for prints. Out of a list of

fourteen known prints, two latents lifted from the sliding door of the van were matched to the known prints of Tautai Seumanu. (7RT 1788; 8RT 2114, 2120-2123, 2211-2217, 2228.)

Even before this, the lead detectives, Cooper and Cardes, had contacted Bank of America for the ATM records and security video for the branch at Sorenson and Mission, which was not far from East 13th and Hancock, where Nolan's body was found. The records disclosed that Nolan had in fact withdrawn $300 from the ATM machine at this location on May 17 at 11:45 p.m., only minutes before the homicide. Further, the transaction was captured on the security video, showing Nolan at the ATM machine flanked by two other, very much larger, men. (7RT 1848-1859.)

Through the bank, the officers were also able to obtain the names of those persons who used the ATM immediately before and immediately after Nolan. (7RT 1861.) They both saw a van parked at the curb facing southbound on Mission. (7RT 1802-1803, 1815.) The customer who used the machine afterwards, Malcolm Scott, had in fact seen the three people at the machine before he got out of his car and walked past them as they were returning to their van, whose motor had been running throughout. (7RT 1817-1820, 1847-1848.) Detectives Cardes and Cooper showed Scott a lineup containing the photo of Tautai Seumanu, and Scott identified him. (7RT 1847; 14RT 3136.)[3] Based on the evidence of the prints and on Scott's identification, Detective Cardes obtained a search warrant for Tautai's residence at 1157 Folsom in Hayward. They executed the warrant the next morning at 7:30 a.m., May 25, 1996. (8RT 2131; 14RT 3136; 15RT 3201.)

[3] Scott identified Tautai again at the preliminary hearing. (7RT 1821.)

2. The Search of the Folsom Street House and the Arrests of Jay Palega, Tony Iuli, and Tautai and Paki Seumanu

The main house on the property was a single-story, three-bedroom dwelling of about 1800 to 2000 square feet. Behind the main house, there was an outbuilding of about 500 square feet, containing two beds, a coffee table, and a stereo cabinet. (7RT 1871, 1873, 1879, 1900, 1903, 1923; 8RT 1999; 10RT 2457; 15RT 3281.) About 24 persons, all Samoan, lived in the complex. Most of them were members of the Seumanu family, which included 16-year-old Tautai and his older brother, 22-year-old Ropati, which was the Samoan equivalent of "Robert," and which was shortened informally to "Paki," -- the rough equivalent of "Bob." Sixteen-year-old Tony Iuli, who was married to Seu Seumanu, also lived there, as well as 18-year-old Galuvae, or Jay, Palega, who was a godson of Tautai's father, Vui Seumanu, and who was married to Faasamoa Seumanu. Paki's wife, Lefea, or Lucy, Masefau, and her young daughter, Peggy, also lived there. (10RT 2448-2452, 2466; 11RT 2706-2708, 2718-2719; 12RT 2736; 13RT 2909; 14RT 3035, 3183.)

In addition to the Seumanus, their sons-in-law, and Paki's wife, Jay Palega's family stayed at the Folsom house, and Tony Iuli's parents and seven siblings visited on the weekends, staying in one of the rooms. The house, as might be expected, was messy in the extreme, with piles of clothing strewn about and dirty dishes and food all around. (8RT 1948, 1993, 2001, 2176; 10RT 2457-2458; 11RT 2676; 12RT 2708.) For the younger men, there were no fixed sleeping arrangements. The outbuilding with the two beds in it was called "the hangout room" by Tony Iuli (10RT 2453-2454), and "the boys' room" by Jay Palega (12RT 2728), and it could be used at any time by any of the men or their wives, or by Tautai. (10RT 2454, 2460; 11RT 2687; 12RT 2728-2730.)[4]

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[4] The police recovered habitation indicia in the form of bills, receipts, and photographs from around the room. These came mostly from the drawers in a stereo cabinet and were mostly connected to Paki or Lucy. However, there was

The search on the morning of May 25 began after a fully-equipped SWAT team secured the property. Jay Palega and Tony Iuli were in the main house and were detained in this first sweep. In the kitchen, on top of the microwave, the police found the Gucci watch Nolan had been wearing on May 17. (7RT 1739, 1741, 1870, 1876-1878, 1885; 8RT 1990-1991, 2132, 2133; 12RT 2730; 13RT 3002-3003; 14RT 3136, 3138.) On a pile of mattresses outside the "hangout room" or "boys' room," the police recovered a Navy peacoat, size medium, which was later identified as belonging to Nolan. (7RT 1745; 8RT 1949-1952, 2162.) In the "hangout room" or "boys' room" itself the police found Nolan's size 8 boots in a makeshift "Dutch oven." Under them they found a name tag from Food Source Grocery Store. The tag had the visible letters A-K-I, but the first letter was faded or missing. This was later identified by the manager of the Food Source as a "Food Source Team Badge" belonging to Paki Seumanu, who worked at the store until April 27, 1996. The store was located on Mission near Sorenson, just behind the ATM where Nolan made the withdrawal on May 17. (7RT 1736, 1738-1739, 1746-1747, 1801, 1871, 1884, 1920; 9RT 2326-2329.)

Inside the hangout room, there was a white five gallon trash bag, crumpled shut, but not secured. On top there was a paper lunch bag containing Nolan's driver's license, credit cards, the Great Western ATM card with which he made the withdrawal on May 17, and the ATM receipt showing this $300 withdrawal from the Sorenson and Mission ATM at 11:45 p.m. on May 17. (7RT 1735, 1750, 1891-1896.) Under the lunch bag there was another Food Source badge with the name "Paki" written on it. (7RT 1898; 9RT 2328.) In a drawer in the stereo cabinet in the hangout room, the police found Nolan's pager. (7RT 1742, 1908-1909.) Nolan's sports coat, size medium, was lying on the floor of the hangout room. In the pocket were empty breath mint wrappers Nolan used because of his

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also a drawer full of papers for Jay Palega, and miscellaneous papers with a half dozen different names on it. (7RT 1898, 1904, 1906, 1908-1910, 1915, 1916-1917, 1921; 8RT 1957, 1988-1989, 1990, 2008-2009.)

smoking. Eight packs of the same brand of mint had been recovered from Nolan's Acura, and another empty pack of the same brand had been found in the middle bench seat of the stolen Plymouth van. (7RT 1736, 1738, 1741-1742, 1887; 8RT 2125, 2129-2130, 2134, 2160-2162.)

Under one of the beds, a canvas duffel bag was found. Inside, the police recovered a left-hand gardening glove with what appeared to be blood stains on its cuff and thumb. Based on the match probability, the examiner stated her opinion that the blood on the glove was Nolan's. (7RT 1928-1929; 8RT 1944, 1999-2000; 9RT 2244-2245; 15RT 3241-3247.) Under a pile of clothing at the foot of one of the beds in the hangout room, the police recovered a black, Byrnes & Baker, leather jacket, large. Inside the pocket of the leather jacket the police found three keys belonging to Nolan, one of which was to the Acura and one of which was to the "club," which locked the steering wheel. (7RT 1746, 1925-1926; 8RT 2156-2157, 2170.) Later testing discerned blood spatter on the front of the jacket, and some blood smear on the left sleeve. (9RT 2303-2310.) A swab taken from under a pocket flap on the jacket produced the same DNA profile as that of Nolan's known blood sample. (15RT 3250-3251.)

Finally, on the coffee table in the hangout room, the police found the black box to the Movado watch Rowena had given Nolan at the wedding rehearsal. The watch itself was not there. Of the property the police knew belonged to Nolan, this watch, along with Nolan's engagement ring, were the salient items still outstanding at this point. (8RT 1946-1947; 14RT 3143.)

Tony Iuli and Jay Palega, who had been detained since the start of the search, were formally arrested at 10:18 a.m. Throughout, they had been sitting together in the same patrol car, which had been wired for recording. They discussed a story about the Gucci watch found on top of the microwave, agreeing that Jay would tell the police that the watch was a gift from Jay's mother. Tony also said in the car that he hoped that the police did not find the gun. (10RT 2485, 2487-2488; 12RT 2730-2731; 14RT 3137, 3138, 3177-3178.)

As the search continued, Cardes, who returned to the station with the suspects, began Tony's interrogation at about 12:40 p.m. Tony admitted his participation in the crime, and identified himself as the other man in the ATM video with Nolan. Tony also related that Tautai and Ropati were involved, as well as Jay, who was the driver of the van. (10RT 2488, 2570-2571; 14 RT 3137, 3138-3140.) At 2 p.m., Cardes began with Jay. Jay told Cardes how his mother had given him the Gucci watch, but soon admitted his involvement when Cardes revealed that the police had overheard Jay and Tony concoct this story about the watch, and when Cardes falsely claimed that the ATM video showed Jay to have been in the driver's seat of the van. Jay identified Tony, Tautai, and Paki as the other participants, but also named a fifth person, Roger Prasad, as the shooter. (12RT 2734; 14RT 3140-3142.)[5] However, Cardes went back to Tony, who insisted that Roger Prasad was not there, and that there were just the four of them. (14RT 3143.)

Cardes issued a bulletin for Paki and Tautai, whom he expected to be returning with the family from a church function in San Francisco. The entire Seumanu family, along with the Iuli family, had gone there in two vans, one, a gold-colored GMC, belonging to Vui Seumanu, Paki's and Tautai's father, and the other, a blue-colored Chevy, belonging to Tony Iuli's father. The GMC was driven by Vui's wife, Seu Seumanu, with Vui in the front passenger seat. Paki and his wife, Lucy, were behind them, and the rest of the van was filled with 9 other women of the Seumanu family. Tautai was in the Chevy van with the Iuli family. (13RT 3003-3004, 3008, 3011-3013, 3016, 3017, 3021, 3023-3024; 14RT 3042-3044, 3115, 3143, 3145, 3150; 15RT 3201-3202, 3308.)

The police, in force, were waiting near the Folsom street house, and were prepared for a "high risk" stop, with pistols drawn and pointed, in the expectation

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[5] In the drawer of the stereo cabinet in the hangout room, where the police found papers related to Jay, they also found a paper related to Roger Prasad. (7RT 1915.)

that the suspects might be armed and dangerous. When the two vans appeared at about 6:00 p.m. on Folsom Street, they were stopped. The GMC belonging to Vui was in the lead, with the Chevy van about a block behind. The officers ordered the occupants of Vui's van to stay put until the Chevy van had been processed, which took about 10 or 15 minutes. Tautai, in the Chevy van, was arrested. Paki, in the gold van, was also arrested. About 40 minutes after his arrest, he was patted down before being placed in a patrol car for transport. In the front pocket of his Pendleton shirt, the police recovered Nolan's engagement ring and the Movado watch with the date May 18, 1996 inscribed on the back. (7RT 1734-1735, 1736-1737, 1740-1741; 13RT 3005, 3007-3008, 3011, 3018, 3025, 3029; 14RT 3048, 3107, 3111-3115, 3127, 3130; 15RT 3201, 3308.)

During the search of the hangout room, the police recovered a good deal of ammunition, including shotgun ammunition. The non-shotgun ammunition consisted of a box of 26 Winchester .380 silver tip bullets found in a drawer in the stereo cabinet. There was also a magazine for a semi-automatic with 7 of these Winchester rounds still in it. (7RT 1905; 8RT 2158.) On the floor of the hangout room, the police found an expended .22 caliber Remington casing, a single live round of this same ammunition on top of the stereo cabinet, and three live rounds of .22 Remington long rifle ammunition. (7RT 1900, 1902, 1916; 8RT 2156.) In a black vinyl bag recovered from the same duffel bag that contained the single garden glove with blood on it, the police found miscellaneous .22 long rifle bullets and an entire box of Remington .22 long rifle bullets. (8RT 1935-1936, 1941-1942, 2163-2165.) Later, a useable print developed on the box of .22 ammunition was matched to Paki's left thumb print. (8RT 2217-2219; 9RT 2260-2266.)

There was also in the black vinyl bag containing the box of Remington .22 ammunition, an array of different types of .12 gauge shotgun ammunition. There were two boxes of .12 gauge shotgun ammunition manufactured by Fiocchi, containing a total of 14 rounds. Since the boxes held ten rounds each, six were missing. One, perhaps, was the Fiocchi .12 gauge round found in the top drawer

of the stereo cabinet. (7RT 1907-1908; 8RT 1936-1938.) In addition, in the black vinyl bag, there were 19 loose rounds of Winchester .12 gauge ammunition; five loose rounds of two different types of Federal .12 gauge ammunition; and 23 loose rounds of four different types of Remington .12 gauge ammunition. (8RT 1938-1941, 2163-2165.) Five of the Remington shells were of the 7.5 X 8 duplex heavy duty type of ammunition. This was the type as an expended Remington shell recovered by the police on top of a garbage pile outside the window of the back of the hangout room. (8RT 1939, 1954-1957, 1959, 1961.)

A few days later, the police found a .12 gauge shotgun and a .22 rifle in the trunk of a 1983 Dodge Aries that was parked in the driveway next to the Folsom Street house. The police had it towed on May 25, and the car was searched pursuant to a warrant on May 30. A few months earlier, Paki Seumanu had bought the car for $100 from Afzal Ramzan, who knew Paki as a customer of the gas station where Afzal worked. The rifle was a .22 caliber Glenfield, sawed off at the stock; the shotgun was a .12 gauge Winchester, sawed off both at the stock and at the barrel. The Winchester was encased in a plastic pool cue cover. (8RT 1964-1966, 1970, 2033-2037, 2194, 2194-2195, 2196-2200, 2202, 2244; 14RT 3152, 3154, 3161-3165.) According to the prosecution's ballistic expert, guns were sawed off for purposes of concealment. (8RT 2034.)

The Winchester shotgun contained five rounds, one in the chamber and four in the magazine. They were all Fiocchi rounds, the same brand as those recovered from the stereo cabinet drawer and the black vinyl bag in the hangout room. (7RT 1907-1908; 8RT 1936-1938; 9RT 2256-2257.) By examination of the firing-pin impression the Winchester made on test rounds in the lab, it was determined that the expended Remington shotgun round found on the garbage pile behind the hangout room had been fired by this Winchester. (8RT 1954-1957, 1959, 1966, 2026-2028, 2031, 2045-2048; 9RT 2269-2271.)

At the autopsy, the pathologist removed several shotgun pellets from Nolan's chest. He also removed from his chest the plastic wadding, or shot collar,

that holds the pellets together as they are propelled through the barrel of the shotgun, and then opens up to release the pellets as they exit the muzzle. Because shotguns are smooth-bored and fire shot instead of bullets, the pellets and wadding could not be traced to a specific gun. However, the wadding recovered from Nolan's chest was the same type of wadding used in the Remington 7 X 8.5 duplex heavy duty .12 gauge ammunition, of which five live rounds were recovered from the black vinyl bag, and one expended round was recovered from the garbage pile behind the hangout room. (7RT 1702-1704, 1715; 8RT 1939, 1954-1957, 1959, 2025, 2028-2030, 2050-2052, 2059-2060; 9RT 2268-2269.) In addition, one of the ballistics experts counted 386 pellets on the x-ray of Nolan's chest taken at the autopsy. The number was consistent with the number of pellets expected in a shot load of same weight prescribed for this particular ammunition. (8RT 2053-2058.)[6]

In the search of May 25, in the stereo cabinet's bottom drawer, which contained a hospital receipt in Paki's name and a Wells Fargo document in Jay's name, there was also an envelope on the back of which was written the name "Brad" and a telephone number. The reference was to Brad Archibald, who at the time was living in Hayward. (7RT 1908-1909; 9RT 2344-2345, 2383; 10RT 2404.)

3. The Testimony of Brad Archibald

Brad Archibald testified that he knew Paki from Tennyson High School sometime around 1992. They did not socialize much because Archibald soon

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[6] As for the range of the shot to Nolan's chest, there was some minor disagreement. The experts agreed that because of the wadding embedded in the chest, and the relative lack of dispersion of the pellets, the shot was a close one. However, one expert did not believe he could hazard any more precise a determination than that the gun was fired from five feet or less from Nolan's chest. Another expert believed he could place the distance as between 18 and 36 inches. (8RT 2058, 2060-2064; 9RT 2289-2301.)

moved to Union City. In 1996, Archibald moved back to Hayward and was living with his mother in a trailer park on Alcazar and Folsom. He was working then at a machine shop and would pass Paki's house everyday on his way home. He sometimes saw Paki outside the house and would stop to chat on occasion, and in this way they reestablished their acquaintance. (10RT 2342-2348.) Archibald was also introduced to Tautai, though he did not know Tautai's name. (10RT 2348.) In addition, he knew Paki only as "Robert." (10RT 2342, 2348-2349.)

Sometime around the end of February or beginning of March, 1996, Paki went with Archibald to Archibald's trailer to look at some guns the latter had just acquired. One was a Polytech AKS and the other was a Winchester 1300 Defender Shotgun. Archibald felt compelled by Paki's intent interest in the guns to admonish him that they were not for sale. Paki then asked if Archibald could find him one, and Archibald agreed to do so, though Paki did not specify what kind of gun or how many. (10RT 2349-2352, 2354, 2356-2357, 2414-2416.) Archibald managed to find a Winchester 1300 like his, but it was sawed-off and illegal. He bought it for somewhere between $50 and $80 and received with it a black vinyl bag with a variety of .12 gauge ammunition in it. (10RT 2357-2363, 2365-2366.)

Archibald brought the shotgun to Paki's house in a duffel bag and delivered it to him in the outbuilding behind the main house. In front of Tautai, Tony Iuli, and two or three women, he took it out and showed Paki how to use it, whereupon Paki, with money handed him by Tony Iuli, reimbursed Archibald, who then left, taking the duffel bag with him. (10RT 2363, 2367-2372, 2378-2379.) Three days later, Archibald returned to Paki's late at night with the same duffel bag, this time containing a .22 rifle Archibald was willing to give to him for free because it was not a legal gun. When Archibald had delivered the shotgun, he had mentioned this gun to Paki, who wanted it. He handed Paki the duffel bag now containing the .22 rifle, but did not give Paki any ammunition to go with the gun, except for a few loose .22 rounds. (10RT 2385-2386, 2387-2392, 2427-2431.)

Archibald identified the gun and the rifle recovered from the trunk of the Dodge as the ones he had given to Paki. The duffel bag and the black vinyl bag with the shotgun ammunition were the ones recovered from the hangout room, though the box of Remington .22 long rifle ammunition was not with it, and the gardening glove was not in the duffel bag when Archibald had given it to Paki. (10RT 2357, 2371-2372, 2376, 2378, 2387.)

4. <u>The Testimony of Tony Iuli and Jay Palega</u>

Finally, the prosecution presented the testimony of Tony Iuli and Jay Palega. Both men had been allowed to plead guilty to voluntary manslaughter, simple kidnapping, and second-degree robbery. They were promised a determinate term of 16 years and 8 months, with the sentencing delayed until after they had delivered their testimony in both the guilt and penalty phases of this trial. (10RT 2447-2448; 11RT 2646-2647; 12RT 2703-2706.)

Tony testified that two or three days before the murder, he was about to go to sleep in his father's van when he saw a white guy walking up the driveway to the back of the house. It was unusual to see a white man coming over, so he went back to investigate. The white guy was leaving, but Tony saw the sawed-off shotgun and the .22 rifle on the bed that Paki would use. Paki was the only person in the room. Paki, according to Tony, test-fired the .22. (10RT 2468-2474, 2493-2496, 2499.) He did not see anyone else test-fire the shotgun. (10RT 2475.) According to Tony, he never gave Paki any money to pay for the guns. (10RT 2499.)

The evening of May 17 began in the hangout room with Paki announcing to Tony, Jay, and Tautai that he wanted to steal a car and do "some jacking," i.e., robbing, that evening. The others were willing, and they all left in Vui Seumanu's GMC van to look for a van to take. They spotted a Dodge Caravan, which Tautai tried to break into unsuccessfully. On the way back, they spotted another van. Paki observed that it was a good one because it was dark colored and had tinted

windows. Tautai, this time with Paki's help, broke into the van. Paki and Tautai returned to Folsom Street in the stolen van, while Jay and Tony drove there in the GMC van. The four returned to the back room to retrieve the guns and place them in the stolen van. According to Tony, they had to be especially quiet to avoid alerting Tony's wife, who would not have let him go with them. (10RT 2500-2504, 2505-2514, 2520; 11RT 2577.)

The trip inside the stolen van began with Tony sitting in the middle bench seat; Tautai in the far back seat; Paki in the front passenger seat; and Jay Palega driving. (10RT 2521.) Tony remembered only the shotgun lying between the two front seats; he did not see the .22 rifle and no one mentioned it. (10RT 2525-2526.) They then drove around looking for someone alone to "jack," i.e., rob. There was no discussion, and no one gave directions to Jay, who drove around randomly. The search was fruitless and they headed back home. (10RT 2526-2529.)

As they were proceeding down Huntwood to turn onto Folsom, Tony spotted a man getting out of his car. No one said anything; Jay turned right onto Folsom and they passed the man, when Paki announced, "Let's go back and get that guy who just got out of the car." (10RT 2530-2532.) Jay made a u-turn on Folsom and pulled up next to the man – Nolan Pamintuan as it turned out – trapping him in the wedge of his open driver's door, which he was about to close. Tony and Paki jumped out of the van. Tony stationed himself next to Nolan while Paki pointed a shotgun at the latter's chest and ordered him to put his hands up and get inside the van. Nolan complied, getting into the middle bench seat with Paki while Tony replaced Paki in the front passenger seat. (10RT 2521-2522, 2532-2540; 11RT 2579.)

From the front passenger seat, Tony, who apparently did not turn around to look, "heard" Paki and Tautai stripping Nolan of all he had. He thought he heard Paki order Nolan to take off his boots, and in fact Tony had later seen some boots in the oven of the hang out room. He had asked Paki about them, and the latter

answered they were from the guy they had "lit up," i.e., killed. (10RT 2542-2544.)

Tony believed that Tautai went through Nolan's pockets. He remembered Paki remarking on how little money Nolan had on him, expressing anger that there was only $3.00. According to Tony, Paki then pulled back the slide of the shotgun twice and admonished Nolan not to think that the gun was not loaded. At this point, according to Tony, Nolan began begging for his life and offered to take them to an ATM to get more money. (10RT 2542-2547.)

As they passed an ATM by the bank on Mission, Nolan said that that one would do, and Jay made a u-turn and pulled up in front of the ATM machines. Paki ordered Nolan to get some money, and warned him that he would be shot if he tried to run away. Paki ordered Tony and Tautai to go with him in order to "block" Nolan. Tony expressed some reluctance because of the camera that guarded the ATM, but Paki told him to get out and do it anyway. (10RT 2548-2553.)

Nolan, flanked by Tony and Tautai, went to the ATM machine while Paki and Jay stayed in the van, the latter still in the driver's seat and the former still in the middle bench seat. (10RT 2565-2566.) Nolan withdrew $300 and the trio returned to the van, with Nolan handing Paki the money. (10RT 2567-2569; 11RT 2581.) Tony, at this point, was unhappy with the way things were going. He knew he and Tautai had been caught on camera; also he knew that there was someone there waiting to use the ATM who had seen them. (10RT 2580-2581.)

Paki then ordered Jay to pull away from the curb and head southbound on Mission. According to Tony, he heard from the back more plundering of Nolan. In any event, Paki directed Jay further to a dark side street to the end of the block where he told Jay to stop and turn the van around. Paki then opened the sliding side door of the van and ordered Nolan to get out. As Nolan moved to exit the van, Jay, according to Tony, told Paki in Samoan not to shoot the guy. Paki did not answer and grabbed Nolan to precipitate the exit. Jay told Paki again not to

shoot the guy, this time in English. Nolan was begging for his life. (11RT 2581-2586, 2592-2593.)

Tony, according to his testimony, wanted to prevent Paki from shooting Nolan. This, in Tony's view, was a transgression too far, since Nolan had already surrendered his money. Tony, whose back was to the scene after Jay had turned the van around, opened the passenger door with the intention of dragging Paki back into the van before Nolan was shot. Before Tony could exit the van, however, there was a shotgun blast. Paki, the only other person beside Nolan who was outside the van at this time, jumped back in; Jay took off before the sliding door was even closed. (11RT 2581-2590, 2592-2593.)

Jay drove off with Paki admonishing him to slow down. They drove somewhere and ditched the van. Paki picked up the two live rounds that popped out of the shotgun when he had pumped it twice to scare Nolan. They all walked back to the Folsom house, taking turns carrying the shotgun, which was encased in a pool cue cover. Tony believed that Tautai was wearing Nolan's Navy peacoat. He did not know who had Nolan's sports coat or other items, though Paki had Nolan's $300. In fact, Tony never saw any of the loot or cards belonging to Nolan, except for the boots in the oven, and the Movado watch, which he had seen in a black box on the coffee table in the hangout room the day after the murder. There was no conversation about who would get the watch, and he did not know what happened to it. He denied ever seeing the Gucci watch found in the kitchen on top of the microwave. He knew about it only because Jay had mentioned it in the patrol car after he and Jay were arrested. Tony himself received only $40 from the robbery. (11RT 2590-2599, 2602-2603, 2605-2606, 2620-2621, 2624-2626.)

That evening after they returned to the Folsom Street house, Tony saw Paki place the pool cue case with the shotgun in it into the trunk of the car Paki had bought from the attendant at Rotten Robbie's gas station. (11RT 2621-2622.) According to Tony, in the discussions preceding that night's excursion, Paki had said he needed money to pay for the shotgun. Tony had also told the police that

the whole purpose of the robbery was to pay the $90 Paki still owed for the shotgun. According to Tony, about twenty minutes after they returned to the Folsom Street house from the robbery and murder, the white guy who had brought the shotgun showed up, presumably to collect his payment. (10RT 2516-2519.)

Tony testified that during pretrial proceedings in this case, the four defendants were together on many occasions in the same holding cell. On one of these occasions, Paki asked that one of the juveniles, i.e., either Tony or Tautai, take the "beef." Paki said that he would be out and take care of them by putting money on their books. Tony did not like the idea, and answered, "Fuck no. You take your own beef." (11RT 2636.) Paki said nothing to this, but their relations were chilly after that. (11RT 2638.)

Jay Palega testified that a month or two before the murder and robbery of Nolan, he and Paki worked at the grocery store, the Food Source. Jay remembered one time while he and Paki were taking a break, Brad Archibald, whom Jay had never met before, showed up. He and Paki talked about a shotgun and some handguns, which Paki said he wanted to see. There was no talk about a purchase. (12RT 2710-2716.) About a week or a week and a half before the robbery and murder, Paki, in the hangout room, showed Jay the sawed-off shotgun and the .22 rifle. Paki said he obtained these from Brad, and that he had paid for them. (12RT 2738-2740, 2746.) About two days after this, Paki showed the guns to Tony and Tautai. (12RT 2747-2748.) The shotgun was handed around and they all examined it, working the pump and trying the trigger, discussing how the gun worked. (12RT 2749-2754.) In the course of this conversation, the subject of "jacking" someone came up. It was a passing idea they all talked about. (12RT 2756-2757.)

On the evening of the murder, Paki drove his father's van with Jay, Tautai, and Tony looking for another van to steal. After an unsuccessful attempt on one van, they came on the Plymouth Voyager. With Tony and Paki waiting in Vui's van, Tautai broke into the Plymouth, after which Jay popped out the ignition

switch and started the van with a screwdriver. (12RT 2764-2767.) Jay and Tautai drove the stolen van back to the house where they met up with Paki and Tony. There, both Jay and Paki, who were wearing the Samoan floral wrap, called the *ielavalava* and worn by Samoan men, changed into pants. They all then went back to the stolen van and got into it with Jay driving on Paki's direction, while Paki was in the front passenger seat, Tony in the middle bench seat, and Tautai in the back. There were no discussions about what was going to happen, and Jay started driving randomly looking for someone to jack. (12RT 2868-2772, 2775-2776, 2790-2791.)

Tautai wanted to be the one actually to do the robbery when they found an appropriate victim, and at some point, Jay stopped the van to allow Paki to switch seats with Tony because Paki wanted to be in a position to help Tautai. Soon they came upon an isolated black man. Jay stopped the van. Tautai then got out and attempted to rob the man. He had the .22 rifle with him holding it down at his side and demanded money. The man kept backing up and eluded Paki, who had gotten out to cut off the man's retreat. The two brothers returned to the van and Tautai cursed noting that they had "messed up." Paki criticized Tautai for not "baiting" the man before trying to rob him, and not taking Paki's earlier suggestion that he first approach and ask the man what time it was. They all talked about the need to trap their victim next to the sliding side door of the van and prevent him from escaping. (12RT 2778-2792, 2794-2798.)

Jay then described how they spotted Nolan getting out of his car, how Jay pulled up and how Nolan was trapped by the van and by Tony and Paki in the wedge of the door to his own car. According to Jay, Paki, holding the shotgun at his side, demanded that Nolan give him his "stuff." Nolan, looking shocked and scared, handed Paki a black box saying that that was all he had. Paki took the box. At that point a car drove by, and Paki ordered Nolan into the van. Nolan was unwilling and Paki pulled him, threatening, "Man, if you don't fucking get in, I will shoot your ass right here." (12RT 2797-2808.)

Nolan got into the van followed by Paki holding the shotgun. Jay told Tony, who got back into the front passenger seat, to close the door to Nolan's Acura, before Jay drove off. Where Tony, as he testified, only heard what was transpiring in the back and reported only a general impression, Jay heard with greater particularity what was said and saw what was happening in the rearview mirror as he drove off. According to Jay, Paki asked Nolan if he had anything on him. Nolan said no, while Paki and Tautai were going through his wallet and the pockets of his jacket. They were angry and harshly incredulous that Nolan did not have more. (12RT 2809-2812.) Tautai demanded, "You got to have fucking more than this," and slapped Nolan twice in the back of the head. (12RT 2812.) Paki, for his part, cocked the shotgun and warned Nolan, "Don't play with me." (12RT 2812-2815.)

When Paki discovered Nolan's ATM card, he demanded the PIN number. When Nolan demurred, Paki threatened, "Don't play with me, I ain't playing bullshit." Nolan gave up his PIN number. With this, they sought out a bank. Jay made a u-turn on Mission and pulled in front of the Bank of America. By this time, Nolan had been stripped of his boots, his jacket, his wallet, and the watch on his wrist. It was Tautai who took this watch. (12RT 2815-2818.) At the bank, they all decided that Tautai and Tony would guard Nolan at the ATM. Paki warned Nolan not to run and threatened to shoot him if he did. (12RT 2818.) Tautai opened the sliding side door and exited the van first. Paki moved aside to let Nolan pass, and Tony got out the passenger door. Jay and Paki stayed behind. (12RT 2818-2819.) Jay remembered no discussion about the surveillance cameras. (12RT 2820.)

Before the three returned to the van, someone pulled up behind Jay, which made him nervous. After the three at the machine returned, everyone resumed the same places and Nolan handed the $300 to Paki, who then closed the sliding door to the van. They all began to badger Nolan saying that he could get more, and that he was lying about not being able to. (12RT 2822-2824.) There was a brief

discussion about robbing the guy who had stepped up to the ATM after Nolan withdrew the money, but they decided not to, and Jay pulled away from the bank on his own impulse and drove two blocks before turning right. He was choosing his own route. (12RT 2825, 2829-2830.) Still under his own direction, Jay pulled down a side street and found a dark spot about a block in. (12RT 2829-2830.) In a statement Jay gave a few months before trial, Jay stated that Paki had told him to look for such a spot to drop Nolan off. (12RT 2831.) In any event, at this place, Paki told Jay to make u-turn and back up into the dark part of the street. Jay did so, turned off the headlights, but kept the engine running. (12RT 2830-2834.)

Paki, Tautai and Nolan exited the van. Paki was holding the shotgun in his hands. Nolan repeated, "Don't shoot me." Jay, for his part, told Paki in Samoan, "Don't shoot him, just knock him out and we'll just leave." Either before Jay said this, or in answer to this, Paki said, in Samoan, something to the effect that the man had seen their faces. Jay then heard Paki and Tautai arguing over who would shoot Nolan. Jay, impatient, declared in English, "Hurry up, let's go," while Nolan cried out, "Don't shoot me." Jay then heard the blast of the shotgun. When Tautai and Paki got back into the van, Jay hit the accelerator and took off. (12RT 2834-2841.)

Jay found a spot to ditch the stolen van, which they left with the motor running. They used a *ielavalava* one of them had brought to wipe any fingerprints off the van. The guns were back in their covering and as they set off for home on Folsom Street they took turns carrying them. On the walk back, Tautai, who was wearing Nolan's peacoat, offered everyone some piece of spearmint candy. (12RT 2842-2844, 2845-2849.) Back at the Folsom Street house they divided the money. According to Jay, he took a couple of twenty dollar bills, which was all that he wanted. The rest was split between Paki, Tautai, and Tony. (12RT 2849-2850.)

As for the other loot, Paki, according to Jay, claimed the watch in the black box, while Tautai claimed the Gucci watch from Nolan's wrist. Paki was trying

on Nolan's boots, but they did not fit. He also saw Paki wearing Nolan's ring off and on over the next week on his own pinkie finger. At one point in the following week, Jay's wife, who had seen Tautai wearing the Gucci, asked Jay if she could have the watch. Jay asked Tautai, who refused at first, and then agreed. (12RT 2851-2853.)

Some time before the arrest, Jay believed he saw Paki take the guns out of a duffel bag, place the shotgun in a pool cue case, and then place both guns in the trunk of the Dodge, with Jay acting as a lookout. There was some talk about giving the guns back to Brad Archibald to hold. (12RT 1259-1261.)

It will be recalled that the police recovered a black leather jacket from the hangout room, and that later testing showed that Nolan's blood was on this jacket. According to Tony and Jay, Paki was wearing this jacket the night Nolan was robbed and murdered. (10RT 2557, 2562-2563; 12RT 2770-2771, 2820, 2870; 13RT 2881.) According to Jay, as the quartet was walking home after ditching the stolen van, Paki exclaimed, "Damn, the blood got on me.' " (12RT 2847.) According to Tony, on December 18, 1995, Paki had taken Tony to St. Rose Hospital for stitches to Tony's hand. While Tony was with the doctor in the emergency room, Paki left and came back with the leather jacket he would wear months later at the robbery. According to Tony, Paki admitted stealing the jacket. (11RT 2607-2608.)[7]

Defense Case

Lefea Masefau, or Lucy, two years older than Paki, was born in American Samoa in 1972 and had settled in the United States in 1994. She had by then a five-year-old child named Peggy from a prior relationship. Lucy moved in with an aunt in Hayward and met the Seumanu family through social activities at the Full Gospel Church in Hayward, where Vui Seumanu, Paki's father, was the pastor.

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[7] The records of St. Rose showed a report of a leather jacket missing from the ICU Department on December 18, 1995. (13RT 3001.)

She visited with the Seumanu sisters on Folsom Street as well. She married Paki on May 7, 1996, about two weeks before he was arrested. (14RT 3031-3036.)

During the day, the room behind the main house was open to anyone. At night it was pretty much the same, and Paki, before he and Lucy were married, would sleep there, as did his brother Tautai, his cousin Jay Palega, and sometimes Tony Iuli. After they were married, Lucy sometimes slept there with Paki, and sometimes Jay and Tony with their respective wives slept there. (14RT 3038-3042.)

She remembered reading the newspaper shortly after Paki's arrest on May 25. The article stated that the robbery/murder occurred on Friday night May 17. When she saw this, she knew that Paki could not have done it since he was with her that evening. (14RT 3049-3050.)

Lucy testified that when she moved into the house as Paki's wife, she had certain responsibilities as the second eldest woman in the household. Both she and Paki were expected to help prepare meals and to care for the younger children. So that evening, Paki was helping her prepare the family dinner. (14RT 3054-3055, 3063.) At one point, Paki's father told him to go to the grocery store to get some more food. Paki, Jay, Tony, and Tautai all went on the errand, and they returned with groceries. (14RT 3055-3056.) Paki handed her the key to give to Vui, which she did, and then she and Paki continued making dinner for the ten people who were there at the time. (14RT 3056-3057.)

Dinner was over about 9 p.m. and the dishes all cleaned up and put away by 10. Everyone prepared to go to bed. Lucy and Paki were going to sleep in the main house by the back door near the kitchen. She had laid out blankets there to sleep on the floor, which she preferred to the back room because, which wet from exposure and generally a "dump." She and Paki went to bed about 10 or 11. They made love. She rose about 12:45 a.m. to go to the bathroom and he was lying there snoring. She fell back asleep, but Paki could not have gotten up without her

knowing, and he was there when she woke up the next morning. (14RT 3057-3061.)

After she read the newspaper article about the date of the crime, she was too frightened to go to the police. She had been in one of the vans returning to the Folsom Street house on May 25 when the police stopped them. They had ordered them out of the vans at gun point and patted down everyone. (14RT 3045-3046, 3061.) She had had no contact with the Seumanu family since November, 1996, when she moved out of their house. She lived a year with her aunt in Daly City, and then moved to Los Angeles. (14RT 3036-3037, 3051.) Sometime this year (2000), she was contacted by a member of the Seumanu family and asked to telephone the defense investigator, Clarick Brown. This was the first time anyone contacted her about the case. She had never talked to Paki about the crime, except to tell him once that she knew he could not have done it. (14RT 3051-3053.)[8]

Paki's brother, Tautai Seumanu, also testified for the defense. He pled guilty on June 19, 2000 to murder, kidnapping, and robbery. He decided to change his plea after Jay Palega took his deal, but unlike Tony Iuli and Jay Palega, he had not been offered a deal or any other promises. He was sentenced on this

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[8] While living in Los Angeles, Lucy obtained convictions for three counts of grand theft auto, and one count of simple grand theft. She was placed on probation. (14RT 3037, 3078.) The prosecutor also elicited from Lucy the impeaching admission that she failed to inform AFDC about her marriage to Paki, continued to receive money for her daughter Peggy, and on a few occasions put the AFDC money into Paki's jail account. (14RT 3071-3076.)

In addition, in the prosecution's case, Detective Cardes testified that when he and his partner Cooper returned to the Folsom Street house on May 30 to search the Dodge in the driveway, he encountered Lucy at the front door of the house and asked her if she had the key to the trunk. She did not; Cardes then took the occasion to ask her if she would talk to them, and she declined, saying that there was a court date pending for her husband and she would like to go before talking to them. Cardes suggested that after court she come across the street to the police station to talk to him, and he gave her his card. Lucy never came by, and never informed him of Paki's alibi. (14RT 3159-3161.)

case on July 17, 2000 to 28 years to life. (15RT 326-3270, 3312-3313, 3315, 3318-3319.) According to Tautai, the events of May 17, 1996 occurred without Paki. Present were Tautai, Jay, Tony, and Roger, whose last name Tautai did not know. Tautai was the one who had shot Nolan with the sawed off .12 gauge shotgun. (15RT 3270-3272.)

When the four of them went out that night, the original purpose was to "pay a visit" to a gang called "Don't Give a Fuck" (DGF) that generally "ran" the area in which the Folsom Street house was located. The gang had been doing "stupid stuff," throwing rocks at the window of his dad's van, trying to run over his little brothers as they rode on the street; or slashing their tires; they even shot up the Folsom Street house a few times. It was Tuatai's intention to drive by and shoot them up and he had talked to Jay about it. Jay, Tony, and Roger were all pumped up for it. So they stole the van, returned to the house, where Tautai retrieved the guns Paki had obtained from Brad Archibald, and then left again. (15RT 3276-3277, 3278-3285.)[9]

They began looking for a dope dealer to rob, but did not find one. By random chance, they came upon Nolan getting out of his Acura, and he and Tony forced Nolan into the van. Tautai was holding the .12 gauge. Inside the van, Tautai was in the far back; Roger was in the middle seat with Nolan; Jay was driving; and Tony was in the front passenger seat. Roger and Tautai stripped Nolan of his belongings. (15RT 3286-3292.) Tautai found the ATM card in Nolan's wallet, and they proceeded to a machine. When Nolan refused to get out of the van, Tautai handed the shotgun to Roger, who pumped it as a warning to Nolan, who then promptly got out of the van. (15RT 3292-3293.) With Tony and Tautai flanking him, Nolan withdrew funds from the machine and the three of

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[9] Brad Archibald testified on cross-examination that one time while visiting Paki's house, Brad had seen bullet holes in Paki's father's van. He asked Paki what happened, and Paki told him, relating how his sisters and mother were inside the vehicle when it happened. Paki then asked Brad if the latter could get him a gun for protection. (10RT 2416-2417, 2426.)

them returned to the van. (15RT 3293-3295.) They decided not "to jack" the guy who had pulled up behind them because it was too much out in the open. (15RT 3295.)

After they returned to the van, Tautai, now cold, put on the leather coat he had brought with him from the house carrying it in the same gym bag in which he had placed the .12 gauge. (15RT 3282, 3296-3298.) In Samoan, he, Jay, and Tony discussed what to do, and Jay picked out a secluded spot. While they deliberated about whether or not they should beat Nolan up, Tautai decided on his own to kill him, which he did. His purpose was to "earn" his "stripes," or "make a name" for himself in his gang, the Sons of Samoa, a Crip affiliated gang of which Paki was the leader. (15RT 2399-3301, 3325, 3329, 3334, 3335.)

Back at the house, in the hangout room, they divided the cash, which Jay had carried on the walk back to Folsom Street. Tautai already had the watch and ring, and the others simply took the items they wanted. The guns were placed inside the dresser. Tautai threw leather jacket he was wearing down on the bed at random. The next morning, Tautai saw Paki and told him what happened the night before, including the murder. Tautai asked Paki to get rid of the guns; he also gave Paki the watch and the ring and asked him to sell it for him. (15RT 3305-3307, 3318.)

Detective Cardes testified that when he interrogated Tautai on May 25, 1996 after his arrest, he did say he was the person who had shot Nolan. When the police expressed disbelief and began pressuring him to stop protecting his brother, Paki, and ruining his own life thereby. Tautai in tears, succumbed to this and told the police that Paki was there and had killed Nolan. (15RT 3203-3206, 3227-3228, 3312.)

Tautai, at trial, explained, that he lied about this and had done so for "personal reasons, family reasons." In Samoa, his family was royalty. Vui, their father, was a chief. Paki, his eldest, was his heir and had gone through the ceremonials required for this status. If Paki were to go to prison, then Tautai

would be heir. Tautai rationalized this act of envy with the consolation that Paki, older and tougher than the then 15-year-old Tautai, would be better able to survive the system. (15RT 3309-3312, 3319.)

Finally, there was a longer story to be told regarding the voluntary manslaughter deal offered to Tony Iuli and Jay Palega. Shortly after his arrest, Tony Iuli made his first appearance in juvenile court and soon learned he would be prosecuted as an adult and would be facing life without possibility of parole. Tony, who had committed about 10 armed robberies before he was 16, knew from past experience that he could get a "break" by talking to the authorities, and that he would never get out of jail unless he cut a deal to get Paki convicted. (11RT 2648-2652, 2654-2655, 2657, 2660.) As for Jay Palega, who was 18 at the time of his arrest, he had been under the impression that he was facing a death penalty, until the preliminary hearing occurred, after which he found out he was facing only life without possibility of parole because the prosecution was seeking the death penalty only for the shooter. (13RT 2956-2958.)

Two years after the information was filed in this case on June 19, 1997, Tony's attorney, Michael Berger, began approaching the prosecutor to inquire about a possible plea agreement that would allow Tony to plead to a lesser offense in return for his testimony. (10RT 2445-2446.) No deal was forthcoming, however, until March 3, 2000, shortly after Paki had pulled his time waiver and trial was imminent. At that time, both Tony and Jay were offered the following: if they testified against Paki at the guilt trial, they would be allowed to plead guilty to first-degree murder and receive a sentence of 25 years to life; if they further testified at the penalty phase they would be allowed to plead to second-degree murder for a term of 15 years to life. (10RT 2445; 11RT 2644, 2661-2664; 13RT 2896.) Both men rejected the offer because they believed that no one was being paroled and that any indeterminate term was effectively a full life term in any event. (11RT 2644-2645; 13RT 2896-2897.) In April, 2000, prosecutor then "sweetened" the deal for Tony at least, offering him the current disposition, which

allowed him to plead guilty to voluntary manslaughter and then receive 16 years and 8 months *after* he testified against Paki at both Paki's guilt and penalty trial. (10RT 2446; 11RT 2645-2646.)

In May, 2000, after a deposition with the prosecutor, Tony asked the prosecutor to offer Jay the same deal. The prosecutor agreed and allowed Tony to write the letter as a precursor to the offer. The letter began with the salutation, "*Uso*," which was the Samoan word meaning "brother." (11RT 2630-2631.) The letter continued:

> "Well it's me, Tony. Just writing you a quick letter. I guess you already know that I'm taking the deal. I'm sorry, and I hope you understand. But the D.A. said they will give you the same deal, 16 years, 8 months. It's a great deal. Remember what we talked about, our sons. *Uso*, if you ain't going to do it for yourself, do it for your son. It's a deal you wanted, now take it. It's not 15 to life. It's 16 and 8 months. She said that she is going to change it. *Uso*, please take it. Please take it. Please. 4 years is already done, another 10 and you're done. Don't go out. Think about it, *uso*. Love always, Tony Iuli." (11RT 2631-2632.)

Domestic sentiments and determinate terms appealed to Jay and he accepted the prosecution's offer. (13RT 2954-2955.)

PENALTY PHASE

Prosecution Case

1. Factor (b) Evidence[10]

The prosecution's penalty presentation consisted in part of factor (b) evidence starting with Paki's prominence a street brawler. His punch was styled

[10] Section 190.3(b) defines as a factor in aggravation "[t]he presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

the "one hitter quitter" for its capacity to end a fight in a single blow. (18RT 3758-3759, 3770; 19RT 3830, 3849, 3875, 3897.) Jay Palega had seen this when Paki, only 13 or 14 at the time, knocked out a black guy in a schoolyard fight, although it was Paki who ended up going to the hospital when the boy's friends retaliated. (19RT 3871-3875.) Saiyad "Ed" Hussain a friend of Paki's from Tennyson High School had seen the one hitter quitter when Paki fought four guys at once at Tennyson. (19RT 3896-3899.) Mannix Molia, another high school friend, had seen it at a fight at Fremont High, on a couple of occasions at the Aloha Club in Oakland, and once at a Mexican bar on International Boulevard in Oakland. (19RT 3830-3831, 3849.) There were gang overtones to some of these incidents. Paki, whose street moniker was Smurf or Alf, had been a member of the Sons of Samoa, a Crip affiliated gang, since he was 11. Crips claimed the color blue; the guy Paki punched at Fremont High School, claimed red, the color associated with the rival Bloods. Tennyson, Paki's own school where he fought the four guys at once, was primarily a "red" school. (12RT 2719-2721; 13RT 2983-2984; 15RT 3331; 18RT 3776; 19RT 3820-3821, 3831, 3834, 3855, 3897-3898, 3959-3961.)[11]

Gang motivation played a role in an incident at Arroyo High School on January 15, 1992, when Paki was 17 or 18. On that day, Mannix Molia and Paki, both cutting classes, met at Fremont High School. Paki suggested they go over to Arroyo High School to visit Paki's cousin, Liu Sua, who went to Arroyo. They met Liu at a 7-11 near Arroyo and fell in with a group of young men. They all started talking and began to make plans to go to the school and beat up anyone wearing red. Four carloads drove over to the school. According to Iosefa Mataese, who was one of the assailants that day, Paki was the first one out of the

[11] However, these divisions were not hard and fast, nor did they involve an inexorable enmity: Bloods often socialized with Crips; several of Paki's friends "claimed red"; and Paki's own brother-in-law, Tony Iuli, was a Blood. (11RT 2666-2667; 12RT 2721; 13RT 2983-2984; 18RT 3702-3704, 3711, 3776-3777; 19RT 3812-3813, 3818, 3896-3897, 3902-3903, 3945.)

car to confront an Arroyo student and throw the first punch. This signaled a general mêlée in which one Arroyo student's jaw was broken. Mataese said he had seen Paki kicking someone who was down; Mannix Molia described Paki as "just wild." According to Jay Palega, Paki later told Jay that he had knocked a guy out in this fight and that the reason for it was a sort of gang flexing of muscles. (19RT 3833-3840, 3854-3858, 3885-3886.) Molia testified that the group went back to the Fremont High swimming pool after the Arroyo fight. Paki, according to Molia, talked about how good he felt and how he wanted to go out again. The others refused because the police would now be on the lookout for them. (19RT 3842-3843.)

In another incident that occurred three years later in December, 1995, some sort of family or friendship solidarity played a role. Paki and a group that included Tony Iuli, Tautai, and Roger Prasad drove over to Mt. Eden High School in two cars. They spotted a green Honda that they were looking for, and sandwiched it in at the curb in front of the school. They beat-up the driver, Avi Singh. Tony Iuli busted the windows of Singh's Honda with a crowbar; Paki, at least according to Iuli, beat Singh and busted his nose. In the course of the incident, Singh lost his pager and wallet. According to Darrell Churish, whose T-Bird was one of the cars transporting the assailants, they were looking for a green Honda because that was thought to belong to a Bobby Nair, a Mt. Eden student with whom Roger Prasad had some dispute. They went in a group to back up Roger because Nair had a lot of gangster friends. As it turned out, Singh was in fact a friend of Nair and had often driven Nair around in his green Honda. According to Tony Iuli, however, the assault at Mt. Eden was because several Mt. Eden students had been harassing Tautai Seumanu. (18RT 3746-3749, 3752-3755, 3788-3794; 19RT 3925-3929.) In any event, Paki was interviewed by the police a few days after this incident and denied being present, although he admitted that he told some of his relatives and associates to go to Mt. Eden to "take care of another student" there named Bobby Nair. (19RT 3958-3959, 3961-3963.)

Paki's family was involved in an incident of "road-rage" on September 13, 1991 when 17-year-old Paki was a passenger in a van driven by his father, Vui Seumanu. Jacqueline Romero had to stop to allow another car to back out into the street, causing Vui to stop behind her. He began honking at her, and she raised her hands to signal that there was nothing she could do about it. When she moved forward again, Vui pulled into the lane next to her, and as they proceeded down the road in tandem, a metal rod was launched from Vui's van, missing Jaqueline's car, but hitting a parked car. The police were flagged down and both Paki and Vui were arrested. (18RT 3713-3714, 3716-3717; 19RT 3866-3870.)

Some of the incidents were the result of little more than a kind of puerile truculence. Thus, in the fall of 1994, Paki was hanging out at Tennyson Park with Darrell Churich and Myron Cruz. They spotted a drunk walking through the park and started chasing him for the fun of it. Darrell and Myron testified that they gave up the chase, laughing at the drunk's discomfiture, but Paki proceeded on, caught up with the man and knocked him out. As the three ran away, they could see a patrol car stop by the prostrate man. The officer revived him with smelling salts, placed him in the car, and drove him off, presumably to the drunk tank. (18RT 3757-3760, 3773, 3780-3781.) Some time after this, Paki, Jay Palega, and Ed Hussain beat up a Mexican who was waking by Darrell Churish's T-Bird and peered into the window. According to Palega, Paki hit the guy over the head with a bottle. (18RT 3794-3795; 19RT 3880-3882.)

Similarly, in January, 1996, Paki, Tony Iuli, Ed Hussain, Myron Cruz, and Darrell Churish went to the San Leandro Marina, which at night was a "make-out" spot for teenagers and young adults. For the fun of it, the group walked through the lot bouncing or banging on cars where they presumed some assignation was occurring. One victim of this prank took exception, got out of his car, and started fighting with Ed; Paki intervened and started punching Ed's opponent. The group then ran back to Myron Cruz's van to escape. Two of the disgruntled victims chased them in his car; Either Ed or Tony, picking up a pipe, threw it at the

windshield of one of the cars, busting it. The other car rammed Cruz's van. The group nonetheless escaped. They dumped the van at Ruus park and claimed it was stolen, so that Myron did not have to tell his parents what had really happened. (18RT 3761-3767, 3786-3788; 19RT 3878-3880, 3900-3902, 3931-3934.)

There was testimony that the one-hitter-quitter was sometimes used for robbery. Sometime in 1992, Paki, Darrell Churish, and Oscar Felix, were on lunch break from their vocational class at the Regional Occupation Center associated with Tennyson High School. They were driving around in Oscar Felix's car looking for girls. They saw a large man at a bus stop wearing a blue Georgetown jacket. Paki had Felix stop. He confronted the man, demanded the jacket, knocked the man down with a single punch when the latter refused, and took the jacket. This was Oscar Felix's account. According to Darrell Churish, however, the man surrendered the jacket from Paki's menace alone and no blow was struck. (18RT 3774-3775, 3781-3783; 19RT 3812-3817.) Jay Palega, who was not present, testified that Paki owned a blue Georgetown jacket. (19RT 3876.)

In this vein, Mannix Molia testified that shortly after the Raider jackets first came out, Paki admitted to Molia that he, Paki, beat up a couple of guys to take their jackets. (19RT 3845.) Darrell Churish, attested that he and Paki were in a mall together on one occasion when Darrell was looking longingly at a Raider's jacket someone was wearing. Paki asked him if he wanted the jacket – an offer Darrell declined, assuming that Paki intended to take that particular jacket by force. (18RT 3783-3784.)

Darrell and others were present at another inchoate robbery. Just before the San Leandro Marina incident, the group had been driving around San Jose in Myron Cruz's van, looking for something to do. Paki, Ed, and Tony Iuli began talking about going to Reno to gamble. No one had money, however, and they floated the idea of jumping someone in the parking lot of a casino and taking his money. It was somehow decided that this would not be a good idea, and they all

settled for the prospect of adventure at the San Leandro Marina. (18RT 3767-3768, 3784-3785.)[12]

The prosecution took pains to show that Paki inveterately carried firearms. Darrell Churish testified that in 1992, when he attended the vocational class with Paki, Paki brought a .380 semiautomatic handgun to class to show to his fellow-students, including Oscar Felix, who, for his part, had no memory of this. (18RT 3777-3779; 19RT 3814.) He presumably had this same gun on March 14, 1996 when Officer Pola went to Ruus Park asking to search the cars parked near a group of apparent gangbangers. Although it seemed to be primarily a "red" gathering, Paki was there with Jay Palega and Tautai. Pola asked to search the various cars parked nearby, and Paki consented to the search of a Ford Taurus he was driving, volunteering to Pola that there was a firearm under the front passenger seat. Pola recoverd a .380 Larson, semi-automatic, fully loaded, and arrested Paki for the misdemeanor of carrying a loaded firearm in a vehicle. (18RT 3701-3709., 3711; 19RT 3884.)

About a month earlier, on February 10, 1996, the gun seized by Officer Pola was used to shoot at a house in Pompano Street in Hayward, where a gang called D.G.F., which claimed red, held sway. Tony Iuli provided the details. A few hours before the shooting, Tony was with Tautai, a boy named Matthew, and Matthew's girlfriend, driving home from a Tennyson High School basketball game in the girlfriend's car. A gathering of D.G.F. members on Pompano yelled insults at Tony, making derogatory remarks about Samoans and threatening to kill him. Tony was armed with Paki's .380 and was about to use it, when Matthew's girlfriend stopped him and insisted he not do anything like that from her car. Later in the day, Tony stole a van to take him Paki and Tautai to Oakland to meet with Paki's and Tautai's sister at a club called Sweet Jimmy's. On the way, Tony told Paki about the incident and Paki said that they would take care of things when

[12] According to Ed Hussein, there was no mention of robbery; it was simply decided that it was not a good idea to go to Reno. (19RT 3900.)

they returned to Hayward. On the way back, sometime after midnight, they went to Pompano Street, made sure there were no police around, and then drove by the house where Tony had been insulted. There was no one out there, but Paki told Tony to fire anyways, which he did two or three times. The bullets hit the front of the house; one penetrated to the wall of the living room. (19RT 3822-3826, 3862-3864, 3934-3942, 3945.)[13]

This then was the prosecution's case of factor (b) incidents occurring before the charged crime. The prosecution also presented factor (b) evidence occurring after the commission of the crime, while Paki was in custody.

Donald Mattson testified that he was housing deputy at Santa Rita Jail on May 22, 1998. From his vantage point above C-pod, Mattson saw Paki pull off his shirt in anger, throw some chairs, and then shake his fist at Mattson, yelling at him, "You ain't right man. Come on down here and talk to me like a man." Mattson, on the intercom, asked what the problem was. Paki just responded, "Come on down here so I can take care of you." (18RT 3739-3742.)

John Smith testified that he was the unit deputy at Santa Rita on July 9, 1998, when he helped broke up a brawl between four or five inmates throwing punches at each other. Paki and Jay Palega were involved and, according to Smith, Paki threw three or four punches himself. (19RT 3807-3809, 3810.)

On March 14, 2000, at lockdown time, Paki complained to Deputy Rice about not getting his shower, and he refused to go to his cell. When Rice ordered Paki into an isolation cell, the latter became aggressive and hostile. Specifically, Paki began cracking his knuckles and announcing that he was not afraid of Rice, who was 6 foot 4 inches, 250 pounds. After Rice threatened Paki with pepper spray, Paki went to the isolation cell. (18RT 3731-3733.)

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[13] In evaluating the gang element of this incident, it should be recalled that Tony Iuli, like the D.G.F. members, whose hostility was at least also ethnic or territorial, or both, also claimed red. (19RT 3945.)

While there, Paki's regular cell was searched. In his personal belongings, the deputies discovered a tattoo gun consisting of a bic pen with a sharpened paper clip attached, and powered by batteries to inject the tattooing ink. The item belonged to Paki. Deputy Gattey, who found the item, testified that he had seen inmates use such instruments for purposes of stabbing. However, Gattey, who had the discretion to cite Paki for possession of a weapon chose instead to cite him for possession of tattoo paraphernalia. Gattey's choice was confirmed by Deputy Miller, who had interrogated Paki about the item and recommended a twenty-day loss of privilege. (18RT 3725-3727, 3728-3730.)

2. Victim Impact Evidence

Nolan's brother, Paul, his fiancée, Rowena, and his mother, Clementia Manio, testified for the prosecution. They all attested that Nolan was a kind, unselfish, always helpful and ever giving of himself to others. (19RT 3912, 3917-3918, 3967.) Paul, in fact, who was not as giving, was a bit jealous of these good qualities in Nolan. He also looked up to Nolan as an older brother, even though Nolan, his half-brother through their father Lope, was only six months older. For Nolan was much more mature than Paul. (19RT 3905-3907, 3911-3912.) Rowena remembered how Nolan always treated her like she were his main priority in life. He was both her fiancé and her best friend. (19RT 3918-3919.) Mrs. Manio, Nolan's mother, recalled how he was always attentive to her on Mother's Day, at Christmas, or on her birthday, and how they talked about his plans in life, to have children and to work in the computer field. (19RT 3968-3969.)

Each of these witnesses recounted their memories of the last day of Nolan's life and the stark contrast of a wedding transformed into a funeral. Paul, who was to be the best man at the wedding on May 18 last saw Nolan at the rehearsal on the Friday night before. Their last conversation was about the wedding, which they talked about when they left the restaurant that night to share a cigarette in the parking lot. The next morning, things became frantic when Nolan was not there. About an hour after the missing persons report was filed, the police returned with

a counselor and said they had to have an identification. Paul became apprehensive as he led them into his room. They showed him a photograph of Nolan's dead body, and he made the identification. At the funeral, Paul gave Nolan's eulogy. He broke down in front of everyone. (19RT 3907-3911.)

Mrs. Manio remembered the wedding rehearsal as a gloomy and rainy night. The wind was blowing hard. There was also tension between her and her ex-husband, Nolan's father. This caused Nolan some stress that night, but when the dinner at the restaurant ended, Nolan, on his way out, hugged her, said that he loved her, and that he would see her the next day. (19RT 3969-3971.) The next day, she got a call from Rowena at 7:30 a..m. to ask her if Nolan had spent the night at her house. She told Rowena that he had not, and the latter informed her that Nolan had also not spent the night at his father's house. Mrs. Manio was worried. At 9 she suggested that the police be called. When she was informed that Nolan had been killed, she broke down, yelling and crying. (19RT 3971-3973.) Before the funeral, she wanted to be with him for a few moments before his body was prepared for the viewing. She saw his chest wound and the wound on his hands from "when he was trying to save his body." This was her last image of Nolan, and while she daily remembered her son alive, she also always had in mind the pain and terror he must have suffered in death. (19RT 3973-3974.)

Rowena testified that about 7 a.m., Nolan's stepmother telephoned to tell her that Nolan had not come home from the rehearsal the night before. She telephoned Mrs. Manio to find out that Nolan had not gone there either. She was no more successful in finding him when she telephoned some of his friends. She worry was agonizing, but Mrs. Manio and her own parents urged her to go ahead and have her hair done in preparation for the wedding. While at the beauty parlor with her mother, Rowena received a call asking her to return home. When she arrived, the parish priest and a nun, both of whom were friends of Rowena and Nolan were there. Rowena's father broke the news to her. She could not describe how she felt. "I mean, it is just heartbreaking. You are looking forward to

something, a really happy part of your life, and to realize that wasn't going to happen, that you will never see this person you love so much ever again, it is just very hard." (19RT 3913-3916.) The funeral took place in the church in which they were to be married; the priest officiating was the one who was to have married them; Nolan's body lay in the casket dressed in his wedding tux. (19RT 3916-3917.) Rowena missed her graduation in June; she quit her job because her friends at work had met Nolan and knew him; she cried herself to sleep every night hoping that the next day would be the May 18 they had planned for. (19RT 3918.)

Defense Case

Paki was born in American Samoa in 1975 and lived with his mother until she died two years later, in 1977. His father Vui, left for America, and the boy lived for a couple of years with his uncle, until Vui brought him here to live with him and his new wife, Sao Seumanu. Vui was a *matai* or chief and Paki was his heir, which was not merely a passive status, but a commitment to undertake and accept the responsibilities of a chief and leader. This commitment, called *pa*, need only to exist in the heir, but could be shown by the optional undergoing of a ritual tattooing of the lower body from the knees to the waist, including the scrotum. This tattooing, done with a shark's tooth and taking up to a week, was very painful. Paki submitted himself to this on a family trip back to Samoa when Vui's mother had died. For Paki, the tattooing took four days. (19RT 3980, 3991-3994, 4013-4015, 4030-4031, 4033-4034; 20RT 4062.)

Within the family, Paki was a respectful child. He always helped out taking care of the six daughters and one son – Tauatai – that Sao and Vui had. He changed diapers, prepared bottles, and cooked food, and when he was older, he would be left in charge when Vui or Sao went away for an extended period of time. In these instances, he was always a responsible custodian. When he began to work he always gave his paycheck to Sao to contribute to the family sustenance.

When he married Lucy, he treated her daughter Peggy, as though she were his own child and became very close to her. (19RT 4014-4020, 4032-4033, 4043-4045.)

Paki was also close with his maternal grandparents. When his grandfather got sick, sometime in 1995, Paki moved out the Folsom Street house and lived with his grandfather in San Francisco as his caretaker, cooking and cleaning not only for the old man, but for his maternal uncle and cousins as well. Paki moved back to Folsom Street when his grandfather returned to Samoa. (19RT 4016-4017; 20RT 4058-4060, 4063-4064.)

Paki's sense of *pa* extended to violent confrontations as well, such as when, in 1990, he confronted a group of street thugs who were harassing Lua Sua, the minister's daughter. Paki was beaten up and spent the night in the hospital. (19RT 4000, 4052-4055.) Paki was also active with his family in the First Samoan Gospel Church, where Vui was the pastor. Vui, a roofer, had hurt his knee in a roofing accident and became a pastor in 1995. Paki was a deacon in the church, sang in the choir, worked with the young people, and helped with such fundraisers as the car wash and the barbeque. (19RT 4020, 4030-4033.)

Hanna Seumanu, one of Paki's sisters, testified that Paki was like a second father to her. She remembered how sad she was at the goodbye breakfast they had at Denny's when Paki had moved out of the Folsom Street house to take care of his grandfather. She also remembered how he remembered to call her on her birthday after he had moved out. (19RT 4045-4046.) Siniva Seumanu, another sister, thought of Paki as her best friend and adviser. Once her father and mother forced her to cut off her engagement because the fellow was not worthy of the Seumanu's who were conscious of their status as royalty. Siniva went to Paki, who was in jail on this charge, and Paki, who generally enforced his parents' will, nonetheless gave his blessing and approval. Vui, who was not in the courtroom while Siniva related this story, would be angry if he knew. (19RT 4048-4050.) Manua Malauulu, Paki's maternal uncle, attested how, when Paki moved in to take care of the grandfather, Paki was "the joy of my father." Manua continued, "He is

real close. Every time he have a conversation with my father, I feel happy because my father most of time go along with him. And when he with him, he bring up in Samoa. [*Sic*]." (20RT 4063-4064.)

Clarence Scanlon, a former Honolulu police detective, who was a Samoan and the son of a *matai* and now a *matai* himself, testified about Samoan culture. His cultural expertise was augmented by experience as a policeman in Hawaii with Samoan youth gangs, including the Sons of Samoa. (19RT 3976-3980, 3982-3983.)[14] Scanlon reviewed the police reports in this case and interviewed Paki and Paki's family. According to Scanlon, Paki's home culture was traditionally Samoan, including the involvement in the church, and family oriented. Paki's involvement in the Sons of Samoa, however, was typical of young Samoans trying to assimilate to American culture. Nonetheless, Scanlon believed that the Samoan element predominated over the gang element, as evidenced by the fact that Paki tolerated the marriage of his sister to Tony Iuli, who was a Blood. (19RT 3996-3999.)

Based on his experience in Hawaii, Scanlon attested that the Sons of Samoa was a very violent gang. Nonetheless, Paki's record was not commensurate with what Scanlon would expect from hardcore gangsters. Paki's crimes, though violent, were more in the nature of rallying to the defense of friends or family, of establishing a reputation for purposes of protective deterrence, and establishing a territory. There was in this an undercurrent of the tribal values found in Samoan culture itself. Significantly absent from Paki's gang activity was the sale of drugs – a primary activity of many criminal street gangs for purposes of profit. (19RT 3986-3991, 3995-3997.)

The only other expert to testify for the defense was Marlin Griffith, a clinical psychologist, who conducted psychological testing and had interviewed

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[14] It was Scanlon who attested to the significance of the tattooing on Paki's lower body. (19RT 3992-3994.)

Paki. Griffith described the "general psychological picture" as showing Paki to be "a very personable, emotionally expansive person, quite unsophisticated, psychologically unsophisticated, and somewhat emotionally immature." The testing showed also personality trends such as low self-esteem, and depressive tendencies, although not a depression disorder. Although no IQ test was given, Griffith estimated that Paki was of average to low intelligence. Paki suffered no psychosis or severe personality disorder; he could not be diagnosed as having antisocial personality disorder; the one mental health problem Griffith could firmly diagnose was chronic alcohol abuse. (20RT 4066-4069, 4073.)

ARGUMENT ON APPEAL

GUILT PHASE ISSUES

I.
APPELLANT WAS DENIED HIS RIGHT TO A FUNDAMENTALLY FAIR TRIAL BY THE ADMISSION OF IRRELEVANT AND IMMATERIAL EVIDENCE OF THE PROSECUTOR'S SUBJECTIVE MOTIVATION IN ENTERING INTO A PLEA AGREEMENT WITH TONY IULI AND JAY PALEGA, AND BY THE USE OF THAT EVIDENCE BY THE PROSECUTOR FOR PURPOSES OF VOUCHING FOR THE CREDIBILITY OF IULI AND PALEGA, AND FOR THE GUILT OF APPELLANT

Introduction

The plea arrangements with Tony Iuli and Jay Palega have been summarized in detail in the statement of facts. It was related how after Iuli's suppression motion failed, his attorney began soliciting a deal in return for Iuli's testimony against his co-defendants; how a deal was forthcoming shortly before trial in March, 2000 after appellant had pulled his time waiver; how the first offer, twenty-five years to life for guilt phase testimony, and fifteen-to-life for both guilt and penalty phase testimony, was rejected by Iuli; how a second offer of a determinate term of 16 years and 8 months was made and accepted in April, 2000; and finally how Iuli solicited the same offer for Jay Palega, who, in May, accepted it in exchange for his testimony in both phases of trial. (See above at pp. 29 to 30.) What was not recounted, at least not in full, was the evidence presented at trial regarding the prosecutor's personal and subjective motives in offering these benefits to Iuli and Palega.

First, the prosecutor, Ms. Backers, was allowed to elicit from Tony Iuli, on direct examination, affirmative answers to questions designed to reflect

circumstantially on *her* state of mind, such as "And you told me that you felt bad for Jay because if you guys had just robbed Nolan and let him go you would have been out by now, right? . . . If Paki didn't shoot him" (11RT 2632); or, "And then after you and I talked about Jay's involvement then I told you I would offer the same deal I gave you, right?" (11RT 2632.) Secondly, she obtained a stipulation regarding the testimony of Jay Palega's attorney containing *her* statements reflecting even more directly on *her* subjective state of mind:

> "If called to testify, Mr. William Muraoka, an assistant public defender in Alameda County, would testify that on or about May 15, of the year 2000, he had a conversation with Ms. Backers [the prosecutor] regarding the plea agreement entered into by his client. Ms. Backers indicated to Mr. Muraoka that based on her evaluation of the evidence as the deputy district attorney assigned to this case, that, while she believed all four defendants were legally guilty of the murder, her review and evaluation of the evidence led her to believe it was appropriate for her to exercise her discretion as the prosecutor of the case, to enter into the plea agreements which have been stated on the record." (13RT 3000-3001.)

Finally, all this culminated in a closing argument in which Ms. Backers proclaimed to the jurors that she had exercised her discretion "with a proper amount of integrity" (17RT 3477), and that "the only reason" she allowed Tony Iuli and Jay Palega to plead to such a favorable deal was the "moral difference" between them on the one hand, and Paki and Tautai on the other. (17RT 3475, 3477, 3512-3513.)

There is much more detail to add to this than one can summarize in a single paragraph, and only the flavor of the impropriety can be conveyed by way of introduction. But the law is easier to encompass in a brief introductory span. Indeed, one can reduce it to a single sentence by this Court: "The prosecutor's *opinion* about the various coparticipants' relative culpability is not relevant to any issue at trial." (*People* v. *Cain* (1995) 10 Cal.4th 1, 64, emphasis in original.) But

even an expansive summary can be concise. For it is a familiar and well-established rule that counsel in a criminal trial must refrain from injecting into the case their personal beliefs as to guilt or innocence or the credibility of witnesses. (*United States* v. *Young* (1984) 470 U.S. 1, 8-9; *People* v. *Bain* (1971) 5 Cal.3rd 839, 848; *People* v. *Stewart* (2004) 33 Cal.4th 425, 499.) Considered as evidence, these opinions are irrelevant to any material issue presented to the trier of fact to decide (*People* v. *Bell* (1989) 49 Cal.3rd 502, 537-538; *People* v. *Arends* (1958) 155 Cal.App.2nd 496, 509-510); and when counsel expresses such opinions more openly or expressly to the jury he or she commits the form of misconduct commonly known as vouching. (*People* v. *Huggins* (2006) 38 Cal.4th 175, 206-207.) But whether the error appears through the admission of irrelevant evidence or through misconduct in argument, or both, (see *United States* v. *McKoy* (9th Cir. 1985) 771 F.2nd 1207, 1211), the substance of vouching error rests on the "fundamental tenet of the adversarial system that juries are to ground their decisions on the facts of a case and not on the integrity or credibility of the advocates." (*People* v. *Donaldson* (2001) 93 Cal.App.4th 916, 928, quoting *United States* v. *Prantil* (9th Cir.1985) 764 F.2nd 548, 553.)[15]

Each of these three errors – the direct examination of Iuli, the Muraoka stipulation, and Ms. Backers' closing argument – will be described and analyzed in greater detail. Part of this description will include the lengthy and intricate

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[15] If the integrity or credibility of the advocates were a material issue in this case, then Ms. Backers here was faced with the serious question as to why she gave an illegal plea disposition to Iuli and Palega. Section 1192.7(a) provides in relevant part: "Plea bargaining in any case in which the indictment or information charges any serious felony . . . is prohibited, unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence." Here, Iuli and Palega confessed, or virtually confessed, to first-degree felony-murder before they were offered deals; the circumstantial evidence incriminated them as much as it incriminated appellant; there were no material witnesses unavailable; and the reduction of a sentence from death or from life without parole to 16 years and 8 months is of course a substantial reduction.

procedural history of these issues to show that they have not been forfeited on appeal. One may briefly summarize this, too, for introductory purposes. Once before the Iuli examination, and once more before the Muraoka stipulation, the trial court ruled expressly and unequivocally that the defense had transmuted the issue of Ms. Backers' subjective state of mind in relation to the plea arrangements into a material question relevant to the determination of the case by the jurors. (10RT 2399-2402; 13RT 2965-2967.) Defense counsel worked this effect, according to the trial court, in opening statement by impugning Ms. Backers' subjective motives in offering a deal to Iuli and Palega.

As will be seen, the premise of the trial court's ruling, that defense counsel had opened the door to rebuttal in kind is fallacious, since no such "open-the-door" doctrine exists in California (*People* v. *Gambos* (1970) 5 Cal.App.3rd 187, 192; *People* v. *Arends*, *supra*, 155 Cal.App.2nd 496, 508-509), and because the remedy for any defense misconduct in opening statement was for Ms. Backers to have objected and requested an admonition. (*People* v. *Bain*, *supra*, 5 Cal.3rd 839, 849.) On the question of forfeiture, the record will show that the trial court's clear pronouncements on the matter rendered timely objection futile and therefore excused any procedural default. (*People* v. *Hill* (1998) 17 Cal.4th 800, 822.) This applies to the examination of Iuli and to closing argument. The same applies also to the Muraoka stipulation, but for that, trial counsel had in any event lodged a timely objection against Ms. Backers' offer of proof, and acquiesced through stipulation after the trial court had overruled the objection. (13RT 2965-2966, 2998-3000.)

Finally, appellant will demonstrate that the three vouching errors, in their force and effect, were egregious, injecting the prosecutor's personal beliefs into a case that was already highly emotional on the proper evidence alone; that these errors undermined the fundamental fairness of the guilt trial by a violation of distinct federal constitutional provisions; and finally, that under any standard of review for prejudice, reversal of the guilt verdict is required.

A.
Opening Statement and the "Berger" Stipulations

As just noted, the trial court cited defense counsel's opening statement as the basis for finding Ms. Backers' subjective state of mind to be a material issue in the case. The court declared this to be the case during discussions that occurred just before Tony Iuli testified, when Ms. Backers claimed that because of counsel's opening statement impugning her motives in conferring plea benefits on Iuli and Palega, she was now warranted in presenting rebuttal evidence on her motives and state of mind. Although the substance of this discussion concerned evidence of the actions of Michael Berger, Tony Iuli's attorney, and resulted in stipulations, here denominated the "Berger" stipulations, that were not in themselves, at least, objectionable from appellant's point of view, that discussion illustrates the provenance of the vouching errors in this case as well as the futility of objection for the improprieties in the Iuli examination and closing argument. Thus, a detailed summary and legal examination of the procedural course of this issue from opening statement through the "Berger" stipulations is necessary to the exposition of error in this case.

In his opening statement, defense counsel announced that the defense would present alibi evidence showing that appellant was not present at the murder/robbery and did not commit it, and that the incriminating evidence of where the victim's property was found was undercut by the communal density of the twenty-five people living in the "tribal compound" on Folsom Street. (6RT 1642.) Counsel also spoke about Iuli and Palega and outlined the evidence of motive, bias, and prejudice that circumstantially impeached these witnesses, who were to receive substantial legal benefits in exchange for their testimony. (6RT 1643.) However, defense counsel's introduction to the subject of Iuli and Palega's credibility sounded the wrong note in the following three sentences:

> "And one thing I want you to remember is a particular day, and that is March 3rd of this year [i.e., 2000]. Because what occurred on that day is my client withdrew his time waiver, which meant he had to commence this trial within 60 days. And after that date, the prosecution realized that they cannot make the case against my client, that they had to get him by testimony." (6RT 1643.)

This was indeed a reasonable inference, but, as set out in the introduction, an immaterial and irrelevant one. (*People* v. *Bell* (1989) 49 Cal.3rd 502, 537-538.) The legal use of this inference to impugn the prosecution case was no more proper from the defense than the use of a favorable inference of this type to bolster the prosecution's case would be from the prosecutor. (See *People* v. *Von Villas* (1992) 10 Cal.App.4th 201, 249-250.) However, the misconduct was mild and curable. (See *People* v. *Gionis* (1995) 9 Cal.4th 1196, 1216-1217 [prompt admonition corrected any misconception that arose from prosecutor's argument that a defense attorney has a duty "to lie, conceal and distort everything and slander everybody."].) Here, any prejudice could have been dispelled by an admonition to the effect that the prosecutor's personal opinion about her case was irrelevant, and that the case had to be decided on the basis of the evidence presented. (See *People* v. *Price* (1991) 1 Cal.4th 324, 462 ["[A]n admonition that the prosecutor's opinion was irrelevant would have avoided any possible prejudice."].) Further, a timely objection and admonition would have allowed defense counsel to reform his statement to a relevant proffer of evidence: *Iuli* and *Palega* were pressed by the imminence of trial, which they also manipulated as leverage to obtain what they believed was an offer sufficient to induce them to testify for the prosecution.

A timely objection and an admonition, then, was Ms. Backers' remedy; retaliation was not. (*People* v. *Bain* (1971) 5 Cal.3rd at p. 849; *People* v. *Kirkes* (1952) 39 Cal.2nd 719, 725-726.) But she kept silent for several days of trial. Brad Archibald was still testifying on cross-examination (10RT 2395, 2403), and

Tony Iuli had not yet appeared. (10RT 2446.) This was when Ms. Backers first made her dissatisfaction with counsel's opening statement known.

In her belated objection, Ms. Backers quoted the three sentences from the opening statement that formed the prologue to counsel's discussion of the evidence surrounding the plea arrangements. (10RT 2395.) She also added that she was offended by trial counsel's narrative characterization of the events leading up to this arrangement, when he stated, "The prosecution approached them through their counsel and offered them, what we say in criminal vernacular, a deal." (10RT 2396; see 6RT 1643.) In fact, according to Ms. Backers, Michael Berger, Iuli's attorney, began approaching *her* for a deal as early as 1999 after his motion to suppress had been denied. He approached her on three occasions, soliciting a deal and offering to have Iuli testify against the remaining co-defendants. Ms. Backers, however, was in the middle of trial and told Mr. Berger he would have to wait until she had time to attend to this. (10RT 2396.) "So," continued Ms. Backers, "the impression left with the jury that I got desperate because I thought I couldn't prove my case against this defendant, and approached them for deals, is absolutely not true." (10RT 2396.)

She wanted to correct the falsehoods she believed to be purveyed by the defense in its opening statement, and she demanded a series of stipulations to the effect that she had been working on the case for two years, and by March 3, 2000, she had, in that very week, provided defense counsel with 1174 pages of penalty phase discovery. This was relevant to show that she was already working up the penalty phase of the case, and therefore not concerned with the soundness of her guilt phase case. (10RT 2396-2397.)

She also anticipated calling Mr. Berger and Mr. Muraoka, Jay Palega's attorney. Berger would be asked who approached whom for a deal. (10RT 2397.) She also proposed to "ask" Tony Iuli: "You and your lawyer had an agreement that you would take a deal from the prosecution that included you testifying

against the others, and you had that agreement that you would take that deal for over a year before you actually pled guilty." (10RT 2397.)[16]

Defense counsel defended his opening statement as a fair comment on the evidence. Morevover, he argued, Ms. Backers' offer of proof would entail problems in that it might penetrate the attorney-client privilege between Mr. Berger and Mr. Iuli if Mr. Berger were to be cross-examined. In addition, Ms. Backers would be trying to convey the unilateral impression that she was too busy to deal with this case and that somehow providing discovery to defense counsel was significant, especially since current counsel, Mr. Ciraolo and Ms. Levy, had entered the case in December, 1998 and discovery had to be reissued because the previous attorney, Lincoln Mintz, never handed over his file or materials. In any event, according to defense counsel, whether or not she was busy with another case was simply irrelevant. (10RT 2397-2399.) Counsel went on:

> "[MR. CIRAOLO]: . . . . What is critical here is that an offer was not made until after he [appellant] withdrew the time waiver. And the offer that was made by Ms. Backers was rejected. They had – there had to be a further offer. The subsequent offer was accepted.
>
> "Whether Ms. Backers had a case or not, what her rationale was or was not for making an offer, I believe is fair comment in the opening statement and outline and final argument.
>
> "If she wants to put her credibility on the line, the evaluation of the case, she is doing so here. And I don't think that's appropriate.

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[16] One must note carefully Ms. Backers' precise formulation in this quote: her proposed question to Iuli is about an agreement *between him and Mr. Berger*, not Iuli's agreement with Ms. Backers. The latter deal was only a month old.

"THE COURT: So what you are saying Mike, it is okay for you to raise an inference that she did this for a certain reason, but it is not okay for her to try to refute it.

"MR. CIRAOLO: I am not saying that.

"THE COURT: But that is what you are saying that what you said was a fair inference on the evidence. And I don't disagree with that.

"MR. CIRAOLO: Okay.

"THE COURT: But she certainly is entitled to put before the jury her perspective so they can draw her inferences from the same evidence." (10RT 2399-2400.)

Thus, Mr. Ciraolo recognized that Ms. Backers' placing "her credibility on the line" was in some way not "appropriate;" the trial court, however, precisely identified Mr. Ciraolo's logical dilemma if he maintained that his opening statement represented a fair inference from the evidence. The Court agreed that it *was* a fair inference, but carried this premise to the logical conclusion that Ms. Backers' state of mind in relation to the plea deal was now relevant and could be rebutted by counter-evidence from her.

Of course, her state of mind was not relevant, defense counsel's opening statement notwithstanding. "The so-called 'open the gates' argument is a popular fallacy." (*People* v. *Arends*, *supra*, 155 Cal.App.2nd 496, 508-509.) It does not exist under California law, and there is no alchemy that can transmute the nature of irrelevant evidence into relevant evidence by redressing one error with another, counter-error. (*People* v. *Gambos* (1970) 5 Cal.App.3rd 183, 192.) Again, "[t]he proper way for the prosecutor to correct misconduct by the defense counsel is to object and have the trial judge reprimand the misbehavior and admonish the jury to disregard such remarks." (*People* v. *Bain*, *supra*, 5 Cal.3rd 839, 849.) Strictly speaking, the trial judge here did not fall prey to the "popular fallacy" of the

"open-the-gate" argument, but, like defense counsel, mistook a reasonable inference for a relevant and material one. Moreover, the ruling was clear and unequivocal: Ms. Backers' state of mind was now a material issue in the case.

The immediate upshot of this discussion was the "Berger" stipulations, drafted by the trial court. They informed the jurors that the information in this case was filed on June 19, 1997, which, under the law, triggered a 60-day time limit to go to trial. However, appellant entered a general time waiver. Ms. Backers was first assigned to this case on or about December 28, 1997, while Michael Ciraolo and Debra Levy entered the case on or about December 11, 1998 for the defense. From at least December, 1998, defense counsel had been provided discovery related both to guilt and penalty phases of trial on an ongoing basis. During the year of 1999, Mr. Berger, who had been representing Tony Iuli since May 27, 1996, approached Ms. Backers on at least three occasions regarding a possible plea agreement that would involve Mr. Iuli being allowed to plead to a lesser offense in consideration for his testimony at trial. On March 3, 2000, appellant withdrew his time waiver, which meant that trial had to commence no later than May 2, 2000. On April 26, 2000, Tony Iuli entered into an agreement with the prosecution to give testimony in exchange for a plea to a lesser offense. (10RT 2445-2446.)

There was nothing in these stipulations, taken in themselves, that prejudiced appellant. Indeed, they were useful to the defense in that they showed that Iuli, through his attorney, was angling for a deal about a year before one was forthcoming. Further, it is doubtful that these stipulations in themselves established anything unequivocally favorable to Ms. Backers' subjective state of mind. If Iuli initiated requests for a deal, the prosecution had the absolute power to respond or not with an offer. If a substantial amount of penalty discovery was available before the deals were offered, that hardly meant that the prosecutor had fully prepared or was fully confident in the guilt case. It would be even more doubtful that inexperienced, lay jurors could penetrate the practical or legal

implications of the rules of discovery. Ms. Backers would, of course, eventually explain all this in closing argument, in which she did engage in vouching. But the discussions surrounding the "Berger" stipulations establish that any relevance or materiality objection lodged in a timely manner against evidence or argument related to Ms. Backers' subjective state of mind would have been futile. Thus, where no objection was lodged, as it was not in the direct examination of Tony Iuli or in Ms. Backer's closing argument, there is nonetheless no forfeiture of the issue on appeal. (*People* v. *Hill* (1998) 17 Cal.4th 800, 822; *People* v. *Abbaszadeh* (2003) 106 Cal.App.4th 642, 648; *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033.) One may now turn to the direct examination of Tony Iuli.

B.
The Examination of Tony Iuli

The direct examination of Tony Iuli was previewed in the introduction. The fuller context was as follows:

> "Q. In the month of May, specifically on May 5th when I was talking to you, you told me that Jay had said several times to Paki: Don't shoot the guy, right?
>
> "A. Yes.
>
> "Q. And then you talked to me about Jay getting a deal, the same deal you got, right?
>
> "A. Yes.
>
> "Q. Tell the jury how that conversation went.
>
> "A. I asked you if you gave Jay the same deal that I got.
>
> "Q. And I asked you why I should, right?
>
> "A. Yes." (11RT 2630, emphasis added.)

At this point Ms. Backers elicited testimony about the letter Tony wrote to Jay, and had him read it in court including the sentence that "the D.A. said they will give the same deal, 16 years, 8 months." (11RT 2631; see above, p. 30, for the entire letter.)

After Iuli read the letter, the direct examination continued:

"Q. And you wrote that while you and your lawyer and I and my inspector were sitting in this courtroom, right?

"A. Yes.

"Q. And you told me that you felt bad for Jay because if you guys had just robbed Nolan and let him go you would have been out by now, right?

"A. Yes.

"Q. If Paki didn't shoot him.

"A. Yes.

"Q. And then after you and I talked about Jay's involvement, then I told you I would offer the same deal I gave you right?

"A. Yes.

"Q. But you would have to testify truthfully?

"A. Yes.

"Q. At the penalty phase too?

"A. Yes." (11RT 2632.)

When a witness is, or might be, beholden to the prosecution, the only relevant question is whether or how that witness's motives, biases, prejudices, and generally, his state of mind, has been influenced by interaction with the authorities. The subjective intentions of the authorities are not at issue. (*People* v. *Brown* (1970) 13 Cal.App.3rd 876, 883; *People* v *Allen* (1978) 77 Cal.App.3rd 924, 931-932.) What Tony Iuli said to Ms. Backers to form *her* state of mind was thus irrelevant. Here, through Iuli, Ms. Backers was clearly trying to establish why she offered a deal to Jay Palega. Further, although she had already given a deal to Tony Iuli, she clearly, here, wished to establish this extrajudicial conversation as a *reflection* of why she offered a deal to Iuli. In short, this was the erroneous admission of irrelevant and immaterial evidence (*People* v. *Cain* (1995) 10 Cal.4th 1, 64; *People* v. *Price* (1991) 1 Cal.4th 324, 462; *People* v. *Bell* (1989) 49 Cal.3rd 502, 537-538), which also constituted a vouching error. (*United States* v. *McKoy* (9th Cir.1985) 771 F.2nd 1207, 1211.)[17]

Defense counsel, despite his opening statement, did not even attempt to respond in kind during the cross-examination either of Tony Iuli or Jay Palega. His cross-examinations touched only on the conventional points that impeach accomplice-witnesses in almost every case such a witness appears. But it is worth examining the cross-examination in more detail because during the later discussion about Mr. Muraoka's evidence, the trial court referred to the Iuli cross-examination as containing "insinuations" about Ms. Backers' state of mind (13RT 2965-2966), while Ms. Backers more vehemently accused counsel of expressly "reiterat[ing] throughout the cross of Tony and Jay" that she had panicked because she could not prove her case and therefore had to lower her offer to them. (13RT 2967.) The trial court's temperate, but mistaken, observation was merely the influence of the court's legal error in seeing reasonable inferences as relevant and

[17] The questions Ms. Backers asked were also leading and argumentative, but these were problems only of form. The substantial problem was lack of materiality and relevance, and vouching.

material ones, and it can be shown to be wrong. As for Ms. Backers' hyperbole, if it was meant to be an accusation that defense counsel actually stated that she had panicked, then it was false.

Defense counsel began his cross-examination of Iuli on the topic of the plea arrangement by eliciting from Iuli the admission that Iuli would do anything to stay alive and that he did not want to die in prison. (11RT 2643-2644.) Counsel then went over with Iuli the course of the multiple offers without even referring to the prosecutor, by office or name, as the active agent in this. (11RT 2644-2645.) The subject then turned to Iuli's expectations regarding the deal:

"Q. The deal has not gone down yet, has it?

"A. No.

"Q. Because you haven't been sentenced yet?

"A. Right.

"Q. And your deal is conditioned on your performance, isn't it?

"A. Right.

"Q. And your deal is dependent on *what do you believe*, is it dependent on my client getting convicted?

"A. In a way, yeah.

"Q. Pardon me?

"A. Yes.

"Q. *Do you believe* your deal is dependent on my client getting executed?

"A. I don't know.

"Q. *So you believe*, is it not correct, that for you to get the deal you have to do your best job to see that my client is convicted?

"A. Yes." (11RT 2645-2646, emphasis added.)

Counsel then turned to "[w]ho was supposed to decide" if Iuli was telling the truth. This was where Ms. Backers was first mentioned, when trial counsel asked Iuli, "Not Ms. Backers?" to which Iuli answered, "No." (11RT 2646.) Again, despite the possibility of misinterpreting this question as placing Ms. Backers' state of mind in issue, the focus clearly was on Iuli's.

The cross-examination, then, was conventional and proper. No mention whatsoever was made of Ms. Backers' subjective expectations; the focus held steady on *Iuli's* expectations, on *his* state of mind, and on *his* credibility. Even when such questions as, "And during those conversations, Ms. Backers told you what she was looking for; did she not?", which, by the way, elicited from Iuli, a "Yes" (11RT 2653) were not improper since they went to the issue, not of Ms. Backers' intentions, but those of Iuli.

Even when defense counsel raised the topic of appellant's withdrawal of his time waiver, which in opening statement was proffered as a central fact in the inference about the prosecution's motives in offering the deal, the focus remained on Iuli's state of mind:

"Q. And in the course of his [Mr. Berger's] representations to you, you became aware of the charges that were against you?

"A. Right.

"Q. And you became aware of the consequences of those charges?

"A. Right.

"Q. And you formed your own opinion, in your own mind, as to what would be in your best interest or not in your best interest?

"A. I already made my mind up that I was already through at Juvenile Hall.

"Q. You made up your mind in Juvenile Hall?

"A. I knew I wasn't never going to get out again.

"Q. You figured you never were going to get out again?

"A. Yes.

"Q. And you had the goal to get out again; is that correct?

"A. Right.

"Q. So you would do anything to get out again?

"A. Right.

"Q. And you knew that the only chance you had to get out was to make a deal?

"A. Right.

"Q. And by 'deal,' some people call it a plea bargain. Would you call it that?

A. No.

"Q. You just call it a deal?

"A. Right.

Q. What does a deal mean to you in this context?

"A. Lesser time.

"Q. Lesser time?

"A. Yes.

"Q. And the lesser time is the District Attorney says I will give you lesser time if you do something?

"A. Right.

Q. Is that correct?

"A. Right.

"Q. And you believed that your deal in this case was to get Paki convicted?

"A. Right.

"Q. And with this goal in mind, you waited to see if you were offered a deal?

"A. Right.

"Q. And you were offered a deal; is that correct?

"A. Right.

"Q. And you were offered a deal this year, right?

"A. Right.

"Q. And the first deal you were offered was after March of this year; is that correct?

"A. Yeah.

"Q. Tony, you remember going to court with the three other guys several times; is that correct?

"Q. And you remember seeing me in court and Ms. Levy in court a couple of times?

"A. Right.

"Q. The other lawyers were there, Mr. Berger, Bill Muraoka, Mr. Daley.

"So these were formal court appearances; is that correct?

"A. Right.

"Q. And do you remember one time in court my client, and I spoke for him, withdrew the time waiver; remember that happening earlier this year?

"A. Right.

"Q. And you were aware by withdrawing the time waiver this trial would have to start within a short period of time?

"A. Right.

"Q. And after that was done in court was the first time somebody told you you had a deal offered to you; is that correct?

"A. Yes.

"Q. And the deal that was offered to you at that time was split deal, testify in guilt, get first degree, testify in penalty, get a second degree; is that correct?

"A. Yes.

"Q. So you were given the option that is you could get Paki convicted, you get 25 to life; if you could get him executed you could get 15 to life?

"A. Right.

"Q. And you turned that down?

"A. Right.

"Q. That wasn't good enough for you; is that correct?

"A. Right.

"Q. Now up to that point in time, you had not talked to Ms. Backers yourself directly?

"A. Right.

"Q. And up until that point in time you went through – strike that.

"Before that time, you had a hearing where evidence was taken here in Superior Court, remember that, a 1538.5 hearing?

"A. Huh-uh.

"Q. Do you remember coming to court?

"THE COURT: Mike, nobody knows what a 1538.5 hearing is.

"That is a motion to suppress evidence, ladies and gentlemen.

"MR. CIRAOLO: Q. You had a hearing before another Superior Court judge where police officers came in and testified regarding the circumstances of the search warrant and the seizure of the property.

"Do you remember that?

"A. Yes.

"Q. So you heard what the police had to say as to what they found and why they found it?

"A. Yes.

"Q. And that all happened before the time waiver was withdrawn?

"A. Right.

"Q. So you had this information of two preliminary examinations and other information before the time waiver was withdrawn?

"A. Right.

"Q. Is that correct?

"The time waiver is withdrawn, and within a few days to a week after that, is that correct, an offer was made to you?

"A. Right.

"Q. And that offer wasn't good enough?

"A. Right.

"Q. For you?

"A. Right.

"Q. And we were actually assigned down to this courtroom for trial, remember that?

"A. Right.

"Q. And by 'we,' I mean yourself, Tautai, my client, and Jay Palega, and all their attorneys. We were here, we were sitting over here; is that correct?

"A. Right.

"Q. And we were assigned to Judge Goodman. And there were discussions as to scheduling of the motions and the jury selection and so forth?

"A. Right.

"Q. And after coming down here you were made aware of another offer; is that correct?

"A. Yes.

"Q. And that offer is the one that you believe you are operating under now?

"A. Right.

"Q. And that other offer is what we would call a fixed sentence offer, that you were given a release date from prison unless you pick up new offenses in prison?

"A. Right.

"Q. Is that right?

A. (NODS HEAD AFFIRMATIVELY.)

"Q. And you took that offer?

"A. Right.

"Q. And after taking that offer, Ms. Backers started talking to you?

"A. Right." (11RT 2659-2664.)

It would be tedious to go through Palega's cross-examination in detail as well, but nothing there was unconventional or improper either. (11RT 2668-2671; 13RT 2891-2900, 2920-2921, 2954, 2956-2958.). Whenever a witness testifies pursuant to some consideration from the prosecution, inferences can be made about the purposes and intent of the prosecutor. One could undoubtedly draw inferences from the respective cross-examinations about Ms. Backers' state of mind, but nothing in the phrasing or focus of the questions actually encouraged this, and if the trial court saw insinuations in defense counsel's questioning, then it was through the refracted prism of legal error regarding what was relevant and material. If Ms. Backers heard even more, then the solipsism of partisanship deluded her. In any event, even if the trial court was correct in any way in its perception, the remedy was still an admonition to defense counsel and to the jurors. (*People* v. *Bain* (1971) 5 Cal.3rd at p. 849; *People* v. *Kirkes* (1952) 39 Cal.2nd 719, 725-726.) Instead, the court allowed Ms. Backers to up the ante, as it were, with the Muraoka evidence, which one may now proceed to examine.

C.
The "Muraoka" stipulation

Jay Palega's testimony followed immediately on that of Tony Iuli. (12RT 2703.) The discussions regarding Ms. Backers' proffer of testimony from Mr. Muraoka took place the morning after defense counsel completed his cross-examination of Palega, but before the redirect examination began.

Ms. Backers announced that she intended to call Mr. Muraoka to testify after Palega was finished. She intended to elicit from him the course of plea negotiations for Palega and how Palega then entered his plea agreement on May 15, 2000. (13RT 2961-2962.) She also intended to elicit from him his opinion about whether it was more dangerous for an inmate who testifies for the prosecution at both a guilt and penalty trial than for an inmate who testifies only in a guilt trial. This, Ms. Backers, believed, would explain to the jury the reason why the initial offer was graded in this way, and why the second offer was so much better. (13RT 2962.) [18] She continued:

> "And the most important portion of the testimony that I would seek to elicit is a conversation I had with Mr. Muraoka on the 9th floor lobby of the District Attorney's office, where after the plea took place, Mr. Muraoka was at the front counter and asked if he could speak with me. We sat down ten or fifteen minutes and spoke. And his question to me was exactly this: I know that you did not need Jay to prove your case, I would like to know why you gave Jay that deal.
>
> "And I told him exactly my feelings. And my feelings were that after my full investigation of the case and talking to Tony, that I believed that although all four of them were legally guilty, that there was a difference in moral culpability between the defendants, and

[18] Tony Iuli had already testified that from his point of view, a "snitch" is a "snitch" and that there were no differences in degree or corresponding risk. (11RT 2683-2684.)

that it was my belief that Tony and Jay did not want Nolan to get shot.

"And so I made a moral distinction between them, and I believe that morally Tony and Jay were entitled to a lesser sentence, and that is why I gave his client the deal. And he thanked me.

"And I would not seek to elicit this, but the conclusion of that conversation was that he thanked me and commended me for making that kind of distinction, moral distinction." (13RT 2962-2963.)

The trial court, without lingering over any relevancy problem, began exploring with defense counsel the possibility of using stipulations here as well. Defense counsel was not averse to some sort of stipulation as to the letter, the communication of the letter to Palega, and to other matters already before the jury, but counsel objected to anything based on Mr. Muraoka's supposed expertise regarding graded plea benefits in accord with the phases of a capital trial. (13RT 2963-2965.) Counsel also expressly objected to evidence of Mr. Muraoka's encomium for Ms. Backers' morality in making the plea offers: "Furthermore, the ultimate substance of this whole exercise appears to be that Ms. Backers had rendered a personal opinion as to the moral justification of making an offer. And the personal belief and opinion of a District Attorney as to a person's guilt is misconduct." (13RT 2965.)

This was the first time counsel made the appropriate objection, and belated as it was, he certainly advanced the legal discussion beyond the erroneous principle that Ms. Backers' state of mind had become relevant through defense counsel's opening statements. Whatever counsel may have erroneously thought of the relevance and materiality of his opening statement, he did now make a timely and accurate objection (Evid. Code, § 353), which, as could be predicted with certainty, was futile.

For the trial court responded: "Mr. Ciraolo, haven't you sort of thrown open the doors to what her motivation was for making these offers was because your whole case so far has been based on the implication that the offers were made in a fit of panic because your client pulled his time waiver? . . . So how do, in the spirit of fair play, in a search for the truth, do I allow Ms. Backers to rebut the insinuation that you have been raising throughout your cross examination of both the last two witnesses where she is able to put on the record what maybe really happened?" (13RT 2965-2966.)

The trial court's finding such "insinuations" in counsel's examination of Iuli and Palega has already been examined and refuted, as well as the court's resort to the "open-the-gate" rationale for the admission of evidence. At this point, Ms. Backers added her view:

> "Your honor, the statements that were made in opening statement, and have been reiterated throughout the cross of Tony and Jay, are that I panicked when the time was pulled on March 3rd and thought I could not prove my case and that is why I had to lower the offer from second to a determinate. And you have absolute offers of proof that that is not true. To the contrary, that in the discussions with Tony Iuli and in investigating the case, that I came to a moral decision that the two people in the front of the car did not want Nolan to get shot. And you have a witness who can testify to that. . . It is absolutely untrue." (13RT 2967-2968.)[19]

A consensus began to develop from this legally confused discussion that the word "moral," at least as an opinion issued by Mr. Muraoka, had no place in any evidence that would be presented to the jury, and Ms. Backers was willing to

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[19] She seems to mean that her agreement with Mr. Muraoka proves "absolutely" not only that her second offer was motivated only by moral considerations, but also that her first offer, which had to be lowered, was motivated only by moral considerations.

take the word out as long as it was clear from Mr. Muraoka's evidence that she did make a decision that she could later characterize in argument as a moral distinction between the defendants. (13RT 2968-2969.) However, Mr. Ciraolo still resisted having any evidence about Mr. Muraoka's conversation with Ms. Backers as to why she made the offer to Iuli and Palega. He insisted that it was improper under the authorities that establish vouching as misconduct. Mr. Ciraolo then requested that the matter be put over until Palega finished his testimony so that he could "figure out what I am going to do, research the law and explain to the jury." (13RT 2969-2970.)

The result of Mr. Ciraolo's consideration was his acquiescence in two stipulations. One superfluously described the facts about how the deal was communicated by Tony Iuli's letter to Jay Palega, which letter was reviewed by all the prosecutor and by defense counsel for both Iuli and Palega, and how Palega accepted the offer and entered his plea on May 15, 2000. (13RT 2998-3000.) The second stipulation was the one quoted in the introduction, about how Mr. Muraoka would attest to Ms. Backers' statement that she believed "it was appropriate for her to exercise her discretion as the prosecutor of the case, to enter into the plea agreements which have been stated on the record." (13RT 3000.)

The legal analysis of the Muraoka stipulation has already been done. It contained irrelevant and immaterial evidence of Ms. Backers' opinion on the relative levels of culpability of her witnesses over appellant (*People* v. *Cain* (1995) 10 Cal.4th 1, 64), and the only effect of the "evidence" was to vouch for the credibility of Iuli and Palega. (*United States* v. *McKoy* (9th Cir.1985) 771 F.2nd 1207, 1211.) The discussion surrounding the Muraoka stipulation also buttresses the conclusion that relevancy objections if lodged against the Iuli examination would have been futile, while misconduct objections during the upcoming closing argument would be the same.

D.
Ms. Backers' Closing Argument

This leads to the closing argument where Ms. Backers pulled the evidentiary strands together in order reveal in more express terms the inferences she desired, and those she desired concerned her subjective state of mind as the index of her integrity and, thereby, the integrity of the prosecution itself. The occasion for initiating this topic in closing argument was the distinction in law between the defendant who actually commits the homicide in a felony-based special circumstance, and the defendant who only aided and abetted in the underlying felony and did not commit the homicide itself. Ms. Backers explained to the jurors that the former was strictly liable for first-degree special circumstance murder, while the latter had to have either the intent to kill or have acted as a major participant with reckless indifference to human life. (17RT 3470-3471; see § 190.2, subds. (b)(17), (c) and (d).) This provided her a smooth transition to the subject of the plea bargains with Iuli and Palega:

> "Now, you wonder why I talk about that when it is clear that Paki is the killer and you don't need to find the intent to kill if he is the triggerman?
>
> "Well, there is a very good reason why I even bring up the rules for non killers. Because all four of the men in that van, Paki, Tony, Tautai, and Jay are legally guilty of first-degree murder and legally guilty of the specials. It doesn't mean that they all are morally guilty and deserve the same sentence.
>
> "There is something in this case that you heard a stipulation on that is called discretion. And one of the absolute shams that has been perpetrated in this courtroom, throughout this trial, since September 18th, is that there was a prosecutor who panicked because she didn't have any evidence in the case and she made a deal with the devil to buy testimony.

"That could not be further from the truth. And you have absolute proof to the contrary. That is what you were told in your opening statement about the fact that Paki pulled time and I panicked and made a deal with the devil because I had no evidence.

"Remember the stipulations you got about the fact that when this information was filed against the defendant in June of 1997 that he legally had a right to trial within 60 days?

" . . . . [20]

"The truth of this matter has been proven by stipulation; that I was assigned this trial at the end of 1997; that I had worked up both the penalty phase and the guilt phase and provided discovery to the defense over the years; both portions of the trial had been worked up.

"By stipulation you have proof that Mr. Berger, Tony Iuli's lawyer, in 1999 approached me, not me going to them in a fit of desperation, but Mr. Berger approached me in the year of 1999 on at least three occasions asking for a deal for Tony." (17R 3471-3473.)

One might pause here to make some analytical observations relevant to the issue of vouching. Here, Ms. Backers cites the "Berger" stipulations in support of her claims, and will eventually cite the Muraoka evidence as well. Respondent will of course discover the commonplace formulation found in this Court's vouching cases that "so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the facts of the record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief, his comments cannot be characterized as improper vouching." (*People* v. *Ward* (2005) 36 Cal.4th 186, 215, quoting *People* v. *Frye* (1998) 18 Cal.4th 894, 971; accord, *People* v. *Dickey* (2005) 35 Cal.4th 884, 913-914; see also *People* v. *Bain* (1971) 5 Cal.3rd 839, 848.) This, however, is a

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[20] In this elision, Ms. Backers digressed for two or three paragraphs regarding appellant's belated alibi. Her argument in that regard will be the subject of the next claim of error.

formulation fitted for situations in which vouching occurs only through argument and not through evidentiary manipulation and error as well.

Throughout this argument, appellant has been referring to "vouching errors," and has, at points, made clear that "vouching" occurs in different forms. For whatever form the vouching takes, substantively it is the same error, predicated on the prosecutor's invocation of his or her "personal prestige, reputation, or depth of experience, or prestige or reputation of their office, in support" of the witness's credibility or the defendant's guilt. (*People* v. *Huggins* (2006) 38 Cal.4th 175, 206-207.) Thus, vouching is an error that can manifest itself either in argument or in the presentation of irrelevant evidence, or in both. (See *United States* v. *McKoy* (9th Cir.1985) 771 F.2nd 1207, 1210-1211; *People* v. *Donaldson* (2001) 93 Cal.App.4th 916, 923-927; and *People* v. *Arends* (1958) 155 Cal.App.2nd 496.) Indeed, "even when grounded in an inference from the [admissible] evidence, a prosecutorial statement may nevertheless be considered impermissible vouching if it 'places the prestige of the government behind the witness' by providing 'personal assurances of a witness's veracity." (*United States* v. *Weatherspoon* (9th Cir. 2005) 410 F.3rd 1142, 1147.)

In this regard, it has been noted above how the "Berger" stipulations carried very little real probative value favorable to the prosecution regarding Ms. Backers' state of mind favorable to the prosecution case, even if that state of mind *were* relevant and material. (See above, pp. 52-53.) The weakness of the evidence would be apparent, except that Ms. Backers' interpretation of this evidence in closing argument itself would inevitably be understood as her attestation of the integrity of her motives. Functionally, Ms. Backers' closing argument was supplemental testimony, and she was not merely an advocate, but an advocate-witness. (See *People* v. *Arends* (1958) 155 Cal.App.2nd 496, 505-511; *People* v. *Donaldson*, *supra*, 93 Cal.App.4th 916, 921-927.)

The argument continued. The next paragraph, before which she had described the stipulation about Mr. Berger approaching her in 1999, began as follows:

> "Now, remember, Tony is the first one to confess. He is the first one to lay it out to the police. And sometimes when the police tell people that they will – things will work out better for them if they confess, that they will be presented in a better light to the prosecution, sometimes that actually comes true." (17RT 3473, emphasis added.)

This time was one of those times, apparently, since, as Ms. Backers might vouch, Iuli *did* appear to her in a better light.

Ms. Backers then talked about the first, graded offer, claming that this offer has been portrayed "in an absolutely false light." (17RT 3473-3474.) The falsehood was that Paki had to be convicted of a first-degree murder for Iuli and Palega to get twenty-five to life, and then he had to be sentenced to death for them to get fifteen to life. "That," Ms. Backers assured the jurors, "is a complete lie." Perhaps it was, if Ms. Backers' subjective intentions were the issue, and even then, "complete lie" is excessive. But Tony Iuli himself testified that *his* understanding was that appellant had to be convicted at least in the guilt phase (11RT 2644-2645), and it was his understanding that was material and relevant. (*People* v. *Brown* (1970) 13 Cal.App.3rd 876, 883; *People* v *Allen* (1978) 77 Cal.App.3rd 924, 931-932.)

But Ms. Backers disagrees with Tony Iuli. She told the jurors that there was evidence about "snitch jackets" and contracts to kill. "Ask yourself," she stated, "whether it is a reasonable inference based, on the evidence you have, that if a person comes in and testifies in the murder trial and just talks about the murder, that is one thing. But if they come back in the death penalty portion of the trial and testify about all the other things they know, whether or not they would be

entitled to some greater benefit because they are placing themselves in greater jeopardy." (17RT 3474.)

But "ask yourselves" what exactly? Does the evidence show that this was what the witnesses feared and expected from a deal? No, because Tony Iuli testified that there were no mitigated or aggravated degrees of "snitching;" all "snitching" was equally dangerous as far as *he* was concerned. (11RT 2683-2684.) Clearly, Ms. Backers in the above passage was defending *herself*, announcing conclusively, "That is why those offers were made that way." (17RT 3474.) If Tony Iuli did not understand this, then Ms. Backers understood it for him.

After this the prosecutor's integrity and honesty and the credibility of Iuli and Palega is merged expressly:

> "So what happens?
>
> "We come to trial. The offers are made.
>
> "Before we go any further in this discussion, I wanted to say one thing. I, and I am sure you all heard it in jury selection in this case and that has to do with prosecution and law enforcement.
>
> "Throughout history, and Mr. Ciraolo bore this out in his questioning in each of you individually, prosecutors and law enforcement are always accused of abusing their power. And he talked to you about police framing people, abusing their power, not exercising their discretion with integrity. He even mentioned L.A. to some of you.
>
> "So what happens in this case?
>
> "The evidence in this case comes forward, it is proven now to you, through stipulation, a prosecutor thoroughly prepares and evaluates her case, and she decides that while all four of them are legally guilty, there are some major differences between the men in that van.

"And the differences are this: the two men in the front seat of that van wanted to let Nolan go. They wanted to let him live. They didn't believe Paki should shoot him. They even told Paki not to shoot him. Even Paki broke their code, their m oral code, and they are criminals.

"If somebody gives up their stuff, you let them go. But he broke their rule, too. Instead of letting Nolan go, like they told him to, like they thought they should, he blew Nolan's chest apart.

"There is a moral difference, not a legal difference, but a moral difference between the two in the front seat and the two in the back seat. And that is why there were different offers made. And that is the only reason why." (17RT 3475.)

Thus, she uses here the Muraoka stipulation to prove that the plea offers were motivated by the cognitive assessment that Iuli and Palega were telling the truth and that that truth then entailed on her a moral duty to relieve them of the drastically harsh consequences of the law of special circumstance felony-murder for defendants who had no intention to kill and did not kill. This is nothing other than vouching. (*People* v. *Huggins*, *supra*, 38 Cal.4th 175, 206-207.)

There is more, but one thing requires further pause for comment. In the above-quoted passage, Ms. Backers makes no mention of defense counsel's opening statement, which, in her discussions outside the presence of the jury, she designated as the decisive warrant for her need to discuss her own motives. Instead, to the jurors, and for the very first time in this case, she cites jury voir dire, suggesting that defense counsel somehow harped on police or prosecutorial misconduct as a screening topic for prospective jurors. One need only cursorily review jury selection in this case to see that the abuse of power by the authorities, whether police or prosecutor, was not at all a theme of defense counsel's voir dire. Ms. Backers' specific claim, that Mr. Ciraolo mentioned "L.A." to several jurors, was true in only the case of *one* prospective juror, who had indicated on his questionnaire that his views on the death penalty had changed over time:

"Q. And you've indicated your views on the death penalty have somewhat changed because of some publicity dealing with reversals, inadequate counsel and I guess DNA, recent media on this stuff?

"A. Right.

"Q. Have you actually looked at some of the articles dealing where the criminal justice system in Los Angeles where certain officers went out and framed people and got convictions? Have you read any of those articles?

"A. I've heard, you know, information on that.

"Q. So you're aware that this kind of information is going about in the community here in this community?

"A. Right.

"Q. Okay. Has that shifted your thoughts on the criminal justice system at all in recent years?

"A. Well, you know, I was raised here in Oakland and you know, so we, you know, we know that there are good police, bad police, so I – I have no problem with that and understanding that.

"And you know, it depends on who the individuals are and what the testimony is.

"Q. Okay. So whether it's a cop or not a cop, you're going to take a look at them and make your own independent judgment on them?

"A. Exactly." (2RT 484-485.)

It is not clear how accusatory or condemnatory Ms. Backers was trying to sound in her statements about defense counsel's conduct of voir dire, but if she was maintaining or implying that defense counsel did something improper or

dishonest, this is truly false. Furthermore, not only did she not object to this exchange during voir dire, it appeared that this juror would have been acceptable to *both* sides except for a belated hardship excuse. (6RT 1481-1488.)

In any event, her closing argument continued with her explanation of another "falsehood" being foisted on the jurors: that she had to give Jay a deal because she needed him to corroborate Tony. This was false, as Ms. Backers explained, because of the rule that one accomplice cannot corroborate another accomplice:

> "So making a deal with Jay doesn't make my testimony with Tony any better. I can't use Jay to corroborate Tony and neither can you. So that tells you that the deal to Jay was made for a very different reason, not because I needed to bolster my case.[21]
>
> "So the offers that were made, which you now have heard so much about, and you heard the actual conditions of the offer read to the witnesses while they were on the stand, is that those two men in the front seat who wanted to let Nolan go, let him live, got 16 years, eight months.
>
> "And clearly, after seeing Tautai testify, I think you can see why there is such a difference between the two in the front seat and the two in the back seat. I am sure you see that that discretion was exercised with a proper amount of integrity. Because once you met Tautai, and you saw his lack of moral fiber, I am sure that you could see that there was a big difference between the two in the back seat and the two in the front seat." (17RT 3476-3477.)

Here, Ms. Backers comes close to expressing the implication just below the surface of her vouching for the credibility of Iuli and Palega: vouching for

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[21] Of course, missing from Ms. Backers' logic, is the important distinction between corroboration as a foundational requirement for the use of accomplice testimony (§ 1111) and corroboration as adding to the weight and persuasiveness of evidence once the foundational requirements for the use of that evidence are satisfied. Tony and Jay *can* legally corroborate each other in the latter sense.

appellant's guilt. In drawing attention to Tautai's "lack of moral fiber," which consisted in his willingness to take credit for murder, she was effectively commenting on appellant's lack of moral fiber since, in Ms. Backers' view, he *actually* committed the murder. Thus, all Ms. Backers' personal prestige, and in the integrity she claimed for the exercise of discretion and pursuit of this prosecution, was invoked not merely to vouch for the credibility of Tony Iuli and Jay Palega, but also for the guilt of Paki Seumanu.

When Ms. Backers completed her testimonial for herself, Iuli and Palega, she began discussing the evidence that corroborated Iuli and Palega (17RT 3477-3495); this was followed by her summary of the substance of their testimony, "because really, now that you know we have all this corroboration with Tony and Jay, what Tony and Jay add to the crime is the frightening reality of what happened inside that van, the frightening reality of the last 30 minutes of Nolan's life, and what a terror it must have been." (17RT 3498.) But she did not talk only about their descriptions of the crime, she talked about Iuli's testimony about the plea negotiations, and thus the theme of her personal motives arose again:

> "On May 5th of this year in his conversation and interview with me, you now know that there were several times that he, Tony, told us that Jay was hollering at Paki not to shoot the guy, both in Samoan and English. And Tony asked me if I would give the same deal to Jay because both of them didn't want Nolan to get shot.
>
> "And after evaluating the evidence and the differences, the moral differences, between the guys in the front and the guys in the back, Tony said he felt bad for Jay because if Paki hadn't shot Nolan, if they had just done a robbery and let this guy go like they wanted, if Paki had just let him go that they would be out by now, they would have done a robbery, let the guy go, and they would be out of jail by now.
>
> "That is what they went out to do. But no, Paki had to kill the guy, so Tony told me, and he told you, that he felt bad for Jay because if Paki hadn't shot him they would have been out.

> "So we talked about it, his involvement, Jay's involvement. And I told Tony that I would offer Jay the same deal that I offered him." (17RT 3512-3513.)

In other words, Angela Backers believed Tony Iuli and Jay Palega were telling the truth, and she responded morally to the moral distinctions that this truth demanded. Of course, whether this was moral or not, legally she committed the misconduct of vouching. (*People* v. *Huggins*, *supra*, 38 Cal.4th 175, 206-207.)

E.

Federal Constitutional Error[22]

When Ms. Backers proclaimed her personal integrity as a guarantee of her witnesses' credibility and appellant's guilt, the jurors would not discount this as partisan conceit. She was a public prosecutor and her office gave a force and dignity to whatever personal qualities she claimed for herself in connection with the discharge of her office:

> "The argument of the district attorney, particularly his closing argument, comes from an official representative of the people. As such, it does, and it should carry great weight. It must, therefore, be reasonably objective. It is no answer to state that defense counsel also used questionable tactics during trial and therefore the district attorney was entitled to retaliate. Defense counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige." (*People* v. *Talle* (1952) 111

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[22] To forestall respondent's claims that federal constitutional arguments have been forfeited by the absence of federal constitutional objections, it should be pointed out that such objections are not necessary when, on appeal, the unconstitutional *effect* of state evidentiary error is the nature of the constitutional claim. (*People* v. *Partida* (2005) 37 Cal.4th 428, 438-439.)

Cal.App.2nd 650, 677; see also *Berger* v. *United States* (1935) 295 U.S. 78, 88.)

But Ms. Backers was also manifestly a skillful and experienced attorney, as in fact her vouching proclamations themselves vouchsafed to the jurors, and this brought into play an inflated respect by the jurors for her cognitive discernment about matters with which she was familiar:

> " . . . . A jury is especially likely to perceive the prosecutor as an 'expert' on matters of witness credibility, which he addresses every day in his role as representative of the government in criminal trials. It may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled." (*United States* v. *McKoy* (9th Cir.1985) 771 F.2nd 1207, 1211.)

When one considers that the aura of office, personal integrity, and supposed "expertise" was brought to bear in this case not merely on the issue of credibility, but on the issue of guilt itself, and that the vouching errors in this case so penetrated and suffused this central question of the guilt trial, then one can only conclude that the state law errors in this case rose to the egregious level of a violation of due process. (*Darden* v. *Wainwright* (1986) 477 U.S. 168, 181; *Donnelly* v. *DeChristoforo* (1974) 416 U.S. 637, 642-643; see also *People* v. *Arends* (1952) 155 Cal.App.2nd 496, 509, 511.)

Viewed from a slightly different perspective, the conclusion is the same. Ms. Backers' integrity, whether personal or official or both, and her "expertise" in conducting prosecutions on behalf of the People, were factors external to the proper assessment of guilt *vel non* based on the facts of the case established by relevant and material evidence. (*People* v. *Donaldson* (2001) 93 Cal.App.4th 916, 928; *United States* v. *Prantil* (9th Cir.1985) 764 F.2nd 548, 553.) Due process

requires a criminal conviction based only on properly developed evidence presented in court to a jury whose impartiality remains unaffected by external considerations. (*Morgan* v. *Illinois* (1992) 504 U.S. 719, 726-727; *Bruton* v. *United States* (1968) 391 U.S. 123, 131, fn. 6; *In re Carpenter* (1995) 9 Cal.4th 664, 677; *People* v. *Valentine* (1986) 42 Cal.3rd 170, 177-178.) All this is to say the same thing: the guilt trial in this case was fundamentally unfair and violated the Due Process Clause of the Fourteenth Amendment.

In addition, the Sixth Amendment of the United States Constitution, "guarantees the defendant [not only] a face-to-face meeting with witnesses appearing before the trier of fact," (*Coy* v. *Iowa* (1988) 487 U.S. 1012, 1016, but also the right to cross-examine those witnesses. (*Pointer* v. *Texas* (1965) 380 U.S. 400, 404, 406-407; *Douglas* v. *Alabama* 380 U.S. 415, 418.) When a prosecutor, through vouching functions as a witness, as Ms. Backers did here, he or she does so as one who is not sworn, who is not confronted, who is not cross-examined, and who, in sum, presents "evidence" in contravention of the Sixth Amendment right to confront adverse witnesses. (*People* v. *Gaines* (1997) 54 Cal.App.4th 821, 823-825.)

Finally, this is capital case governed by the Eighth Amendment to the federal constitution. In both guilt and penalty trials in a capital case, a heightened degree of reliability is required for factual determinations. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628; *People* v. *Cudjo* (1993) 6 Cal.4th 585, 623.) That reliability is clearly diminished to a point below the Eighth Amendment threshold when the level of confidence required of each and every juror for a determination of guilt beyond a reasonable doubt is imparted in any degree by the juror's trust in the prosecutor's personal and subjective confidence in excess of the proper evidence in the case.

The question then becomes overall prejudice, and this issue is half-addressed simply by the inherently prejudicial nature of the misconduct in this case. Before proceeding to complete the examination of prejudice, appellant

would make one short prudential digression to discuss ineffective assistance of counsel on the hypothetical chance that this Court will find procedural default for any or all of the vouching issues raised in this argument.

F.
IAC Digression

A claim of ineffective assistance of counsel is of course a two-prong consideration, requiring that the defendant show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and, secondly, that but for counsel's failings the deficient representation subjected defendant to prejudice. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687; *In re Wilson* (1992) 3 Cal.4th 945, 950.) The second prong of the test, prejudice, may be addressed in the next section of argument when prejudice is examined, whether the errors here are attributable to the court and prosecutor, or whether they must be filtered through the medium of ineffective assistance of defense counsel. Here, the concern is the first prong of the test, whether counsel's failure to object fell below professional norms, again, on the assumption that timely objection would not have been a futile act excusing procedural default.

People v. *Donaldson* (2001) 93 Cal.App.4th 916 is dispositive on this question. In *Donaldson*, the prosecutor attempted to impeach her own witness with a prior inconsistent statement uttered apparently *only* to the prosecutor, who, when the statement was denied, called herself to the stand to complete the impeachment. Not only did defense counsel not object to this procedure that violated the advocate-witness rule, but counsel's cross-examination of the prosecutor elicited her personal belief in the credibility of the other witness's extrajudicial statement at issue. (*Id.*, at p. 921-925.) The prosecutor also argued her own testimony to reiterate in closing argument her belief in the credibility of the other witness's extrajudicial statement. (*Id.* at 926.) The Court in *Donaldson* found that a timely objection would have prevented the prosecutor from even testifying, that trial counsel's failures fell below reasonable standards of

competent representation in not lodging the objection, and that the conviction was indeed reversible for the Sixth Amendment violation. (*Id.*, at pp. 927-932.)

Although in the instant case, Ms. Backers did not testify as such, as did the prosecutor in *Donaldson*, the admission of immaterial evidence regarding her extrajudicial statements to Mr. Muraoka about the case, and her assertions in closing argument were the functional equivalent of the prosecutor's testimony in *Donaldson*. Beyond that the vouching was the same, both going to the central question of guilt through the medium of the credibility of a witness of that guilt. *Donaldson* establishes that the failure to object to this type of evidence does indeed fall below acceptable standards of practice for purposes of the Sixth Amendment. But *Donaldson* establishes something more that it is important to note.

In the first prong of a claim of ineffective assistance of counsel, a defendant pursuing his claim on appeal must establish that there was no conceivable tactical purpose for trial counsel's failure to act, and if defendant cannot meet this standard, he most resort to habeas corpus in order to bring in evidence of trial counsel's reasons and motives for not acting. (*People* v. *Pope* (1979) 23 Cal.3rd 412, 426.) In *Donaldson*, the court reversed *on the appellate record.* There was, in other words, no conceivably reasonable tactical grounds for counsel not to object and to prevent the injection of prosecutor's personal opinion into the case. Here, the conclusion is no different. The defense gained absolutely nothing by allowing Ms. Backers to make an issue of herself and her state of mind. There was only prejudice and harm to reap in a case that was highly emotional on its relevant and material facts without the added layer of Ms. Backers' personal passion. This case, like *Donaldson*, does not require the augmentation of habeas corpus to establish a deficiency in counsel's representation in the face of so egregious an impropriety as the vouching errors in this case. The question then is prejudice, which again can be addressed in a single argument distributed over the type of error in question.

G.
Prejudice

This guilt phase trial in this case proceeded on two separate but parallel tracks. On the one hand, this was a straightforward case of a random murder/robbery, presenting little or no legal complication in the application of the felony-murder rule or the felony-based special circumstance. The only factual question was whether appellant was even the perpetrator. The second track was the emotion provoked by facts that were coincidental to legally required elements of the crime, but compelling in a moral sense. Murder is a heinous crime because it unjustly cuts off a life that has intimate connections and productive associations with other lives, and whose potential for imposing a benevolent order on even a small corner of the world is ever present. This is true regardless of the personal circumstances or characteristics of the victim, and the law makes no distinctions or accommodation for the type of victim killed with malice aforethought or in the course of specified felonies. However, few cases render moral horror of the crime of murder so vivid and dramatic as the instant case in which Nolan Pamintuan was randomly kidnapped, robbed, and murdered on the eve of his wedding, returning home from his rehearsal dinner, and snatched off the street on the verge of safety and asylum in his father's house.

On the pedestrian, forensic level, the evidence showed that when appellant was arrested a week after the robbery/murder, he had Nolan Pamintuan's engagement ring and his Movado watch in his pocket. Nolan's property was also scattered all over the "hang out" room. Brad Archibald testified to selling appellant the shotgun used to kill Nolan. The leather jacket with Nolan's blood on it had been stolen by appellant from St. Rose Hospital a few months earlier. And finally Tony Iuli and Jay Palega testified that appellant was the moving and directing force behind the robbery, and had committed the murder himself.

But there was here also evidence substantial enough to support a reasonable doubt as to appellant's guilt. The evidence showed that at lest twenty-five people lived in Folsom Street complex, and that the hangout room was used not only by appellant, but by Tony Iuli, Jay Palega, and Tautai Seumanu, not to mention the various wives. Not only did the numbers and casual assignment of space suggest a communal regimen, the careless placement of the Gucci watch in the kitchen also suggested a communal attitude toward property. It was also clear from the evidence that the communism of this arrangement was informed by tribal culture, in which Paki, the son of a chief, was the leader of at least the younger men of the family, and endowed with certain privileges in addition to responsibilities. (14RT 3054-3055, 3063; 15RT 3309-3312, 3319.) That appellant therefore possessed some of the loot taken by the younger men in the robbery and murder of Nolan was not dispositive of his guilt for this robbery and murder. That he bought the shotgun he allowed the younger men to use was also consistent with this. If none of this is edifying, it is also not the crime of murder.

Further, the Samoan substratum of tribal culture undoubtedly rendered the American style of gang association congenial to this group of young men, who were actually related either by blood or marriage. But it also illustrated that they were not simply a criminal street gang united around the happenstance of neighborhood or race, or the mysterious cohesion of numbers, colors, hand signals and other assorted shibboleths. Indeed, Tony Iuli was a "Blood," while Palega and the Seumanus were "Crips," who combined despite the inexorable enmity of the two groups. There was therefore plausibility to Lucy Masefau's testimony that appellant was home with her discharging his duties in the extended family to feed and attend to his younger siblings. At the same time, an act of tribal gangsterism was being committed by Tautai Seumanu, Tony Iuli, Jay Palega, and perhaps Roger Prasad, whom Jay Palega had initially identified as a participant. (12RT 2732-2734; 14RT 3142, 1385; 15RT 3200.)

All of these were substantial considerations on the question of guilt that should have been weighed and considered in an impartial and rational manner. Could they possibly be in a case that was not only emotionally charged inherently, but one in which Ms. Backers lit the tinder even before there was any improper vouching evidence or argument. This was the very opening of Ms. Backers' opening statement to the jury:

> "May 18, 1996. That was the date that Rowena Panelo had engraved on the back of this watch. May 18, 1996. It was a special day, for it was to be her wedding day. And this was to be her wedding gift to her groom.
>
> "It was such a lovely and treasured gift from Rowena that Nolan, after looking at the watch, put it back into its case because he didn't want to get it scratched before the ceremony. So he looked at it, admired it, thanked her, and put it back in the case, back in the box, and put it with him so that he would take it home and wear it with his tuxedo the next day.
>
> "This very watch became a murderer's trophy. Because it was just over a week after Nolan's chest was blown apart by a shotgun, at close range, just a week later that this watch was found in that man's shirt pocket. He was carrying it; this watch and Nolan's engagement ring. A week after the murder the defendant had this watch and Nolan's engagement ring in his front pocket, a trophy.
>
> "Ladies and gentlemen of this jury, may it please the court, counsel, Nolan's family and friends, I am about to share with you a family's worst nightmare, the story of their son's murder and the evidence that so horrifyingly tells that story.
>
> "Ven, Charlie, Ricky, Raul, Paul, Victor and Mark.
>
> "Who are these people? Who are these special people?
>
> Well these are the people that would be wearing tuxedos along with Nolan, on his wedding day.

"Ven, Charlie, Ricky, Raul, Paul, Nolan's brother, Victor, Mark, and Nolan." (6RT 1554-1555.)

This was opening statement of the *guilt* phase of trial, and these representations are based on what would be essentially inventory testimony by Rowena Panelo to identify Nolan's property and to provide some minimal *res gestae* evidence as to when Nolan was last seen alive. The names spouted by Ms. Backers were from the tuxedo rental receipts found in the hangout room of the Folsom Street house. (7RT 1748.)

As might be expected, the personal tone of emotional argument would not diminish with closing argument. These were the opening paragraphs of Ms. Backers' first closing:

"This case is about good and evil. It is about the joyful bliss of the anticipation of your wedding day which is replaced with sheer and unending terror; it is about Nolan, an innocent bridegroom, a son, a brother, who becomes Paki's captive. And the first day of the rest of your life never comes.

"It is about a bride's gift to her handsome husband that becomes a murderer's trophy. It is about a wedding that becomes a funeral, a plea for mercy which is denied with an intense explosion that rips apart your heart.

"The breath of life becomes bloody lungs filled with hot pellets. And you die, scared to death, begging for your life all alone on your wedding day.

"That is the defendant's crime. That is Paki's crime, the crime for which he is on trial. And today is the day which he must be held accountable for this horrible murder." (17RT 3429.)

If this vivid rhetoric in opening statement and closing argument represent the "hard blows" allowed to a prosecutor fairly and properly pursuing his case

(*Berger* v. *United States*, *supra*, 295 U.S. 78, 88), it nevertheless acted as a clear signal to the jurors of the emotional response Ms. Backers' believed to be appropriate and proportionate to the proven facts of the case. This tone could not but be interpreted as her own personal reaction to the case. Thus, when her "hard blows" landed "foul" (*ibid.*) with the vouching errors, the jurors had no sure standard by which to distinguish what was within the proper evidence and what was not. In short, the jurors could were induced to conclude that Ms. Backers' confidence in her case was *in itself* an evidentiary factor to be considered by them.

And this tone of personal confidence was a mark of her style throughout the trial. Sometimes it showed itself in minor and harmless ways, as when she was asking Lorena Hurtado, the witness who had seen the van on East 12th Street, "Okay. So you told the police, *and you told me*, that you thought it turned left on East 12th towards Tennyson, right?" (6RT 1656, emphasis added.) Sometimes this style emerged in a more aggressive fashion as in opening statement and closing argument, or when she ridiculed Tautai, impeaching him by his nickname with the question, "This big, bad, cold-blooded murderer is called Teaspoon; is that right?" (15RT 3331.) The same injection of personal attitude could appear as a sort of argumentative incredulity, as when, in cross-examining Lucy Masefau on the latter's claim not to have heard about Nolan's murder n the news before appellant was arrested, Ms. Backers "asked," "This sweet Filipino boy with interviews from his family all over the news," and again, when objection to this question was overruled, "You never saw how traumatized his family was on the news?" – a question sanctioned again by the trial court's overruling of the defense objection. (14RT 3080.) Sometimes this personal style impelled her to make speaking objections that revealed her personal motives, such as, "Objection, you honor. Statute of limitations had run. That is an improper question," when defense counsel asked Brad Archibald whether he was afraid Ms. Backers would file weapons charges against him if he did not cooperate. (10RT 2436-2437.)

Sometimes, this personal style led her to the very same sort of impropriety at issue in the vouching errors raised in this argument, such as when, with court sanction, the following occurred on direct examination of Michelle Fox, a forensic scientist who had done some fingerprint work on this case:

"Q. In the year, 2000, did you do any additional laboratory work on this case?

"A. No.

"Q. And, in fact, did I call a meeting with you, and the rest of the members involved in this case, and ask that some re-testing be done?

"A. Yes.

"Q. Explain to the jury why.

"MR. CIRAOLO: Objection, your Honor. She is asking this witness for what her motive and intent was.

"THE COURT: Overruled.

"You can answer.

"THE WITNESS: Because I had some trouble in another case and – which would result in criticism of my character. And so I think that you felt more comfortable having somebody else double check the work.

"MS. BACKERS: Q. Okay. And the trouble you had in the other case was years ago in a preliminary hearing, in the Michael Singh case, where you were asked whether you had ever taken a test, and rather than saying you failed it, you just said you hadn't taken it; is that right?

"A. Right.

"Q. So you lied under oath?

"A. Yes.

"Q. And so I said that I wanted all your work rechecked?

"A. Yes." (9RT 2273.)[23]

One can find other examples, whether within the bounds of propriety, without the bounds, or on the sometimes vague border between the two. The vouching errors were well outside these boundaries and went to the heart of the question of guilt and innocence. When errors such as these occur in a case that, overall, has been to an extraordinary degree personalized by the prosecutor, then the jurors are misled to believe that the prosecutor's personal motives, opinions, and morality are properly weighed as an evidentiary consideration. If weighed, they added too much to the scale at the expense of the serious and substantial evidence in favor of the defense. If absorbed, they obscured the considerations in favor of the defense altogether. In either case, they meet every and any pertinent standard of review for reversal. If the error here is deemed to be of state law, then absent these errors there is a reasonable probability that appellant would have been acquitted. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837.) If the error here consists in ineffective assistance of counsel, the standard of review is the same as it is for state error (*Strickland* v. *Washington* (1984) 466 U.S. 688, 694) and

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[23] Indeed, in opening statement Ms. Backers previewed the significance of this evidence, informing the jury that when she, Ms. Backers, found out about Michelle Fox's impropriety, "I didn't want any questions to be asked so I had everything retested." (6RT 1625.) In any event, defense counsel's objection to "the evidence" was well-taken, and this exchange was error in itself, though in itself not prejudicial. It is here to help illustrate how Ms. Backers' personal opinion came to be an acceptable element in this case, and how her "morality" was to be taken as evidence by the jurors. One might also note that this exchange occurred even before the discussion on the "Berger" stipulations, and shows that the trial court considered Ms. Backers' subjective motives to be a material issue even without the "open-the-gates" argument. This further strengthens appellant's claim as to the futility of objection to the more egregious vouching in this case.

therefore reversible for the same reasons. Finally, if these errors are, as appellant claims, of federal constitutional magnitude, then *a fortiori* the record does not establish that they were harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

II.
THE PROSECUTOR'S ARGUMENT IMPUGNING APPELLANT'S POST-ARREST SILENCE AS IMPEACHMENT OF HIS ALIBI, AND IMPLYING THAT HIS PRE-TRIAL TIME-WAIVER WAS FOR PUROSES OF CONTRIVING THAT ALIBI, CONSTITUTED A VIOLATION OF DUE PROCESS

In argument **I** of this brief, appellant quoted a portion of Ms. Backers' guilt phase argument in which in which she engaged in improper vouching by adducing the "Berger" stipulations to argue that she had fully prepared her case and had only moral reasons for offering Iuli and Palega determinate terms. (See above, pp. 68-69.) Three paragraphs were elided from the excerpt cited in connection with that claim, and it was noted there that those paragraphs would be the subject of an independent claim of error. (See above, p. 69, fn. 20.) The argument with the paragraphs included was as follows:

> " . . . [O]ne of the absolute shams that has been perpetrated in this courtroom, throughout this trial, since September 18th, is that there was a prosecutor who panicked because she didn't have any evidence in the case and she made a deal with the devil to buy testimony.
>
> "That could not be further from the truth. And you have absolute proof to the contrary. That is what you were told in your opening statement about the fact that Paki pulled time and I panicked and made a deal with the devil because I had no evidence.

"Remember the stipulations you got about the fact that when this information was filed against the defendant in June of 1997 that he legally had a right to trial within 60 days?

"In June of 1997, if you are sitting here and you are innocent and you have and an airtight alibi, you can have your trial in 60 days.

"But he didn't. He waived time. He waived time. And that is proven by stipulation in this case.

"Real alibi witnesses do not sit on their alibi and keep it secret for four-and-a-half years while their allegedly innocent husbands are rotting in jail."

"The truth of this matter has been proven by stipulation; that I was assigned this trial at the end of 1997; that I had worked up both the penalty phase and the guilt phase and provided discovery to the defense over the years; both portions of the trial had been worked up.

"By stipulation you have proof that Mr. Berger, Tony Iuli's lawyer, in 1999 approached me, not me going to them in a fit of desperation, but Mr. Berger approached me in the year of 1999 on at least three occasions asking for a deal for Tony." (17R 3472-3473, italics added.)

The italicized paragraphs represent a digression from the theme of Ms. Backers' integrity in accommodating Iuli and Palega into a different theme, the credibility of appellant's alibi. -The "Berger" stipulation was put to a second ~~the~~ use, that of impugning appellant's alibi evidence. Thus, in Ms. Backers' argument, one implication of the supposed delay in revealing his alibi was that appellant delayed going to trial to give himself time to concoct and perfect an alibi he could purvey through his wife. The other implication was that appellant himself kept silent about his alibi until he could perfect it.

Ms. Backers' misconduct here was not the exploitation of the already irrelevant "Berger" stipulation for purposes other than the already immaterial issue

of her subjective motives. Her misconduct in those three paragraphs was a completely straightforward violation of the Due Process Clause of the Fourteenth Amendment.

In *Doyle* v. *Ohio* (1976) 426 U.S. 610, the United States Supreme Court held it to be a violation of the Due Process Clause of the Fourteenth Amendment for the state to use a defendant's post-arrest silence as evidence of guilt if that defendant had been given *Miranda* (*Miranda* v. *Arizona* (1966) 384 U.S. 436) warnings. (*Doyle*, *id.*, at p. 611.) This is so because the warnings contain the implied assurance "that silence will carry no penalty . . . ." (*Id.*, at p. 618.) In the instant case, on May 25, 1996, the day of appellant's arrest, he was given standard *Miranda* warnings and invoked his rights. (2CT 447, 437, 449.) For Ms. Backers then to argue that appellant did not come forward with his alibi for four-and-a-half years after the information was filed is unequivocally a violation of due process under *Doyle*. (*People* v. *Lindsey* (1988) 205 Cal.App.3rd 112, 115-117.)

There is a second aspect to the due process error here that derives from the Sixth Amendment right to counsel and embraces the implication that appellant had used his time waiver to serve the ends of fabricating his defense. When appellant appeared for arraignment on the information on June 20, 1997, he entered a general time-waiver, as indicated by the Berger stipulation, although the stipulation was one day off. (6CT 1441, 1456.) For the time waiver, the Court had Mr. Mintz, appellant's attorney at the time, voir dire appellant, which Mr. Mintz did as follows:

> "MR. MINTZ: Ropati Seumanu, you have the right to be tried within 60 says from the date the information in this case was filed. However, you can also give up that right and agree to be tried thereafter. *For the convenience of court and counsel, I suggest that more time is needed to prepare this case than 60 days.*
>
> "Will you waive time?

"THE DEFENDANT ROPATI SEUMANU: Yes.

"MR. MINTZ: Consent of counsel." (6CT 1457, emphasis added.)

This constitutes the same sort of assurance in the Sixth Amendment context that *Miranda* warnings constitute in the Fifth Amendment context, and to use appellant's time-waiver against him as evidence of guilt also constitutes *Doyle* error. (*Marshall* v. *Hendricks* (3rd Cir.2002) 307 F.3rd 36, 70-71 [*Doyle* applies the prosecution abuses any of the enumerated rights.].)[24]

There is even a third aspect of the due process problem with Ms. Backers' argument. The *Miranda* right appellant specifically invoked was his right to counsel. He told the detectives that he wanted to speak to his lawyer, Kevin Taguchi, before making any statement. (2CT 437, 449.) This Fifth Amendment declaration of a desire to speak to authorities only through counsel (see *McNeil* v. *Wisconsin* (1991) 501 U.S. 171, 178) became a Sixth Amendment declaration after arraignment when the Sixth Amendment right to counsel arose. (*Michigan* v. *Jackson* (1986) 475 U.S. 625, 629-630.)

Finally, Ms. Backers' argument violated appellant's Eighth Amendment right in to the heightened reliability of capital guilt determinations. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628.) *Doyle* error is predicated not only on the fundamental unfairness of violating implicit assurances by the state, but also on the fact that in the face of such assurances, post arrest silence is "insolubly ambiguous" (*Doyle* v. *Ohio*, *supra*, 426 U.S. 610, 617) and "of dubious probative value." (*Id.*, at p. 617, fn. 18.) This is true here both of the silence and of the time-waiver.

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[24] The implied assurance that his time-waiver was his to use to foster his right to assistance of counsel was vividly manifested when Mr. Ciraolo replaced Mr. Mintz in December, 1998. Mr. Ciraolo had to have substantial time to prepare and even complained how his preparation was hampered by Mr. Mintz's failure to hand over the defense file. (RT 12/11/98, pp. 1-2; 7CT 1763, 1765, 1768-1769.)

In this case, Officer Corey testified to taking the watch and ring from appellant's pocket on May 25, 1996 before placing appellant in a patrol car for transport. (14RT 3111-3113.) What he did not attest to was that he asked appellant, without *Miranda* warnings, whether the watch and the ring belonged to appellant, to which appellant answered truthfully that they did not. (1CT 41.) When later that day appellant was *Mirandized* at the station, he did not directly invoke his right to remain silent, but rather his right to speak and deal with the authorities only through counsel. (2CT 449.) Thus, appellant answered Officer Corey's un*Mirandized* inquiry truthfully, while his invocation of *Miranda* did not unequivocally convey an unwillingness to speak. In short, appellant's silence was not inconsistent with his having a truthful alibi.

In regard to the time waiver, the record in this case shows that the very first delays here were not only for purposes of attorney preparation, but to give the *People* time to go through the appropriate juvenile proceedings to certify that Tony Iuli and Tautai Seumanu could be tried with appellant and Jay Palega as adults. This extended from May 31, 1996 through January 17, 1997. (1CT 158-159, 166, 192, 193, 200, 206, 208, 214-215, 220, 224-226, 231.4.) From then, it took another month for the two new defendants to enter pleas (1CT 235.2), two months after which the preliminary hearing began on April 18, 1997 and extended to June 6, 1997. (5CT 1390, 1431-1436.) Once in Superior Court on June 20, 1997 (6CT 1456), Mr. Mintz announced on the record that he advised appellant to waive time "[f]or the convenience of court and counsel" (6CT 1457), and continuances proceeded for purposes of preparation. (6CT 1496.)

From October, 1997 through May 29, 1998, court time and continuances were devoted to suppression motions by the different co-defendants, in none of which appellant joined. (5CT 1577-1585, 1587, 1589; 6CT 1591, 1593, 1607, 1613, 1616-1618, 1681-1682, 1683-1684; 7CT 1732-1733.) This left another six or seven months of preparation until Mr. Mintz was relieved and replaced by Mr.

Ciraolo in December, 1998. (7CT 1744-1747, 1751, 1755, 1759, 1762-1763; RT 12/11/98, pp. 1-2.)

In March, 1999, Mr. Ciraolo announced that he had to prepare the case from scratch, as it were, since Mr. Mintz had not handed over his file and the discovery. (7CT 1765-1769.) This went on for the balance of the year (7CT 1832, 1836) when on January 7, 2000, when appellant himself was not present in court, Mr. Ciraolo announced out of courtesy to the court and the prosecutor, Ms. Backers, "I am seriously contemplating withdrawing the time waiver on this case on behalf of my client" on or before the next court date, March 3, 2000. (RT 1/7/2000, pp. 1-2.) Then on March 3, Mr. Ciraolo announced: "Your honor, at this time on behalf of Ropati Seumanu, we withdraw a time waiver. I informed court and counsel at our last appearance that I anticipated doing so. At this time, my client is not present in court, but I have discussed with him and it's his desire and my opinion that this is the appropriate time to withdraw the time waiver." (7CT 1841.)

Thus, one can hardly attribute to the time waiver in this case an intent, personal to appellant, to obtain time to fabricate an alibi. The actual course of events provides a multitude of reasons here for the waiving of time, a substantial portion of which was to allow the *People*, who lodged no objections to any continuance, time to prepare *their* case. The time waiver here was surrounded in fact with the same insoluble ambiguity that surrounded appellant's post-arrest silence in this case. Ms. Backers' triumphally dogmatic assertion to the jurors that a defendant with an alibi does not waive time and keep his alibi a secret from the prosecution for four and half years, is thus a violation of the Eighth Amendment.

Defense counsel did not object to the improper argument, but the unusual circumstances of this case would render the application of the forfeiture rule itself fundamentally unfair. As discussed in the first argument of this brief, the "Berger" stipulations, setting forth a time-line of the pre-trial process in this case, were admitted because Ms. Backers, with the trial court's sanction and approval,

turned her own procedural default into the "open door" through which the issue of her personal motives entered the case. (See above, pp. 47-53.) If this was the first ambush, as it were, her argument connecting the "Berger" stipulations to the issue of alibi was the second. In her argument to the court that she be allowed to bring in the evidence that culminated in the "Berger" stipulations, she made no mention whatsoever that this evidence would be relevant to the issue of alibi. Indeed, it had no such relevance without, at the very least, appellant testifying in his own behalf, and even then, if *Doyle* error could be avoided, its relevance and probative value would be questionable given the inherent ambiguities of such procedural evidence and the record in this case showing the true reasons for the delay.

Ms. Backers' argument connecting the "Berger" stipulation to the issue of alibi was both sudden and unforeseen. When one therefore considers that the People, through Ms. Backers, "sandbagged" the defense, not once, but twice in order to achieve the advantage of a clearly unconstitutional argument, they should not now be allowed to reap the further advantage of insulating their misconduct from review and accountability. (*People* v. *Abbaszadeh* (2003) 106 Cal.App.4th 642, 649.) Appellant submits respectfully that refusal to review his claims in this instance would itself constitute a violation of the Due Process Clause of the Fourteenth Amendment insofar as it confers on one party the power to manipulate mere procedure for its own undue and unfair advantage. (See *Solin* v. *O'Melveney & Meyers* (2001) 89 Cal.App.4th 451, 463-464; see also *County of Nevada* v. *Kincki* (1980) 106 Cal.App.3rd 357, 363-3641.) In any event, this Court of course has the discretion to review appellant's claim. (*People* v. *Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6.) Not only is the exercise of this discretion in appellant's favor appropriate because of the consideration of the People's affirmative improprieties, but also because the claim presented here is predicated on indisputable facts, requiring only a determination of law related to a clearly constitutional issue in a criminal case. (*Hale* v. *Morgan* (1978) 22 Cal.3rd 388,

394; *People* v. *Brown* (1996) 42 Cal.App.4th 641, 470-471; *People* v. *Ramirez* (1987) 189 Cal.App.3rd 603, 618, fn. 29.)

Finally, even if an objection had been proffered and properly sustained, and even if an admonition had been given, it would have been useless. The "Berger" stipulations had been presented to the jurors as though it were relevant evidence. The question of Lucy Maseferau's delay in revealing appellant's alibi to authorities was also before the jurors as relevant evidence. (*People* v. *Ratliff* (1987) 189 Cal.App.3rd 696, 700-701.) Indeed, Ms. Backers had cross-examined her about this (14RT 3078-3082, 3090-3094) and, even before the passage now in question, made an extensive argument (17RT 3437-3438), concluding it with a sentence whose verbal echo would be re-used later in the *Doyle*-error passage: "She [Lucy] never says a word, because the alibi was manufactured four-and-a-half years later." (17RT 3838.) Thus, when, in the *Doyle*-error passage Ms. Backers implicitly accused *appellant* of manufacturing the alibi four-and-a-half-years later, no admonition could keep the jurors themselves from viewing the Berger stipulations as impeachment of appellant's alibi. Thus, if *appellant's* procedural default is deemed here to be the important one, then his is excused on the basis of the futility of objection and admonition. (*People* v. *Cook* (2006) 39 Cal.4th 566, 606.)

This confounding mixture of proper and improper argument points in the direction of prejudice. Once Ms. Backers impugned appellant's silence and his alleged manipulation of the system through time waivers then the previous use of the word "manufacture" in reference to Lucy alone would take on a different color, and would be assimilated into the *Doyle*-error. The same is true of subsequent argument, such as her final closing, when she used the phrase "four-and-a-half-years" again to invoke the theme of belated alibi. "Ask yourself," she argued, "if Paki really had an airtight alibi. If he really wasn't there, then how come his three accomplices mention his name and bring it up and put him there right then when they get arrested?" (17RT 3591.) The question, of course, should

be self-answering: that, indeed, they all blamed Paki for the homicide for the very reason that *they were accomplices*. (See *People* v. *Tewksbury* (1976) 15 Cal.3rd 953, 967.) But Ms. Backers had a different answer: "They tell it right then, the police go check it out, the alibi is true, Paki doesn't get charged. That is how alibis work. They are given up right at the time, not four-and-a-half years later." (17RT 3591-3592.)

Thus the *Doyle* error, by which appellant also means the Eighth Amendment error, pervaded the prosecution's assault on the alibi defense and tainted it with improper and irrelevant evidence. In the previous argument, appellant discussed at length how there was indeed substantial evidence from which a jury could form a reasonable doubt as to his guilt. (See above pp. 82-83.) Specifically, the jurors could have formed a reasonable doubt as to his alibi since this alibi had circumstantial support and did not have to rely solely on the credibility of a wife testifying on behalf of her husband. On this record, one cannot say beyond a reasonable doubt that the misconduct in question did not contribute to the verdict of guilt in this case. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

III.
THE PROSECUTOR COMMITTED MISCONDUCT IN IMPUGNING THE INTEGRITY OF DEFENSE COUNSEL AND ARGUING THAT COUNSEL DID NOT BELIEVE IN HIS CLIENT'S INNOCENCE

It is of course misconduct to impugn the integrity and honesty of defense counsel, and to claim that defense counsel himself in fact believes in his client's guilt. (*People* v. *Thompson* (1988) 45 Cal.3rd 86, 112-113.) This is what occurred here in both Ms. Backers' first and second closing. (17RT 3437, 3604-3605.) The occasion for this in the arguments was a rather minor factual dispute over the

shotgun wadding in this case, and before quoting the relevant passages from the argument, it will be helpful first to give summary of the conflict over the wadding.

Clifford Tschetter, the autopsy surgeon in this case, testified on direct examination that he had removed from Nolan's chest the shot collar, or wadding, from a shotgun shell, along with some pellets, all of which he placed into a Petri dish then sealed in an envelope he signed and dated. This was marked as Exhibit 62. (7RT 1705.) On cross-examination, Mr. Ciraolo elicited from Tschetter the fact that the autopsy report, which was based on dictation contemporaneous with the exam itself, mentioned the recovery only of the pellets and not the wadding; that although the pellets showed up on the x-ray and on the reverse image made from the x-ray, the wadding did not; and that Tschetter may have left the task of placing the pellets and wadding in the Petri dish to one of his assistants. (7RT 1708-1709, 1713-1715.) On redirect examination, Ms. Backers emphasized the contemporaneous writing on the evidence envelope, which stated "pellets and wadding from right chest" (7RT 1715-1716), and had Tschetter identify Exhibit 61, which showed the wadding covered with blood. (7RT 1716.) On recross-examination, Mr. Ciraolo emphasized that nothing in the photograph showed the reference number of this case. (7RT 1717.) Later in the case, Detective Cardes testified that he attended the autopsy, had witnessed Tschetter removing pellets and the wadding from the body, and taken the photograph that was Exhibit 61. (14RT 3134-3135.)

The above summary, in the concentration necessary to summaries, gives a false feeling of intensity to this dispute and exaggerates the importance of the shotgun wadding, which was not particularly material as evidence in the case. The wadding was relevant to help identify the weapon as a shotgun and to help assess the distance of the muzzle from the victim, assuming that the wadding was in fact removed from Nolan's chest. However, both identification and distance were established by the pellets and the degree of pellet dispersion. (See above, pp. 13-14 and fn. 6.) But it takes only a spark to set a fire, and Ms. Backers was ready to

confer on the wadding a status quite beyond its minor role in the tedious technical aspects of this case:

> "You met Detective Cardes. And he had different things to say about this case. The things that are important for this conversation we are having right now is that he attended this autopsy. And while he was at the autopsy, he personally saw and photographed Dr. Tschetter removing the pellets and wadding from Nolan's chest.
>
> "There has been a lot said about that wadding in this case. And Mr. Ciraolo asked Dr. Tschetter: Well, you didn't dictate into your autopsy report, so how do you know it actually came out of Nolan's chest?
>
> "And Dr. Tschetter told you: Because I took it out. I put it in this Petri dish. I labeled it: Pellets and wadding from Nolan's right chest. Then it was inside this envelope, which I also signed, which said: Pellets and wadding from Nolan's right chest.
>
> "And now we know there is a photograph of it lying on a table in the coroner's office covered in blood.
>
> "And you might ask yourself: why is all this hullabaloo being made about this wadding?
>
> "I will tell you why.
>
> "That wadding was imbedded [*sic*] in Nolan's chest. And that means this shooting was at close range.
>
> "*Well, why does Mr. Ciraolo care if the shooting was at close range if Tautai is the shooter?*
>
> "*Why does he care?*
>
> "*Because he knows you are not going to believe that Tautai is the shooter. He knows that Paki is the shooter. And he is hedging his bets by making all this conversation about this wadding because he knows that you know Paki is the shooter.*" (17RT 3436-3437, italics added.)

If Ms. Backers had stopped before the italicized portion of the argument, there would have been perhaps an overheated and disproportionate argument, but not misconduct. When she extended the "significance" of the wadding as evidence of Ms. Ciraolo's lack of belief in the very defense he was presenting, she had crossed the line into misconduct, stating that counsel knew appellant was guilty, did not believe the defense he was presenting, and was somehow disingenuously "hedging his bets," presumably for the penalty phase of trial. There can be little doubt that this is improper argument. (*People* v. *Thompson*, *supra*, 45 Cal.3rd 86, 112-113; *People* v. *Herring* (1993) 20 Cal.App.4th 1066, 1075-1076.)[25]

The implication of arguing defense counsel's personal disbelief in the defense case of course implies that *counsel* had been fabricating the defense, which is another form of the same kind of misconduct (*People* v. *Cash* (2002) 28 Cal.4th 703, 732; *People* v. *Benmore* (2000) 22 Cal.4th 809, 846; *People* v. *Bain*

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[25] Ms. Backers may have given some advance notice of her argumentive intent concerning the wadding immediately after the cross-examination of Dr. Tschetter. Outside the presence of the jury, she declared her desire to make record of the extensive efforts she made to show defense counsel the evidence and thereby induce him to stipulate about the recovery of the wadding. (7RT 1718.) What conceivable purpose such a record would serve is unclear in light of the rule that no party can be forced to stipulate to a relevant or material fact in a case (see *People* v. *Scheid* (1997) 16 Cal.4th 1, 16-17), and indeed she asked for nothing else *beyond* the making of a record. But when one considers her subsequent closing argument impugning defense counsel, then a statement she made while making her empty record begins to sound like an implicit warning that counsel's refusal to stipulate might carry a price: " . . . I thought [Mr. Ciraolo] would want to consider [the evidence showed to him] before he made the strategic decision not to stipulate to that particular paragraph." (7RT 1718.) In any event, counsel, for his part, at the time stated that he believed the matter was appropriate for cross-examination because of the discrepancies in the report (7RT 1719); he also stated that "[w]hether it was strategic or tactical, I am too close to it to label." (7RT 1719.)

(1971) 5 Cal.3rd 839, 847). The latter predominates in the theme of imputation against counsel in the final closing. There Ms. Backers argued:

> "*There are several shams that have been put forward to you in the hopes that you might believe one of them. And these are those*:
>
> "*Number one, that the wadding didn't really come from Nolan's chest.*
>
> "Number two, that after March 3rd the prosecution realized they couldn't make their case and they approached the two co-defendants for a deal because there was no evidence in the case.
>
> "Number three, that Paki was home asleep with his wife, who just never happened to mention his alibi for four-and-a-half years;
>
> "That Tautai is really the triggerman and that Tautai told the police back in '96 that Paki was the triggerman so he could ascend the royal throne to be the trial chief.
>
> "This is what you have been asked to buy by the defense. This is the package that they are selling." (17RT 3604-3605, emphasis added.)

Thus, Ms. Backers' grievance about the wadding tops the list. "Sham" of course is a strong word suggesting not merely a tendentious view of the evidence on the part of defense counsel, but a manipulative and deceptive *fabrication* of it. Even if the first sentence in the above passage is cast in the passive voice, "put forth" certainly could not exclude defense counsel, who, after all, was the "put-forther" in chief for the defense. When one considers also that in the first argument she accused counsel of creating the dispute over the wadding out of whole cloth to obscure his own disbelief in his case and to manipulate the jurors by "hedging his bets," then one cannot escape the implication that defense counsel

is indeed the one fabricating defenses. There can be no doubt that Ms. Backers committed misconduct in these arguments.

There were no objections to the misconduct, raising again the issue of procedural default. Objection here, however, would clearly have been futile. Impugning defense counsel personally is effectively the same error as vouching in that it injects into the case the personal beliefs and motives of defense counsel, which is as immaterial as the personal beliefs and motives of the prosecutor. (*People* v. *Thompson*, *supra*, 45 Cla.3rd 86, 112-113.) A trial judge who viewed Mr. Ciraolo's opening statement as laying a foundation for the issue of Ms. Backers' personal motives would also see his cross-examination of Dr. Tschetter as opening the door to the issue of his personal motives. The two issues were substantially the same and would be subjected to the judge's erroneous "open door" principle for the same result. In short, an objection would have been futile. (*People* v. *Chatman* (2006) 38 Cal.4th 344, 380.)

But even if the Court discerned a difference in the two issues and would have sustained an objection in the latter, it does not mean that the jury would have had the same discernment and been able to follow a curative admonition. In the first argument, it was demonstrated how, beyond the vouching itself, Ms. Backers' personalization of this case pervaded the entire guilt trial. *If* Ms. Backer's integrity was a proper matter for consideration for the jurors, how could the question of Mr. Ciraolo's integrity not also be an issue, and by what *real* principle can the mind of a reasonable person distinguish the two? Thus, quite apart from the futility of objection, the fruitlessness of admonition excuses any procedural default here. (*People* v. *Hill* (1998) 7 Cal.4th 800, 822; *People* v. *Bandhauer* (1967) 66 Cal.2nd 524, 530.)

In regard to the prejudice, one expects respondent to argue that the misconduct in question applies only to the question of the shotgun wadding. But, not only is the imputation of dishonesty against a lawyer difficult to confine to its immediate context, but also Ms. Backers' list of grievances, quoted above, links

the *important* factual matters in this case, *viz.* the alibi and Tautai Seumanu's third-party culpability, to the wadding issue and places all of them under the rubric of "shams" that the defense has "put forth." This is not to mention that in the first quoted passage, Ms. Backers simple declaration was that Mr. Ciraolo "knows that Paki is the shooter" and that he is therefore "hedging his bets" presumably to avoid too steep a wager on acquittal. To argue that the imputation of dishonesty and lack of integrity would not be understood in a comprehensive way is specious.

Beyond this, the remarks on prejudice made in the previous two arguments also apply here. To accuse counsel of disbelieving in the defense, indeed of having a hand in fabricating the defense, goes directly to the heart of the dispute at the guilt trial over whether appellant was present and committed the murder of Nolan. Again, there was substantial evidence in the record to establish the reasonable doubt required for acquittal. It was sufficiently substantial that, absent Ms. Backers' misconduct in impugning the defense, an acquittal was reasonably probable. (*People* v. *Watson* (1957) 46 Cal.2nd 818, 836-837.) Certainly when one considers the vouching errors discussed in the previous argument, and understands that Ms. Backers made this case a battle between her personal integrity and that of defense counsel (see *People* v. *Herring*, *supra*, 20 Cal.App.4th 1066, 1075), then the clearly the combined errors were prejudicial. (*People* v. *Hill* (1998) 17 Cal.4th 800, 844.)

The misconduct here also rises to the level of federal constitutional error. Whether considered by itself or in conjunction with the vouching errors, the provocative claim that the defense counsel fabricated the defense or that this was somehow a morality play between Ms. Backers and Mr. Ciraolo personally effectively deprived appellant of a meaningful opportunity to present a defense as guaranteed by the Sixth and Fourteenth Amendments. (*Crane* v. *Kentucky* (1986) 476 U.S. 683, 689-690.) Whether by itself or in conjunction with the vouching errors, it injected into the case a strong element of irrelevant and incompetent evidence in violation of the Fourteenth Amendment. (*Bruton* v. *United States*

(1968) 391 U.S. 123, 131, fn. 6; *People* v. *Valentine* (1986) 42 Cal.3rd 170, 177.) Whether by itself or in conjunction with the vouching errors, the unwarranted attack on defense counsel imposed on appellant's right to effective assistance of counsel under the Sixth Amendment. (*Bruno* v. *Rushen* (9th Cir.1983) 721 F.2nd 1193, 1194-1195.) In this last regard, the misconduct at issue here conjoins with the Sixth Amendment aspect of the *Doyle* error discussed in the previous argument, one of whose implications was that if appellant fabricated his alibi, he did so with the help of someone knowledgeable about legal procedure, which of course would be his attorney. Finally, the effect of the misconduct in impugning defense counsel's honesty and integrity was so pervasive, either in itself or in combination with the vouching or the *Doyle* errors, as to undermine the fundamental fairness of the guilt trial in violation of the Fourteenth Amendment (*Darden* v. *Wainwright* (1986) 477 U.S. 168, 181; *Donnelly* v. *DeChristoforo* (1974) 416 U.S. 637, 642-643) and therefore in violation of t the heightened standards of reliability required for capital cases under the Eighth Amendment. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638.) Error or combined error that can meet the standard of review under the California state constitution can, *a fortiori*, meet the more liberal (to appellant) standard of review under the federal constitution. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

IV.
THE PROSECUTOR'S APPEALS TO THE JURY'S PASSIONS AND PREJUDICES CONSTITUTED MISCONDUCT AGAINST WHICH OBJECTION AND ADMONITION WOULD HAVE BEEN FUTILE, AND WHOSE EFFECT WAS TO RENDER THE GUILT PHASE OF TRIAL FUNDAMENTALLY UNFAIR UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

In discussing the prejudice from the vouching errors that occurred in the guilt trial, appellant highlighted the opening passages from both Ms. Backers'

opening statement to the jury at the beginning of the guilt trial and her closing statement at the end. (See above, pp. 84-85.) From the very first sentence of the opening statement, as quoted above, Ms. Backers invoked the theme of the bridegroom murdered on his wedding day, while his bride's gift became the "trophy" of a murderer. (6RT 1554-1555.) This was the theme that the case ended with in her closing, with the tally of "good and evil" represented by the "innocent bridegroom," the "handsome husband," murdered horribly on his wedding day by the man named "Paki." (17RT 3429.) In the first argument, appellant tentatively characterized these statements as the "hard blows" otherwise allowed to the prosecution, whose impact was unduly magnified and distorted by the "foul blows" of prosecutorial vouching. (See above, pp. 85-86.) That characterization, however, depended from the immediate context where the focus was on Ms. Backers' vouching. For in the end these too are also "foul blows," amounting to a calculated appeal to the jury's passions and prejudices, another form unfair and improper argument. (*People* v. *Stansbury* (1993) 4 Cal.4th 1017, 1056-1057; *People* v. *Padilla* (1995) 11 Cal.4th 891, 956-957; *People* v. *Mayfield* (1997) 14 Cal.4th 668, 803.)

Before elaborating on the record itself, the governing legal principles should be clarified. There is nothing wrong, in opening or closing statements, for an advocate to summarize the evidence "in a story-like manner that holds the attention of lay jurors and ties the facts and governing law together in an understandable way." (*People* v. *Milwee* (1998) 18 Cal.4th 96, 137.) Stated another way, there is no impropriety for a party in the case to attempt to induce the jurors to "follow the evidence" and to "discern its materiality, force, and effect" in accord with that party's theory of the case. (*People* v. *Harris* (1989) 47 Cal.3rd 1047, 1080.) However, it is improper, through the use of inflammatory rhetoric calculated to "invite an irrational purely subjective response," to create the impression that "emotion may reign over reason." (*People* v. *Lewis* (1990) 50 Cal.3rd 262, 284.)

This general characterization of the type of misconduct at issue can be narrowed even further to fit this case: "We have settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt. [Citations.]." (*People* v. *Stansbury*, *supra*, 4 Cal.4th 1017, 1057; see also *People* v. *Leonard* (2007) 40 Cal.4th 1370, 1418.) For, as will be seen, Ms. Backers' rhetorical strategy was to take the evidence rendered material and relevant by the narrow legal questions of the guilt phase, and magnify its emotional effect far in excess of actual probative value or materiality, and she did it by having the jurors view this evidence "through the eyes of the victim . . . ."

Appellant has already noted how Ms. Backers tended to personalize the evidence and how, after invoking in vivid and emotional rhetoric in her opening statement the theme of the wedding and the trophy murder, she made her formal invocation:

> "Ladies and gentlemen of this jury, may it please the court, counsel, Nolan's family and friends, I am about to share with you a family's worse nightmare, the story of their son's murder and the evidence that so horrifyingly tells that story.
>
> "Ven Charlie, Ricky, Raul, Paul, Victor and Mark.
>
> "Who are these people? Who are these special people?
>
> "Well, these are the people that would be wearing tuxedos along with Nolan, on his wedding day.
>
> "Ven, Charlie, Ricky, Raul, Paul, Nolan's brother, Victor, Mark, and Nolan." (6RT 1555.)

Instead of explaining at this point that this emotion-laden listing of names was based on the material evidence of a tuxedo rental receipt, whose relevance

was that it was found in the hangout room on Folsom Street (17RT 1896), she merely asserts it as evidence that Nolan, on May 15, was arranging and paid for the tuxedos of the entire wedding party (6RT 1555) --- a fact which was only marginally relevant to the material issues, but more relevant to the emotion of the case. She then continued as follows:

> "Nolan rented one for himself to marry his bride in, but after the defendant was done kidnapping him and shooting him at close range with a shotgun, he didn't get married in that tuxedo.
>
> "On the day that you first came into this courtroom, some many months ago, you met his honor, Judge Goodman, you met his staff, and then a little bit later you met me.
>
> "You were introduced to me, Angela Backers, a member of the Alameda County District Attorney's Office, the prosecutor in this case, the lawyer representing the People of the State of California. And then you were introduced to the defendant's two lawyers, Mike Ciraolo and Deoborah Levy. Ms. Levy, in turn, asked the defendant, Afatia Ropati Seumanu, to stand and look at each one of you. And he smiled. And he was introduced to you.
>
> "On some mornings and afternoons he actually spoke to you and greeted you and said 'Good morning' or 'Good afternoon.'
>
> "I have a client too. The chair next to me appears to be empty, but his name is Nolan. And I would like to introduce you to him.
>
> "This is Nolan Pamintuan." (6RT 1556.)

With this she showed a DMV photograph from Nolan's driver's license, presumably a copy of the license found in the hangout room on Folsom Street. (7RT 1892; see also 7RT 1735.).)

The use of the tuxedo receipt and the driver's license – both material pieces of evidence – was clearly just a pretext to emotionalize the case beyond the

material relevance of the evidence and to allow Ms. Backers to create the impression that the jurors were free to give vent to any sympathy the pathetic circumstances of this case induced in them for Nolan, his fiancée, and his family, who she presented to the jury as though they were her "clients." In fact, this was a public prosecution, in which Ms. Backers represented only the People, who, apart from appellant, was the only other party to the action. (§ 684; *People* v. *Superior Court (Aquino)* (1988) 201 Cal.App.3rd 1346, 1349-1350; see also *People* v. *Von Villas* (1992) 10 Cal.App.4th 201, 250.) Her argumentive purpose, however, was to cast the prosecution as a private vindication for a terrible loss in order to exploit the emotion inherent in such vivid personalization.

One particularly illustrative example of the gross divergence between pretext and purpose is in the evidence of the "to-do" list. Rowena identified the sports jacket recovered from the hangout room as the one Nolan had been wearing at the wedding rehearsal and rehearsal dinner, and which was shown in various photographs of these events. (7RT 1736-1739, 1741-1742, 1887.) The sports jacket, thus, was a major piece of evidence connecting the crime to appellant. Inside the breast pocket of the sports jacket were various pieces of paper, one of which was a "to do" list with handwriting that Rowena identified as Nolan's. (7RT 1742, 1887-1888.) The sports jacket had been identified independently of the to-do list, and thus, the to-do list was of minor relevance and materiality in the case. Nonetheless, here is Ms. Backers' opening statement describing the to-do list:

> " . . . [Nolan] was . . . making a list to himself, a list of things to do that he wanted to be sure to remember to care of. It was in his writing. He used a special piece of paper to make that list; it was the wedding program.

"And on the front side of the program was the information about the ceremony and who was sponsoring them in the wedding, who would participate in the wedding.

"On the back side is his writing about what he needed to take care of that night and the next morning.

"The front piece of this paper I have had blown up for you and it has the name of their wedding. Rowena's last name is Panelo, and his last name is Pamintuan. It has who is celebrating them; they are having a priest marry them on the other side of the bay, all the sponsors in the wedding, then their actual wedding party.

His best man is his brother Paul, who is with us today. His groomsmen were Ricardo, Victor, and Noel, one of Rowena's brothers. We have her maid of honor and her bridesmaids.

"And as secondary sponsor, they are listed, and people who would carry things: the cord, the coin, and the ring, and the flower girl.

"There is a young woman here who is with us today, his little sister named Pia, Pia Manio. That is Nolan's sister, his only sister.

"Now, on the back of that piece of paper, it is actually pink in color, is a list he wrote to himself of things he wanted to remember to do. And he started at the bottom of the page and put: Number one, call Jeff about the hotel booking. And he had the hotel information at the top. Take care of Auntie Edith. Take care of victor and Auntie, Pick up the tux. Paul, pick up his tux. Me, remember my tux, not to forget my tux.

"Then it moves up here. No. 6, take care of Uncle Armand and take care of my baby sister Pia. Pia was the last thing he wrote." (6RT 1562-1563.)

There can be little doubt that this was a calculated appeal to passion and prejudice. The to-do list was a pretext to talk in emotional terms about the wedding itself. It provided the occasion for Ms. Backers to introduce more of her

"clients," Paul and Pia, who were right there in the audience. The poetic concentration of "Pia was the last thing he wrote" would be admirable if this were art and not a legal proceeding, and opening statement at that. The issue of appellant's connection to the crime plays so minor a role in this passage as to be unimportant.

There were more introductions and more "clients":

> "When he left Rowena's home that night, he told Rowena he was going to drive across the San Mateo Bridge and spend the last night of his single life at his dad's house with his dad, Lope, who is with us and his brother Paul, and his dad's wife Elizabeth, who is with us today." (6RT 1563.)

And there was more poetic concentration, as in the very last line of Ms. Backers' opening statement: "And he left that sweet bridegroom to die all alone on a deserted street." (6RT 1641.)

The personalization and exploitation of sympathetic factors continued into closing argument. The opening of Ms. Backers' closing has been quoted above with its vivid rhetoric about wedding, bridegrooms, and murderer's trophies. (See above, pp. 84-85.) But one might note further such statements as:

> "So the evidence in this case will compel you to do the right thing. It will compel you to give Nolan and his family justice." (17RT 3430.)

> "And I ask you to remember that this case is about Nolan." (17RT 3431.)

"One of the people that you met in this case is Nolan's fiancée, Rowena." (17RT 3431.)

"You have all those pictures showing the last moments of Nolan's happiness." (17RT 3432.)

"Rowena also told us that the last time she saw Nolan was Friday night, the 17th of May, between 10:30 and 11:00 when he left to go spend the night with his father.

"And she told that on Saturday she found out her bridegroom had been murdered about 1:30, 30 minutes before her wedding was scheduled to marry Nolan." (17RT 3432.)

"Patricia Henshaw came in and Nolan was pronounced dead by Dr. Snoey at 11 minutes into his wedding day." (17RT 3435.)

"You met Nolan's father, Lope. He went to the rehearsal at the church. He went to the dinner at the restaurant afterwards. And that was the last time he saw his son alive." (17RT 3435.)

"Imagine begging for your life, begging to be let go, being held captive at the end of a shotgun by these four frightening men, and they get mad at you because you only have a little cash." (17 RT 3532.)

"Imagine trying to save you own life, giving them the most you can give them, and you are being called a liar and having a gun pointed at you." (17RT 3537.)

Respondent's primary argument of course will be that there were no objections or requests for admonitions, and that therefore none of this is cognizable on appeal. (*People* v. *Earp* (1999) 20 Cal.4th 826, 858.) However, this

is not required where objections would have been futile and admonitions would not have cured the harm. (*People* v. *Cook* (2006) 39 Cal.4th 566, 606.)

First as to the futility of objection, the various appeals to passion and prejudice was scattered in incremental amounts throughout the arguments in this case, such as when the various family members were introduced, or Ms. Backers' would refer to Nolan as the "sweet innocent bridegroom" or "handsome husband." The situation here was thus similar to that confronting this Court in *People* v. *Bandhauer* (1967) 66 Cal.2nd 524, in which the prosecutor, from the beginning of trial, made scattered statements from the beginning of trial and in final penalty argument about his long experience as a prosecutor and the high duties of his office. One of those statements included, " 'During the many many years that I have been prosecutor, I have seen some pretty depraved character (sic). Usually they are kind of old because it takes a little while to become this depraved. But it has seldom been my misfortune to see a more deprave (sic) character than this one.'" (*Id.* at p. 529.) Further on in the argument, the prosecutor asserted, "'I have stood before this court on occasions and recommended life imprisonment in the first degree murder cases.'" (*Ibid.*) This Court found that the former statement about the defendant's depravity was misconduct, while the latter statement about recommending life imprisonment in other cases aggravated the misconduct. (*Id.*, at pp. 529-530.) In response to the Attorney General's contention that the failure to object forfeited the claim of misconduct, this Court responded:

> " . . . . The argument on the public responsibility of the prosecutor was not by itself subject to objection. The testimonial statements [of the prosecutor] were injected gradually into the argument so that it was not until the prosecutor made the clinching assertion that he had seldom seen a more depraved character that grounds for objection were apparent. It was then too late to cure the error by admonition, and any effort of the prosecutor to cure the error by formally retracting what he obviously believed would only have compounded it. Under these circumstances defendant is not

precluded from raising the issue for the first time on appeal." (*Id.*, at p. 530.)

In addition, the cross-examination of Lucy Massaferau certainly betrayed the trial court's attitude toward the use of inflammatory rhetoric by Ms. Backers. As quoted before, Ms. Backers asked her, "Q. *This sweet Filipino boy* with interviews from his family all over the news. [¶] MR. CIRAOLO: Your honor, objection. [¶] THE COURT: Overruled." (14RT 3080, italics added.) Or again: "Q. You never saw *how traumatized this family was* on the news. [¶] MR. CIRAOLO: Same objection, your honor. THE COURT: Overruled." (14RT 3080, italics added.) If the Court would not suppress argumentative rhetoric in the questioning of witnesses, would the court suppress it in argument itself?

As to the efficacy of admonitions, these matters, even the murder of a victim about to be married the next day is inherently inflammatory without the aid of exploitive rhetoric. Once the Pandora's box was opened, no admonition could restore the contents and close it. The only remedy in this case was for Ms. Backers to have exercised appropriate restraint and to have waited for the penalty phase of trial, which would have given her almost all, if not all, the rhetorical scope she could want for weddings, bridegrooms, and trophies.

The factors making for prejudice need not be repeated again, for they are the same as outlined in the previous three issues. Here, however, "the presumption of innocence" would "melt under the heat of emotions" aroused by Ms. Backers' appeals to sympathy for the victim and his family. (*People* v. *James* (2000) 81 Cal.App.4th 1343, 1353.) Without this misconduct, it is reasonably probable that appellant would have been acquitted. (*People* v. *Watson* (1957) 47 Cal.2nd 818, 836-837.)

Apart from state error, the emotionalism of the prosecution's case was so pervasive as to constitute a denial of the right to a fair trial under the Fourteenth Amendment (*Darden* v. *Wainwright* (1986) 477 U.S. 168, 181; *Donnelly* v.

DeChristoforo (1974) 416 U.S. 637, 642-643), and to impugn the reliability of the guilt verdict in a capital case as required by the Eighth Amendment. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628.) The standard of review for federal constitutional error, whether the misconduct can be shown beyond a reasonable doubt to be harmless, is, *a fortiori*, met in this case. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.) Finally, the combined misconduct of vouching, impugning integrity of defense counsel, using appellant's silence and time waivers as evidence of guilt, and appeals for sympathy was prejudicial whether under the state standard of review or for review for federal constitutional error. (*People* v. *Hill* (1998) 17 Cal.4th 800, 844; *Chapman*, *supra*.)

V.
TONY IULI'S TESTIMONY, "I TOLD HER HER FUCKING BROTHER BLEW SOME DUDE AWAY" WAS HEARSAY, IMPROPERLY ADMITTED ON DIRECT EXAMINATION, CONFERRING ON IT THEREBY A DRAMATIC FORCE FAR IN EXCESS OF ITS NUGATORY PROBATIVE VALUE AS PRIOR CONSISTENT STATEMENT

Iuli testified that after he received his share of the loot, he went back to the van where he slept with his wife and he told her what happened. (11RT 2625-2626.) The following exchange occurred:

"MS. BACKERS: Q. What did you tell your wife?

"A. I told her what happened.

"Q. What did you tell her?

"A. I told her –

"MR. CIRAOLO: Objection. Self-serving, hearsay.

"THE COURT: Overruled.

"MS. BACKERS: Q. You can answer.

"A. I said: Your fucking brother blew some dude away.

"Q. I can't hear you.

"A. I told her her fucking brother blew some dude away." (11RT 2626.)

The court's swift and sure ruling against Mr. Ciraolo's hearsay objection leaves something of an enigma in the record, since no applicable hearsay exception or competent non-hearsay purpose was articulated. Perhaps the most colorable theory of admissibility here is that for prior consistent statement, but that fails for lack of the appropriate foundation, and the trial court erred in overruling Mr. Ciraolo's hearsay objection. But before addressing the problem and prejudice from this purported prior consistent statement, it will perhaps be appropriate to dispense with the more far-fetched legal possibilities for the admission of this evidence.

First, Tony Iuli's declaration to his wife accusing her brother of murder was not a crime victim's timely report to authorities relevant under a non-hearsay theory of fresh complaint. Such evidence is relevant to forestall the adverse inference that the lack of report of a crime undermines the credibility of the victim. (See *People* v. *Brown* (1994) 8 Cal.4th 746, 760-761.) Iuli was certainly not a crime victim, but a crime perpetrator. Moreover, there is no natural expectation that a criminal husband will confide his, or even his brother-in-law's, criminal activity to his wife, and one would hardly argue that the lack of such domestic confidence impeached the witness.

Even in this case, not only was there no specific evidence that Iuli and his wife habitually shared intimacies about his criminal activity, there

was affirmative evidence that Mrs. Iuli in fact did not approve of these activities. For Iuli testified that when they returned to the house with the stolen van in order to retrieve the guns, they had to sneak back out to avoid the notice of his wife. (10RT 2520.) There was, clearly, no non-hearsay relevance to the statement whatsoever.

Secondly, the statement did not qualify as a declaration against penal interest, since this hearsay exception requires the unavailability of the declarant. (Evid. Code, § 1230.)[26] Moreover, even if Iuli had been unavailable, the statement did not clearly militate against his penal interest to the extent he admitted only to witnessing appellant doing something wrong without admitting his own wrongdoing. But even if the statement could be construed against Iuli's interest, this did not render the portion that incriminated a third-party, i.e., appellant, admissible under this exception to the hearsay rule. (*People* v. *Leach* (1975) 15 Cal.3rd 419, 439-440.)

Finally, the statement did not qualify as a spontaneous utterance under Evidence Code section 1240.[27] It was made in the calm circumstances of the marriage bed after Iuli, a veteran armed robber, had helped dump the stolen van, helped clean it to remove fingerprints and other traces of crime, walked home for several blocks with his

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[26] Section 1230 provides in relevant part: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule 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 . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

[27] "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

confederates, and then divided the loot with them. Under these circumstances there was more than enough time to attenuate the allegedly startling effect of witnessing the murder, and to reflect on a contrived or misrepresented version of events. All this disqualified the statement under Evidence Code section 1240 as a spontaneous utterance. (*People* v. *Poggi* (1988) 45 Cal.3rd 306, 318; cf. *People* v. *Ramirez* (2006) 143 Cal.App.4th 1512, 1524-1526.) The question then remains the error and prejudice arising from the admission of the accusation as a prior consistent statement.

Evidence Code section 1236 formulates the hearsay exception for prior consistent statement:

> "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791."

Evidence Code section 791 provides:

> "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
>
> "(a) Evidence of a statement made by him that inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
>
> "(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

There is no doubt that Iuli's statement to his wife about "her fucking brother" was a statement consistent with his testimony at trial. There is also no doubt that there was no foundation for the admission of this statement under Subdivision (a) of section 791 since there was not, and would not be, introduced into evidence a prior inconsistent statement by Iuli to the effect that appellant *did not* commit robbery and murder. The question here revolves around subdivision (b) of section 791, for implied or express charge of fabrication or improper motive.

The terms of section 791 require that the foundation for prior consistent statements be established *before* the admission of the statements. The cross-examination of Iuli of course would raise the implied or express charge of fabrication and improper motive, but that had not yet occurred when the statement was admitted over defense counsel's objection. However, there is no doubt that defense counsel in fact made the implied charge against Iuli of fabrication and improper motive in his opening statement (6RT 1643-1644), and the question of admissibility further resolves itself into whether statements made by counsel in his opening can lay the required foundation for the admissibility. The answer is, no.

Opening statement of counsel serves no evidentiary purpose whatsoever at trial, but is collateral to the presentation of evidence offering only an outline of the facts and each party's theory of the facts of the case. (*People* v. *Stoll* (1904) 143 Cal. 689, 693; *People* v. *Wilson* (1967) 256 Cal.App.2nd 411, 419.) The hearsay exception for prior consistent statement, however, is intended to apply narrowly to the evidentiary process of trial, when witnesses are impeached on cross-examination and rehabilitated on redirect or through a separate witness who could attest to the prior consistent statement. This indeed was the intent of the Legislature that enacted section 1236 as shown by the comment of The Law Revision commission:

"Under existing law, a prior statement of a witness that is consistent with his testimony at trial is admissible under certain conditions when the credibility of the witness has been attacked. The statement is admitted, however, only to rehabilitate the witness – to support his credibility -- and not as evidence of the truth of the matter stated. [Citation.] Section 1236, however, permits a prior consistent statement of a witness to be used as substantive evidence *if the statement is otherwise admissible under the rules relating to the rehabilitation of impeached witnesses.* See Evidence Code § 791. There is no reason to perpetuate the subtle distinction made in the cases. It is not realistic to expect a jury to understand that it cannot believe that a witness was telling the truth on a former occasion even though it believes that the same story given at the hearing is true." (Comment to Evidence Code section 1236, italics added.)

The comment makes it clear that the foundational restrictions were retained from previous law, and the italicized words make it clear these restrictions were conceived in terms of the normal evidentiary process of impeachment and rehabilitation. Such evidentiary process simply does not embrace the opening statement of counsel.[28]

Confinement of the foundational requirements to the evidentiary process has sound sense and reason behind it. As observed by the Maine Supreme Court:

"Certainly the mere suggestion in an opening statement by counsel that a party will attempt to controvert the facts sought to be established by the adverse party is insufficient to establish an implied charge of recent fabrication or improper motive. Were courts to find an implied charge in every denial by one party of the facts asserted by the opposing party, the exclusion from the

[28] This is not to say that opening statements may not illuminate the thrust of questions actually posed to the witness on cross-examination and help establish that they were intended to raise an implied charge of fabrication or improper motive. (See *Smith* v. *State* (Ga.App.2006) 638 S.E.2nd 791, 794-795.)

> definition of hearsay contained in Rule 801(d)(1) would become so broad that it would effectively swallow the hearsay rule in all cases in which a declarant has made a prior consistent statement. [Fn. omitted.] The existence of an implied charge of recent fabrication or improper motive must be apparent from the evidence or from those inferences which fairly arise from counsel's cross-examination of a declarant. [Citation.] If an implied charge fairly arises from the line of questioning pursued by counsel, it is irrelevant whether counsel intended to imply fabrication. [Citation.]" (*State* v. *Zinck* (Me.1983) 457 A.2nd 422, 426.)[29]

Not only would the hearsay exception for prior consistent statements lose its character as exceptional, but the exception would open the door to serious abuse and manipulation, as in fact illustrated by the abuse and manipulation used in this very case. Why would Ms. Backers seek to "rehabilitate" Tony Iuli's credibility with a prior consistent statement attested, *not* by *Mrs.* Iuli, but by Tony Iuli himself? The answer is that she was not seeking to rehabilitate credibility, but to create the vividness of a drama and to reap its persuasive force as affirmative evidence. (See *Old Chief* v. *United States* (1997) 519 U.S. 172, 189.) If this evidence had been produced in its normal order, on redirect examination, after an implied charge of improper motive had been raised on cross-examination, not only would its parameter be more clearly defined and constrained for the jury, but also

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[29] Although the occasion for these observations was an implied, rather than express, charge of fabrication or improper motive, there is no principle that distinguishes the two in relation to the proper mode in which a foundation for prior consistent statements are to be laid. More often than not an express charge of fabrication or improper motive will merely be simply one party's *inference* from some piece of evidence, i.e., a conclusion implied by some piece of evidence, here, for example, the plea deal and accomplice status of Tony Iuli. Indeed, here one can still characterize counsel's opening statement as implied charge. How counsel may or may not express himself, or whether he even gives an opening statement at all, is a matter that depends on various factors beyond the actual evidence itself. This is not a solid basis on which to base matters that need to be decided by evidence actually presented. (See *People* v. *Stoll*, *supra*, 143 Cal. 689, 693.)

the sheer ridiculousness of the self-rehabilitation of an accomplice witness would have been on clear display.[30]

This points in the direction of prejudice for this error. Generally a prior consistent statement admitted without proper foundation " 'is unnecessary and valueless. . . .' " (*United States* v. *Navarro-Varelas* (9th Cir.1976) 541 F.2nd 1331, 1334, quoting 4 J. Wigmore, Evidence § 1124, at p. 255 (Chadbourn rev. ed. 1972.) This of course is a rather muted form of prejudice rendered even more innocuous when the foundation for the admission of the evidence will eventually be established through the upcoming cross-examination. However, sometimes evidence, when presented out of its proper order, becomes unduly magnified (see *People* v. *Carter* (1957) 48 Cal.2nd 737, 753), and here a prior consistent statement, virtually worthless as rehabilitation, became in direct examination an effective and persuasive, if deceptive, vehicle for bolstering Iuli's credibility.

Here, with the air of affirmative evidence, Iuli's testimony that he told his wife that "her fucking brother blew some dude away" becomes forceful on direct examination with its appearance of a *viva voce* immediacy providing the kind of verisimilitude that renders accomplice testimony especially seductive to lay jurors:

> " . . . . In addition to being derived from a suspect source accomplice testimony is frequently cloaked with a plausibility which may interfere with the jury's ability to evaluate its credibility. '(A)n accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth.' [Citation.]" (*People* v. *Tewksbury* (1976) 15 Cal.3rd 953, 967.)

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[30] It is worth noting that on redirect, Ms. Backers adduced only Iuli's statement to the police after his arrest as a prior consistent statement. (11RT 2698-2699.) The subject of his spousal conversation was not raised again.

Thus, placing the statement in direct examination, before the limiting foundation was laid, added to the evidence the appearance of a significance it should not have had. Indeed, as stated above, as proper rehabilitation evidence, the statement, especially when attested by Iuli himself, was ridiculous.

Another aspect of the prejudicial effect of the trial court's error can be seen from how Ms. Backers continued the direct examination once she received the windfall of the dramatic hearsay statement:

> "Q. When you told your wife Seu that her fucking brother blew somebody away, did she start asking you questions about it?
>
> "A. Yes.
>
> "Q. Did you tell her?
>
> "A. Yes.
>
> "Q. What did you tell her?
>
> "MR. CIRAOLO: Objection. Hearsay.
>
> "THE COURT: Overruled.
>
> "MS. BACKERS: Q. You can answer.
>
> "A. I just told her what happened, didn't know why he did it.
>
> "Q. What did you tell her.
>
> "A. I said I didn't know why he did it, he just blew him away.
>
> "Q. Did she ask about who the guy was that got blown away?
>
> "A. Yeah. I told her I didn't know who it was.

"Q. Did you guys tell her you guys went out to jack somebody?

"A. Yes.

"Q. When you told her her brother blew somebody away, did she ask which brother?

"MS. LEVY: Objection. Hearsay as to her statements.

"THE COURT: It's not offered for the truth. It can't be offered for the truth, Ms. Levy.

"Overruled.

"MS. BACKERS: Q. Did she ask you which brother?

"A. No. She knew who it was.

"MR. CIRAOLO: Same objection. Ask it be stricken. Opinion and conclusion.

THE COURT: Sustained.

"MS. BACKERS: I didn't hear you.

"THE COURT: Sustained.

"MS. BACKERS: Q. Did you tell her that the guy – that her brother that blew somebody away was Paki?

"A. No.

"Q. So you just said: your fucking brother blew somebody away?

"A. Yes." (11RT 2626-2628)

Thus once the erroneous door was opened, Ms. Backers could elaborate on the domestic scene between Iuli and his wife, repeating the offending hearsay statement several times. Moreover the drama was brought to an impressive

resolution with, "She knew who it was" without Iuli even having to tell her. Although objection was sustained to this last answer and it seems to have been stricken, the bell would not have been rung to begin with without the trial court's initial error in admitting the hearsay evidence. Furthermore, whether stricken or not, the point was meant to be dramatic and not evidentiary, and no legal ruling could spoil the play by this point.

The prejudice in the broader context of the guilt phase is also clear. Iuli's accomplice testimony was in direct conflict with the alibi defense. Iuli's credibility was a very live issue in the case, and the hearsay evidence in question, although virtually useless in any real sense as a buttress to Iuli's credibility, created the *illusion* of enhancing that credibility by conveying to the jurors something Iuli might have said to a person to whom he might have said it in the very manner he *would* have said it. Absent this vivid piece of storytelling, it is reasonably probable that appellant would have established a reasonable doubt as to guilt, and would therefore have been acquitted. (*People* v. *Watson* (1957) 47 Cal.2nd 818, 818-819.)

Further, insofar as the state evidentiary error was of the nature to substantially undermine the reliability of the factual determination of Tony Iuli's credibility – a central issue in the guilt phase of the case, -- that error resulted in a violation of the Eighth Amendment. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638.) To that extent, there is on this record at least a reasonable doubt that the error did not contribute to the verdict. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

Finally, the instant error substantially complemented the vouching errors, consisting, in one of its important aspects, as vouching for the credibility of Tony Iuli himself. If the prejudice from the hearsay error alone is insufficient to warrant reversal, certainly in combination with the errors set forth in the first issue of this brief, the prejudice is more than adequate. (*People* v. *Hill* (1998) 17 Cal.4th 800, 844; *Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

VI.
THE TRIAL COURT ERRED IN ALLOWING EVIDENCE OF TONY IULI'S OPINION OR IMPRESSION THAT TAUTAI SEUMANU AGREED TO HIS BROTHER'S REQUEST TO TAKE THE BLAME FOR THE CRIME

On direct examination Iuli testified that once, while the four defendants had been waiting for court in the Department 11 holding cell, appellant asked him and Tautai to "take this beef off of him." He offered in return to take care of them sending them money and putting it "on the books." (11RT 2634-2636.) Iuli rejected the offer, saying, "Fuck no. You take your own beef." According to Iuli, Tautai did not say anything and did not appear to be angry. (11RT 2636-2637.) Ms. Backers, however, persisted further, pushing for more:

"Q. What did Tautai do when Paki asked one of the two young guys to take the beef?

"MR. CIRAOLO: Objection. Hearsay.

"THE COURT: Overruled.

"MS. BACKERS: You can answer, sir.

"A. He didn't do nothing.

"Q. What was the look on his face?

"A. Don't know.

"Q. Did he get angry at Paki like you did?

"A. No.

"Q. Didn't you tell me he looked like he was going for it?

"A. Yes.

"MR. CIRAOLO: Calls for opinion and conclusion. Ask it be stricken.

"THE COURT: Sustained. It may be stricken.

"MS. BACKERS: Have you ever told anybody that Tautai looked like he was going to take the beef for somebody?

"A. Yes.

"Q. What made you say that?

"MR. CIRAOLO: Calls ultimately for the man's opinion and conclusion. It has been asked and answered.

"THE COURT: No. That is asking for factors he based his conclusion on.

"Overruled.

"MS. BACKERS: Q. What made you say that, Mr. Iuli?

"A. I think because it was his brother, his older brother. He wouldn't want to see his older brother go down." (11RT 2637-2638.)

The second objection, like the first, should have been sustained.

Lay witnesses are required to attest to what they actually perceive through their eyes, their touch, and, absent hearsay, their ears. "Whenever feasible 'concluding' should be left to the jury . . . ." (*People* v. *Hurlic* (1971) 14 Cal.App.3rd 122, 127.) "[H]owever, when the details observed, even though recalled, are too complex or too subtle' for concrete description by the witness, he may state his general impression." (*Ibid.*; accord, *People* v. *Sergill* (1982) 138 Cal.App.3rd 34, 40.)

Ms. Backers established that Tony Iuli had heard Tautai say nothing in response to the alleged offer from appellant, and do nothing in response. He properly testified to his impression that Tautai, unlike Iuli himself, was not angry

when appellant issued his alleged proposition. What more could be asked in this regard that was not an incompetent opinion or impression? Further, Iuli exhibited here no lack of detailed memory that might justify resort to an impression as the only vestige of perceived facts. (See *People* v. *Hurlic*, *supra*, 14 Cal.App.3rd at pp. 127-128.) Why the court sustained the first objection and not the second is unclear, since it is illogical to find the reasons for an inadmissible opinion admissible. Further, in whatever venue the opinion was first expressed, whether to Ms. Backers, to the "anybody" of the reformulated question, or in court for the first time, the opinion was still incompetent as evidence. In sum, there was no basis for overruling Mr. Ciraolo's objection and, in the upshot, it turned out that Iuli had no percipient facts to offer on the subject, only his assumption that Tautai would naturally want to help his brother.

Thus here, with the sanction the trial court, Ms. Backers obtained impeachment of Tautai Seumanu in advance of his testimony. The power of that impeachment was the same sort of "inside" knowledge that rendered Iuli's prior consistent statement unduly forceful. Here, Iuli's inside knowledge was based not only on his inveterate experience with eluding the full brunt of the criminal justice system, but also his personal knowledge of the protagonists themselves. The attack on Tautai, which was also an attack on the alibi defense, had a strength far in excess of its actual probative force, which was virtually nothing.

This deceptiveness was made worse by the amplification Ms. Backers gave Iuli's opinion in closing argument when she talked about this alleged proposition by appellant:

> "Well Tony didn't take to that very kindly. He goes: Fuck you. This is your beef. You take the beef.
>
> "But he is looking at Tautai. And Tautai looks like he is going for it. Like he is going to fall for it and take the heat for his

> big brother. He said Tautai didn't get angry, Tautai didn't get mad and say to Paki: This is your own beef. He didn't have the reaction Tony had, but this is his older brother. And he said Tautai wouldn't want to see his older brother go down for this murder." (17RT 3514.)

Take out the incompetent evidence here, *viz.*, that Tautai "looked like he is going for it" and "he said that Tautai wouldn't want to see his older brother go down for this murder," and the story Ms. Backers wants to tell here is pretty pale incrimination if it incriminates at all. With the incompetent evidence is resounds persuasively far in excess of its probative value.

Tautai was also an alibi witness for the defense. The attack on his credibility was an attack on this defense, which, as noted in previous arguments of this brief was based on substantial evidence sufficient to raise a reasonable doubt at to guilt. If Tony Iuli's incompetent opinion evidence had been properly excluded, it is reasonably probable that appellant would have been acquitted. (*People* v. *Watson* (1957) 47 Cal.2nd 818, 836-837.) Further, the state evidentiary error here had the effect of skewing the reliability of the assessment of important facts in the guilt phase of a capital case, and this constitutes an Eighth Amendment violation. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638.) On this record, harmlessness cannot be shown beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

VII.
THE EVIDENCE THAT APPELLANT ALLEGEDLY TOOK OUT A "CONTRACT" ON THE LIFE OF TONY IULI WAS PRESENTED ENTIRELY THROUGH INCOMPETENT HEARSAY AND OPINION, AND EVEN THEN WAS ARGUMETATIVELY DISTORTED BEYOND ITS ACTUAL MEANING

Not summarized in the statement of facts in this brief was evidence introduced that after Tony Iuli took a deal from the prosecution, appellant put out a contract on his life. It was not summarized because the evidence consisted of little more than incompetent hearsay whose implications were derived more from the leading questions eliciting answers than from the answers themselves. As with much wrong with this case, the evidence came in through the prosecutor's direct examination of Tony Iuli.

Immediately after Iuli testified to his incompetent opinion that Tautai accepted appellant's proposition to "take the beef," Ms. Backers began a transition to a new topic:

"Q. What happened after you told Paki to take his own beef?

"A. We just walked our own ways.

"Q. And after that, things got pretty chilly between you and Paki, right?

"A. Yeah, a little bit.

"Q. Well, didn't you get a contract put out on you?

"MR. CIRAOLO: Objection. Hearsay, opinion and conclusion.

"THE COURT: Sustained.

"MR. CIRAOLO: No foundation.

THE COURT: Sustained.

"MS. BACKERS: Q. On April 25th of the year 2000 in this courtroom right here, did you have a conversation in Samoan with Tautai?

"A. Yes.

"Q. And your lawyer, Mr. Berger, was present, correct?

"A. Yes.

"Q. And nobody else was here except the bailiffs, right?

"A. Yes.

"Q. And during that conversation, that was the day before you took the deal, right?

"A. Yes.

"Q. All four of you had been in court that morning, right?

"A. Yes.

"Q. In this very courtroom?

"A. Yes.

"Q. And then in the afternoon you and Tautai were sitting at that end of the table talking in Samoan, right?

"A. Yes.

"Q. And what was the conversation?

"A. Just told him what happened.

"Q. What did you tell him?

"A. Told him if they were to come at him with a deal to take it.

"Q. If I offered him a deal for him to take it?

"A. Yes.

"Q. What else did you tell him?

"A. I told him I have some heat on me.

"Q. You have some heat on you?

"A. Yes.

"Q. What does that mean?

"A. I have a contract out on me.

"Q. Did you tell him who put that out on you?

"A. Yes.

"Q. What did you tell him.?

"A. I told him his brother did.

"Q. His brother Paki, right?

"A. Yes." (11RT 2638-2640.)

There is much more, but one might pause here to observe that the trial properly sustained the first objection that Iuli's assertion that he had a contract on his life was hearsay and opinion unless Iuli had heard appellant himself issue the threat. (*People* v. *Lew* (1968) 68 Cal.2nd 774, 778.) Ms. Backers' reformulation of her question merely rendered the subject more precisely the alleged contract on Iuli's life issued by appellant, but the evidence sought was still hearsay, and triple hearsay asking for what Iuli told Tautai about what Iuli was told himself by some unknown declarant about what appellant had allegedly said. The evidence was thus even less admissible in this form. (*Ibid.*)

But there was no hearsay objection to this, or any request to admonish Ms. Backers for ignoring the trial court's initial ruling that this was hearsay. The evidence was clearly inadmissible and there is clearly no conceivable tactical advantage for the defense in allowing this evidence, which, as will be seen, was the only evidence of the existence of so inflammatory a fact as a contract to kill. Thus, pending a showing of prejudice, the failure to lodge a meritorious hearsay objection against this evidence constituted ineffective assistance of counsel. (*People* v. *Moreno* (1987) 188 Cal.App.3rd 1179, 1190-1191.)

Ms. Backers continued:

"Q. And what did Tautai say when you said that his brother Paki had put a hit on you, or put some heat on you?

"A. He said –

"MR. CIRAOLO: Hearsay. Objection.

"THE COURT: Overruled.

"MS. BACKERS: You can answer, sir.

"A. He said don't take – first he said he was going to take the blame, then he said: don't take the deal and he'll try to talk to – try to talk to his brother.

"Q. To take the heat off of you, right?

"A. Yes.

"Q. So you are sitting here in the courtroom and you are about to take the deal, right?

"A. Yes.

"You tell Tautai that his brother has put a hit on you?

"A. Yes.

"Q. You basically got a snitch jacket in this case, right?

"A. Yes.

"Q. You were the first one to confess back in May of '96?

"A. Yes.

"Q. And then on April 25th this year, here in this courtroom, when you told Tautai that his brother put a hit on you, he said he knew about it, right?

"A. Yes.

"Q. And he was going to try to talk you out of the deal?

"MR. CIRAOLO: Excuse me. Continued objection as to what Tautai said on hearsay grounds.

"THE COURT: Overruled." (11RT 2640-2641.)

Before untangling the various strands of law at issue in this exchange, it will be helpful to untangle the strands of supposed facts. According to this exchange and the one quoted above, Iuli told Tautai two things: first that Iuli was going to get a deal that Tautai also should take; and secondly, that appellant had put out a contract on Iuli's life. According to Iuli, Tautai responded by urging Iuli not to take the deal, and by assuring Iuli that if he rejected the deal, Tautai would talk to his brother about the contract. Iuli stated that Tautai stated that he, Tautai already knew about the contract. This, however, was merely the affirmative monosyllable "yes" to Ms. Backers' leading question, "And then on April 25th this year, here in this courtroom, when you told Tautai that his brother put a hit on you, he said he knew about it, right?"

As noted above, Iuli's assertions to Tautai that appellant put out a contract on Iuli's life was hearsay that should have been excluded. That Iuli was about to

take a deal was not hearsay or was at least innocuous hearsay. That Tautai urged him not to take the deal was not hearsay, but not terribly incriminating or inimical to the defense. That Tautai intended to take the blame was probably admissible under the state of mind exception to the hearsay rule (Evid. Code, § 1250)[31], but also highly suspect when attested to by Iuli, an accomplice with an interest in the success of the prosecution, which in this case meant impeaching Tautai and thereby convicting appellant. The toxic portion of the above exchange, in addition to the continuing hearsay assertion by Iuli that appellant had issued a contract against him, was the claim that Tautai said that he, Tautai, already knew about the contract. This too, like Iuli's assertion about his own knowledge, was multiple hearsay and should have been properly excluded on trial counsel's hearsay objection. (*People* v. *Lew*, *supra*, 68 Cal.2nd 774, 778.)

One might further comment here that the trial court's apparent inclination exhibited in the above passage to allow this line of questioning suggests strongly that a timely hearsay objection against Iuli's assertions that there was on contract on his life would have been futile. (*People* v. *Chatman* (2006) 38 Cal.4th 344, 380.) If so, there is no need to resort to a claim of ineffective assistance of counsel to preserve right to review. On the other hand, if the hearsay objections lodged against eliciting Tautai's statements were somehow deficient, the claim of ineffective assistance of counsel extends to this as well. (*People* v. *Moreno*, *supra*, 188 Cal.App.3rd 1179, 1190-1191.)

After the court overruled Mr. Ciraolo's continuing hearsay objection to anything said by Tautai, the examination continued as follows:

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[31] Section 1250 provides in relevant part: "[E]vidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [[¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action ; or [¶] The evidence is offered to prove or explain the acts or conduct of the declarant."

"MS. BACKERS: Q. Tautai was trying to talk you out of taking the deal, right?

"A. Yes.

"Q. And he told you that if you didn't take the deal, that he could talk to his brother about taking the heat off you, right?

"A. Yes.

"Q. What did you understand that to mean?

"A. Excuse me?

"Q. What did you understand that to mean, that Tautai would talk to Paki about taking the heat off, that he would lift the contract?

"A. Yes.

"Q. And he told you he was going to take the blame?

"A. Yes.

"Q. And part of your deal is that if you requested, you would be housed out of state, right?

"A. Yes.

"Q. During that conversation on April 24th, this year, toward the end of the conversation did you tell Tautai that you have been sitting here for four years for something his fucking dumb-ass brother did?

"A. Yes.

"Q. Did you say that in Samoan.

"A. I think I did." (11RT 2641-2642.)

The alleged assertion by Tautai, contained more in Ms. Backers' question than in Tony Iuli's response, that Tautai would urge appellant to take the heat off Iuli if Iuli rejected the deal was not hearsay. The question, however, assumed facts not in evidence, and which could not be in evidence because they *were* hearsay, i.e., Iuli's assertion that there was a contract on his life issued against him by appellant. Iuli's statement, again formulated for him by Ms. Backers, that he had been "sitting here for four years for something [Tautai's] dumb-ass brother did" was unadulterated hearsay that should have been prevented by a timely objection (*People* v. *Moreno*, *supra*, 188 Cal.App.3rd 1179, 1190-1191) or against which a timely objection would have been futile in this case. (*People* v. *Chatman*, *supra*, 38 Cal.4th 344, 380.) Like the statement Iuli allegedly made to his wife, analyzed in argument VI of this brief, that statement served only the dramatic purposes of false and deceptive persuasion.

Thus, the evidence that there was a contract on Tony Iuli's life issued or authorized by appellant was complete hearsay, inadmissible to show appellant's consciousness of guilt. (*People* v. *Hannon* (1977) 19 Cal.3rd 588, 599; *People* v. *Terry* (1962) 57 Cal.2nd 538, 565-566.) It was even inadmissible for the non-hearsay purpose of explaining the reasons why Iuli might be afraid to testify, since Ms. Backers did not even bother asking Iuli whether or not he *was* afraid to testify, and there was in fact no evidence that he was. (*People* v. *Burgener* (2003) 29 Cal.4th 833, 869; *People* v. *Brooks* (1979) 88 Cal.App.3rd 180, 187.) Thus one is presented here with an entire evidentiary unit in the case, of the utmost importance, highly inflammatory, all based on evidence that should have been precluded by the trial court's rulings, by counsel's timely objections, or by some combination of both.

As to prejudice, one may begin with Ms. Backers' opening statement and closing argument. In her opening statement, she featured the April 25, 2000 conversation:

"On April 25th of this year, in this very courtroom, at that very table, Tautai Seumanu and Tony Iuli had a private conversation in Samoan. And during this time Tautai tried to talk Iuli into not taking the deal. He tried to talk Tony out of testifying against his big brother, the defendant.

"Tony told Tautai: I have been sitting here for four years because of something your brother did.

"Tony told Tautai that Afatia put a contract out on him to have him killed because he was going to take the deal and testify against him. Tautai acknowledged that there was a hit on Tony and said that he, Tautai, could help have the heat taken off of Tony if only Tony would not take the deal and would not testify against Paki. Tony took the deal anyway. And he is going to testify." (6RT 1591-1592.)[32]

She amplified all this again in her closing argument:

"So after Tony tells him no [i.e., that he won't take appellant's "beef"], things start to get a little chilly between Tony and Paki and they go their own ways.

"What happens is we get sent to trial in this courtroom. The day we come to trial, all four of them are together in the morning, in this very courtroom. Then in the afternoon there is a private conversation that takes place in Samoan between Tautai and Tony. Those are the only two guys in the courtroom that are criminal defendants. Tautai and Tony are sitting right at that table talking in Samoan. There is a bailiff. I am not here. And Mr. Berger is here, Tony's lawyer.

"They have this conversation in Samoan.

---

[32] One might well extend the claim of ineffective assistance to the failure to lodge hearsay objections at this point. However, this being opening statement, it would not necessarily be clear that these representations were based on inadmissible evidence.

"What is the conversation, Tony?

"Tautai said – I told Tautai that I was going to take the deal and if they came at him with a deal that he should take it too. I also told Tautai that I had some heat on me and his brother Paki had put some heat on me, put a contract out on me to have me killed. He fully acknowledged it. Tautai said that he knew about that, he knew about the hit, he knew about the contract, and he tried to talk Tony out of taking the deal because, you know, the deal hasn't gone down yet. Tony doesn't plead until the next day, on the 26th.

"So he tries to talk Tony out of taking a deal. And in exchange for that, he will lift the contract, he will try to get Paki to take the heat off.

"That is what you call consciousness of guilt. Because what you have now is you've got everybody talking about the fact that Tony is going to take a deal and testify." (17RT 3514-3515.)

This is a powerful argument and all the more so to the extent that it was dramatized as another one of Tony Iuli's vivid and interesting conversations, rendered deceptively plausible by Iuli's hearsay complaint that he had to spend four years in jail because of what Tautai's "fucking dumb-ass brother did." But the power is all argument, for there was in fact no competent evidence to support the argument, or at least there should not have been if trial counsel had lodged appropriate objections. Either way, there would be no evidence of a contract to kill, let alone a contract to kill issued or authorized by appellant, and there would be then no consciousness of guilt evidence as Ms. Backers claimed there was.

If the deficiencies here consist in trial counsel's failure to object properly, specifically, or in a timely manner, then in order to complete a Sixth Amendment claim of ineffective assistance of counsel, appellant must show that if counsel had lodged the appropriate objections, there is a reasonable probability that the case would have resulted more favorably for appellant. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 694; *People* v. *Cash* (2002) 28 Cal.4th 703, 734.) This is the

same standard of review for state evidentiary error. (*People* v. *Watson* (1957) 47 Cal.2nd 818, 836-837.) The highly inflammatory evidence of a contract killing could not but overwhelm the defense presented, which was alibi. On this record, appellant can satisfy both standards of review.

But whether the deficiency here was the omissions of counsel or the errors of the court, or whether they were some combination of both, the effect of the improprieties at issue was to violate the Eighth and Fourteenth Amendment rights to due process. To allow the jurors to find that appellant issued a contract to kill the chief witness the prosecution was going to produce against him could not but contribute substantially to the conviction and death sentence in this case. The evidence on which this fining was based was completely incompetent to prove those facts by any fundamental idea of the competence of forensic evidence. Under these circumstances, the errors here violated the Due Process Clause of the Fourteenth Amendment. (*Bruton* v. *United States* (1968) 391 U.S. 123, 131, fn. 6; *People* v. *Valentine* (1986) 42 Cal.3rd 170, 177.) Further, and *a fortiori*, such evidence violates the requirement of heightened reliability in the factual determinations in a capital case. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638.)

VIII.
THE COMBINED EFFECT OF THE ERRORS DISCUSSED IN ARGUMENTS V, VI, AND VII FORM A SNGLE UNIT OF PREJUDICE IN UNFAIRLY BUTTRESSING TONY IULI'S CREDIBILITY; THEY ALSO CONTRIBUTED TO THE PREJUDICE FROM THE VOUCHING ERRORS ANALYZED IN ARGUMENT I OF THIS BRIEF

The errors discussed in the three previous arguments, V, VI, and VII were of course unified by their placement in the direct examination of Tony Iuli. This unified them in their prejudicial effect, which all conduced to a single end: the improper and undue bolstering of Tony Iuli's credibility. This has been explained

in detail in the case of the purported prior consistent statement that "her fucking brother blew some dude away." The dramatic immediacy of the statement had a verisimilitude that disguised the fact that Iuli's self-rehabilitation as a witness was logically and probatively worthless. The same was true of the hearsay assertion Iuli allegedly made to Tautai that Iuli was in trouble "for something [Tautai's] fucking dumb-ass brother did."

Certainly, the alleged contract placed on Iuli's life, attested only through incompetent hearsay, was not only prejudicial in placing consciousness of guilt "evidence" before the jury, but also in buttressing Iuli's credibility. For when Ms. Backers announced in her opening statement that Iuli was going to testify *despite* the existence of a contract on his life authorized by appellant (6RT 1591-1592), she was pushing forward the counterpoint to the prosecution's inducements designed to assure that Iuli would testify. Indeed, the further implication was to enhance Iuli's moral standing for putting, as it were, his life on the line.

Finally, as to the incompetent opinion evidence, this was designed not only to impeach Tautai in advance of his testimony, but to elevate, if not the moral standing, then the credibility, of Iuli, who had the firmness either of principle or of material interests to resist appellant's corrupting propositions.

The effect of these errors in combination was undoubtedly powerful in buttressing the credibility of a key prosecution witness in this case. They contributed so substantially to a skewed portrait of that credibility that it is reasonably probable that the guilt phase of trial would have resulted more favorably for appellant without these errors. (*People* v. *Hill* (1998) 17 Cal.4th 800, 844.) Further, to the extent that the resolution of Tony Iuli's credibility favorably to the prosecution's case could not but constitute a substantial part of the reasons for a conviction in this case, the combined errors constituted a violation of the Due Process Clause of the Fourteenth Amendment (*Bruton* v. *United States* (1968) 391 U.S. 123, 131, fn. 6; *People* v. *Valentine* (1986) 42 Cal.3rd 170, 177), and *a fortiori*, the Eighth Amendment requirement of heightened reliability for factual

determinations in a capital case. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638.) Thus, appellant's convictions are reversible under a standard of review for federal constitutional error. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

Finally, one significant aspect of the vouching errors in this case was the design in fact to buttress the credibility of Tony Iuli and Jay Palega. One of the vouching errors in fact occurred during this same direct examination. Thus, the evidentiary errors analyzed in arguments V, VI, and VII all flow directly into that stream of vouching that was headed toward guilt phase conviction. Thus, the combined prejudice from the evidentiary errors and the vouching errors require reversal. (*People* v. *Hill*, *supra*, 17 Cal.4th at p. 844; *Chapman* v. *California*, *supra*, 386 U.S. at pp. 23-24.)

IX.
THE TRIAL COURT'S REMARKS CASTING ASPERSION AND RIDICULE ON TAUTAI SEUMANU'S CREDIBILITY CONSTITUTED IMPROPER CONDUCT AND PREJUDICIAL ERROR

Ms. Backers' cross-examination of Tautai Seumanu was hard-hitting and contentious. It explored first Tautai's possible motive arising from his immunity from the death penalty as a juvenile offender. (15RT 3319-3323.) She then turned to the topic of whether he had talked to appellant about this case over the four-and-half years they were incarcerated before trial (15RT 3324), and then she examined Tautai's testimony that he had originally blamed appellant to clear the way for Tautai's inheritance of the position of tribal chief. (15RT 3324-3325.) She incredulously asked, "A little 15 year old boy ascends to the throne of tribal chief?" whereupon Tautai corrected her mischaracterization by answering, "I grow into it." (15RT 3325.) This was the transition point to the topic of earning gang "stripes":

"Q. You will grow into it.

"Because back then, you were just a little boy, weren't you?

"A. Yes.

"Q. And your brother was 22 years old and you idolized him, didn't you?

"A. No.

"Q. You didn't look up to Paki?

"A. Pretty – little here and there.

"Q. You are a gangster with a capital "G", aren't' you?

"A. No.

"Q. Really?

"Then what were you trying to earn stripes for, sir?

"A. To get there.

"Q. To get there.

"And exactly what gang were you trying to ascend into?

"A. I was already into.

"Q. Who jumped you in?

"A. People.

"Q. Yeah, your big brother Paki?

"A. No.

"Q. What gang did you belong to?

"A. S.O.S.

"Q. Sons of Samoa?

"A. Yes.

"Q. That is not a social club, is it?

"A. No.

"Q. Not a little place where Samoan children get together and play games, is it?

"A. No.

"Q. It is a criminal gang, isn't it?

"A. I wouldn't call it that.

"Q. What would you call it?

"A. Brotherly love.

"Q. Brotherly love.

"Go out and do murders, earn stripes, that is brotherly love?

"A. They do, they do.

"Q. Who is 'They'?

"A. Those who are in it.

"Q. I thought you were in it?

"A. Me too.

"Q. How old were you when you were jumped into S.O.S?

"A. Eight.

"Q. Eight.

"So you have been claming blue as a Crip since you were eight years old?

"A. Yeah.

"Q. Who jumped you in?

"A. People.

"Q. People.

"Like who?

"A. Certain people in the click.

"Q. Answer the –

"A. I can't give no names.

"Q. Why not?

"A. Because they are not in the case.

"Q. You are under oath to tell the truth. I know that doesn't mean much to you.

"MS. LEVY: Objection. Argumentative.

"MR. CIRAOLO: Argumentative.

"THE COURT: Ms. Backers, I know the temptation, but sustained." (15RT 3325-3327.)

The trial court's gratuitous remark in sustaining defense counsel's objection constituted misconduct.

"[I]t is the right and duty of a judge to conduct a trial in such a manner that the truth will be established in accordance with the rules of evidence." (*People* v. *Corrigan* (1957) 48 Cal.2nd 551, 559.) This duty is of course discharged by sustaining appropriate objections to questions that violate the rules of evidence, as the trial court did in this instance. (See *People* v. *Chatman* (2006) 38 Cal.4th 344,

384.) "The trial judge, however, must not become an advocate for either part . . . or cast aspersions or ridicule on a witness." (*People* v. *Rigney* (1961) 55 Cal.2nd 236, 241; *McCartney* v. *Commission on Judicial Performance* (1974) 12 Cal.3rd 512, 533.) The court's remark thus subverted the very duty the court had just discharged.

For this reason, a second objection and a request for self-admonition by the court would have been futile. Thus the court, while sustaining the objection displayed an ostentatious wink and nod, as it were, by expressing sympathy with Ms. Backers' impropriety. How seriously then would the jurors take an admonition from the judge recognizing his own impropriety when recognition of an impropriety carried so little weight? Such an admonition could only be the next step in regress that echoed but did not cure, and procedural default here should be excused for futility. (See *People* v. *Shrum* (2006) 37 Cal.4th 1218, 1238.)

Was it prejudicial? This was not an impropriety whose implication was in fact far from the surface of the literal acts or statements. (See *People* v. *Sanders* (1995) 11 Cal.4th 475, 530-532; see also *People* v. *Cash* (2002) 28 Cal.4th 703, 729-730.) This was a virtually explicit judicial pronouncement that the oath to tell the truth did not in fact mean much to Tautai Seumanu. This in turn was a pronouncement that every fault exhibited by Tautai as witness in this case conduced to the conclusion that he was a *complete* liar. This renders the court's single comment a serious transgression. Although the defense of alibi did not necessarily fall with a finding that Tautai was not telling the truth, judicially branding Tautai a thorough liar was undoubtedly a giant step toward a rejection of the entire defense in this case. As argued in previous arguments, the alibi defense in this case was nonetheless substantial and had a reasonable probability of raising a sufficient doubt for an acquittal. With the trial court's comment on Tautai's credibility, that probability was extinguished, and appellant's convictions must be reversed. (*People* v. *Watson* (1957) 47 Cal.2nd 818, 836-837.)

If this Court deems the prejudice to be insufficient to reverse under the standard of review for state law error, the question of federal constitutional error arises. The comment in the context it was made, i.e., in reference to the an argumentative question about the oath to tell the truth, could not but suggest in a broad sense the trial court's own partisan sympathies with the prosecution. This very partisanship or appearance of partisanship constitutes a direct violation of the Due Process Clause of the Fourteenth Amendment:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.' (*Tumey* v. *Ohio* [(1927)] 273 U.S. 510, 532 . . . .) Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' (*Offutt* v. *United States* [(1954)] 348 U.S. 11, 14 . . . .)" (*In re Murchison* (1955) 349 U.S. 133, 136; see also *Peters* v. *Kiff* (1972) 407 U.S. 493, 502; and *Witherow* v *Larkin* (1975) 421 U.S. 35, 46-47.)

The trial court's impropriety falls well within the range of this due process deficiency, which in turn renders it deficient under the Eighth Amendment's requirement of heightened reliability in capital cases. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638.) Under the standard of review for federal constitutional error appellant's convictions must be reversed. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

Finally, the trial court's comment should be considered in connection with Ms. Backers' vouching errors, one of which expressly embraced Tautai's testimony:

> "So the offers that were made, which you now have heard so much about, and you heard the actual conditions of the offer read to the witnesses while they were on the stand, is that those two men in the front seat who wanted to let Nolan go, let him live, got 16 years, eight months.
>
> "*And clearly, after seeing Tautai testify, I think you can see why there is such a difference between the two in the front seat and the two in the back seat.* I am sure you see that that discretion was exercised with a proper amount of integrity. *Because once you met Tautai, and you saw his lack of moral fiber, I am sure that you could see that there was a big difference between the two in the back seat and the two in the front seat.*" (17RT 3476-3477, italics added.)

There could be no more direct connection between the vouching errors and the judge's improper comment. If the comment alone was not enough to establish prejudice, Ms. Backers' amplification of that comment in her vouching for herself and her witnesses more than compensates to meet any standard of review for reversal. (*People* v. *Hill* (1998) 17 Cal.4th 800, 844; *Chapman* v. *California*, *supra*, 386 U.S. 18, 23-24.)

X.
ALLOWNG EVIDENCE OF A PURPORTED GANG-STATUS LIST WITHOUT PROPER FOUNDATION WAS TRIAL ERROR IN ITSELF AND IN ITS CONSEQUENCE OF ALLOWING THE PROSECUTOR TO CONVEY TO THE JURY INFORMATION SHE NEITHER INTENDED TO PROVE NOR COULD PROVE BY PROPER EVIDENCE

During the cross-examination of Tautai Seumanu at the guilt trial, Ms. Backers displayed Exhibit 46 (15RT 3333-3337; 74CT 20706, No. 8), an enlarged facsimile of what purported to be a type-written note, which she used for purposes of impeachment. The exhibit will be transferred to this Court in due course (see Cal. Rules of Court, Rule 8.224), but it appears approximately as follows:

USO 4 LIFE

MR. SMURF		**BIG TONE**
MAC.JAY	***RIP***	**TEO (*I LOVE YOU 4-4*)**
T. SPOON		**FAGASA**
LIL. VIC		**PETE**
LIL. JAY		**LIL. TONE**

SAMOAN STYLE

AMERICA'S MOST WANTED SAMOAN'S!!!

In limine she had offered this exhibit as a party admission by appellant to the crime of murder. According to her offer, appellant had made the design and had Tony Iuli type it up on a computer in Juvenile Hall. "Mr. Smurf," first on the list, was appellant, and "[t]his was a badge of honor for him, a stripe for him . . . ." (6RT 1540-1541.) The trial court found the theory of party admission to be "a stretch," and forbade Ms. Backers from mentioning the exhibit in her opening

statement. (6RT 1541.) But she warned, "I definitely plan on using that when Tony testifies so we will have to cover it again." (6RT 1542.)

Tony Iuli's testimony came and went in the guilt phase with no mention or discussion of Exhibit 46. Instead, it was brought up with Iuli only when he testified at the penalty phase of trial, where the exhibit was used as evidence of appellant's lack of remorse. (See 6RT 1540.) After having Iuli authenticate the exhibit at the penalty phase as the chart he typed up from the list and design mailed to him in Juvenile Hall from appellant, who was incarcerated in the adult jail, she had Iuli attest to the significance of the writing:

> "Q. Now of all the times you've ever talked to Paki about the murder of this young man, has he ever told you that it was an accident?
>
> "A. No.
>
> "Q. Has he ever told you he was sorry?
>
> "A. No.
>
> "Q. And , in fact, he had you type up 'AMERICA'S MOST WANTED SAMOANS;' is that right?
>
> "A. Yes.
>
> "Q. What does that mean?
>
> "A. Just means what it says.
>
> "Q. You told me that was a badge of honor, right?
>
> "A. Yeah.
>
> "MS. BACKERS: That is all I have." (19RT 3943-3945.)

On cross-examination, defense counsel then established more expressly that *Iuli* did not know what appellant meant by "AMERICA'S MOST WANTED SAMOANS," and that the chart was a fraternal list in chronological, from eldest to youngest. (19RT 3952-3953.)

However, before this, at the guilt phase, during the cross-examination of Tautai, Ms. Backers displayed exhibit 46 (74CT 20706, No. 8) and through *only* the representations contained in her questions, unaffirmed by Tautai himself, who had never seen the list, *she* provided the authenticating information, and then *she* conveyed to the jurors that Exhibit 46 constituted a hierarchy of gang status in which appellant, "Mr. Smurf," was the highest, Tony Iuli was second, and Teaspoon, or Tautai, was fifth, which, according to Ms. Backers, belied Tautai's claim to have earned gang "stripes" for the murder of Nolan Pamintuan. (15RT 3333-3337.) She was allowed to do this over the foundational objections lodged by defense counsel, which, as will be elaborated, constituted the trial court's error. (Evid. Code, §§ 702 and 1401.)[33]

But also, as may be seen from the account of Iuli's penalty phase testimony, the information she conveyed about Exhibit 46 in the guilt phase through her questioning of Tautai was more than she could prove. Except for the belated authentication, she did not establish through Iuli what appellant intended

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[33] Evidence Code section 702 provides: "(a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter. [¶] (b) A witness's personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony."

Evidence Code section 1401 provides: "(a) Authentication of a writing is required before it may be received in evidence. [¶] (b) Authentication of a writing is required before secondary evidence of its content may be received in evidence."

by Exhibit 46; she did not establish through Iuli that Tautai lied about never having seen the list; and she did not even establish through Iuli that Exhibit 46 was informed by gang-status or criminal achievement. In other words, capitalizing on the trial court's foundational errors during her cross-examination of Tautai, she committed misconduct in presenting information to the jurors that she could not reasonably expect to prove either from Tautai, Iuli, or by any other evidence. (*People* v. *Price* (1991) 1 Cal.4th 324, 481; *People* v. *Warren* (1988) 45 Cal.3rd 471, 480; *People* v. *Chojnacky* (1973) 8 Cal.3rd 759, 766.) With this introductory outline in mind, one may turn to the actual cross-examination of Tautai.

After the trial court expressed sympathy to Ms. Backers for having to observe the restraints of the rules of evidence in cross-examining Tautai, Ms. Backers turned to Tautai's claim on direct examination that he had committed the murder to "earn his stripes" in the Sons of Samoa. (15RT 3299-3300.) She began this theme by eliciting from him his nickname "Teaspoon," making fun of him with her follow-up question, "This big, bad cold-blooded murderer is called Teaspoon, is that right?" to which Tautai responded with a curt "Yep." (15RT 3331.)

With this she began asking him what his new status in the gang was since the murder. Tautai replied that it was not for him to say, and when pressed by Ms. Backers, he asserted that his name was "already out there," to which *she* replied, "It is already out there. I don't think so, Teaspoon." (15RT 3331-3332.) A defense objection to this comment was sustained, but it constituted Ms. Backers' prologue to the use of Exhibit 46 in her cross-examination:

> "MS. BACKERS: Q. After you were in custody of this crime and you put your brother as the triggerman, you went to the Hall for two years, right?
>
> "A. Yeah.

"Q. Right?

"A. Yeah.

"Q. And your brother drew up a little drawing of some people in the gang, right?[34]

"A. I don't remember that.

"Q. You don't remember seeing it at the Hall when he asked Tony to type it up at the Hall?

"MR. CIRAOLO: Objection. No foundation.

"THE COURT: Overruled.

"MS. BACKERS: Q. When you are doing a murder, and you are proud of it, and you earn your stripes, you are going to be number one on that list, aren't you?

"That is the whole idea behind it, right?

"A. Some.

"MS. LEVY: Objection. Compound.

"THE COURT: Overruled.

"MS. BACKERS: You earn your stripes, you are number one on the list, right?

"MR. CIRAOLO: Objection. No foundation. Assumes facts not in evidence and vague as to what list.

"THE COURT: Counsel, overruled. This is cross-examination. And I don't expect objections after every question when the questions are legally sufficient and proper." (15RT 3332-3333.)

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[34] By now, Exhibit 46 was being displayed. (74CT 20706, No. 8.)

What appears to be occurring here is an attempt by Ms. Backers to have Tautai authenticate Exhibit 46, which was now on display. (Evid. Code, § 1401.) When he did not, Mr. Ciraolo entered a meritorious objection of lack of foundation since Tautai did not have personal knowledge of the document. This invoked the clear-cut rule of Evidence Code section 702(a): "Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." (See *People* v. *Anderson* (2001) 25 Cal.4th 543, 573-574.) The court erroneously overruled the objection, , allowing Ms. Backers then to add to the jurors' store of information that this was a list of ranking in the gang. The passage ends with the court putting, or trying to put, a final point on the issue by admonishing counsel that these objections are so far-fetched that they should stop, thereby impliedly ratifying the factual premise of these questions. The objections, as will be seen, not stop however, since it was cross-examination, rather, that was becoming far-fetched.

The cross-examination continued:

"MS. BACKERS: Q. You told us that you jumped out of that van and killed that young man to earn a stripe because of your ego, right?

"A. Yeah.

"Q. So you would gain status in your Crips gang, right?

"A. Yeah.

"Q. Right.

"To earn your stripes, right?

"A. Yeah.

"Q. And so that would move you up to the top of the class, wouldn't it?

"A. Wouldn't necessarily move me to the top.

"Q. Well, when you say earn stripes, are you talking about becoming a lieutenant?

"What are you talking about?

"A. Just get my respect.

"Q. Get your respect.

"And if you had just done this cold-blooded, brutal murder of a sweet, innocent bridegroom –

"MR. CIRAOLO: Objection. Argumentative.

"THE COURT: Sustained.

"MS. BACKERS: Q. If you had just done a cold-blooded murder to earn your stripes, that would move you up the list in the gang, wouldn't it?

"A. Not necessarily?

"Q. Then what is the point of doing it to earn a stripe?

"A. They will let you – let you know that you gonna play.

"Q. After you were in custody on this murder, tell us how you were fifth on the list if you were such a bad actor.

"MR. CIRAOLO: Objection. No foundation. No foundation that he has knowledge of this list, your honor.

"THE COURT: Overruled." (15RT 3333-3334.)

How does one even know, apart from Ms. Backers' assurance, that Tautai is indeed fifth on the list and that the list proceeds by column rather than by row, making Tautai in fact third on the list? How does one know, apart from Ms.

Backers' assurances, that this is even a gang list of the Sons of Samoa, -- a Crip gang that supposedly includes as a high ranking member Tony Iuli, a Blood and not a Crip? Finally, how does one even know, apart from Ms. Backers' assurances, that prestige in the gang in fact corresponds precisely to the specific placement on any list?

Ms. Backers turned again to an attempt to authenticate Exhibit 46:

"MS. BACKERS: Q. Mr. Seumanu, you've seen that before, right?

"A. No I haven't.

"Q. You were in the Hall when Tony typed it up, right?

"MR. CIRAOLO: Objection. Assumes facts not in evidence. He answered he hadn't.

"THE COURT: Sustained.

"MS. BACKERS: Q. Mr. Seumanu, you know what *uso* means, it means brother, right?

"A. Yeah.

"Q. Brothers for life, right?

"A. Yep.

"Q. Right.

"Q. The first guy on there is Paki, right?

"A. Yeah.

"Q. Your big brother, right?

"A. Yeah.

"Q. The second guy on there is Big Tony, right?

"A. Yeah.

"Q. The next guy on there, the third guy on there, is Jay Palega, Mac Jay, right?

"A. Yeah.

"Q. The fourth guy on there is Tim Tao who passed away, right?

"A. Yep.

"Q. That is Tony's brother, right?

"A. Yeah.

"Q. You don't make the list until number five.

"MR. CIRAOLO: Objection, your honor. May we approach the bench?" (15RT 3334-3335.)

It is worth noting in this passage that the fact not in evidence, for which the trial court sustained an objection, was first the missing authentication for Exhibit 46, and secondly the missing personal knowledge of Tautai not only as to the provenance, but also as to the meaning of Exhibit 46. Apart from Tautai's knowledge of Samoan and his recognition of the names on the list, all other information came from Ms. Backers.

At sidebar defense counsel raised again his foundational objection. There was, counsel argued, nothing to show that this was any kind of gang status list. The court, begging the foundational question, replied, "So he can say it is not a gang status list." (15RT 3336.) When counsel pointed out that Tautai testified that he had never seen the document, the Court replied, "Mike, I am not going to stand in the way of legitimate cross-examination when this guy is lying through

his teeth and everybody in the courtroom knows it and it is just the way it is going to come out." (15RT 3336.)

When Mr. Ciraolo insisted that even in cross-examination a proper legal foundation is required for the testimony elicited, the Court retreated from its extreme position and pointed to Tautai's testimony that he knew the meaning of *uso*, brother, which, in the court's view, connected Exhibit 46 to the subject of gangs. When Mr. Ciraolo pointed out that this still did not establish Exhibit 46 as a gang status report, the court directed Ms. Backers to ask Tautai if it was such a report. (15RT 3336-3337.)

One might pause here to comment on the legal implications of this sidebar conference. The court's view seems to have been that Exhibit 46 and Ms. Backers' questions somehow represented good faith impeachment of Tautai. The court's view also seems to have been that Tautai's mendacity was so incontestably apparent that his claim never to have seen Exhibit 46 and not to know what it meant provided adequate foundation of the affirmative propositions offered by Ms. Backers in her questions. But "[a] legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established." (*Eramdjian* v. *Interstate Bakery Corp.* (1957) 153 Cal.App.2nd 590, 602; accord *People* v. *Stein* (1979) 94 Cal.App.3rd 235, 239.) This is to say that Ms. Backers *could not* establish Tautai's personal knowledge of Exhibit 46 from his testimony that he had none; more generally she could not establish his personal knowledge of it from the supposed nonexistence of his veracity.

Indeed, even if there was something to the court's highly unforensic epistemology, one cannot escape the further rule that a doubtful or uncertain fact must inure to the detriment of the party with the burden of proof on the issue (*Reese* v. *Smith* (1937) 9 Cal.2nd 324, 328; *People* v. *Tatge* (1963) 219 Cal.App.2nd 430, 436), that is, on the prosecution in this instance. The only solution for Ms. Backers was to have authenticated Exhibit 46 through Tony Iuli; have Tony Iuli testify that he had showed Tautai this list, or that Tautai had otherwise seen it; and

to explain what appellant told him the list had meant. As seen from the above, Ms. Backers could only authenticate the document and nothing more.[35]

In any event, Ms. Backers did not even ask the question the court directed her to ask:

> "MS. BACKERS: Q. Mr. Seumanu, what does America's most wanted Samoans mean to you.
>
> "A. Samoans wanted.
>
> "Q. And you were one of the four wanted for this murder, right?
>
> "MR. CIRAOLO: Objection your honor.
>
> "May I approach the bench again."

At sidebar, Mr. Ciraolo complained that there was no foundation to connect Exhibit 46 to the crime – which amounted to a relevance objection that in fact was grounded in all the foundational failures of this cross-examination. Mr. Ciraolo also pointed out, "Counsel is trying to draw an inference by her question. The court has ruled she should establish if he has knowledge of what this thing represents, what does it stand for. She hasn't established that foundation yet."

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[35] Her procedural tool for this would have been Evidence Code section 403(a), which provides: : "(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] (1) The relevance of the proffered evidence depends on the existence of the preliminary fact; [¶] (2) The preliminary fact is the personal knowledge of witness concerning the subject matter of his testimony; [¶] (3) The preliminary fact is the authenticity of a writing; or [¶] The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself." All these categories apply here.

(15RT 3337-3338.) The court's response was merely to direct Ms. Backers to bring this line of questioning to a close (15RT 3338), which she did as follows:

> "MS. BACKERS: Q. Mr. Seumanu, if you pulled the trigger, on this list, explain to the jury why you are number five on the list – excuse me – if you pulled the trigger in this murder, explain to the jury why you are number five on that list.
>
> "MS. LEVY: Objection.
>
> "MR. CIRAOLO: Objection. No foundation.
>
> "THE COURT: Counsel, one of you is going to object. The other is going to keep quiet.
>
> "MR. CIRAOLO: I will do it.
>
> Objection. No foundation.
>
> "THE COURT: Sustained." (15RT 3338.)

What is one to make of this last sustaining of a foundational objection in light of all that preceded? It seems that the court and parties understood it as extremely narrow: Tautai was not obligated to *explain* why he was only number five, because he did not know the document. However, the document and the fact that he was number five on a gang status list was still, with court sanction, in evidence.[36] Moreover, Exhibit 46 and the impeachment of Tautai was before the jury *as* evidence when it was in fact only the representations of Ms. Backers that explained the exhibit. Indeed, it was even before them as evidence that the list represented a kind of boast about the crime – the very party admission that the court, *in limine*, found to be "a stretch." All of this was in violation of the rules of

[36] This is evidenced by the fact that counsel did not bother to renew a fruitless foundational objection when Exhibit 46 was formally admitted into evidence. (16RT 3416; 10CT 2592.)

evidence and was not justifiable by any measure of discretion allowed to a trial court on evidentiary matters.

Further, as becomes apparent from the penalty phase testimony of Tony Iuli, all she could have done properly was authenticate the document. None of the other information she provided was provable. Tony Iuli did not testify that he was told by appellant that this was a list showing gang status; he testified that this was a list ordered by the ages of the people on it. He did not testify that appellant told him that this was a boast about the charged murder; he testified that in his opinion that was some sort of generalized "badge of honor," -- which was a reasonable characterization given that of the ten names, one was a dead man, while only four were implicated in the murder of Noel Pamintuan. Finally, Iuli did not testify that he distributed this list to Tautai, or that Tautai told Iuli what the list meant. Beyond Iuli, Ms. Backers never showed the exhibit to Jay Palega either at the guilt or penalty phase, and she never brought in a gang expert to attest to the significance of the list. (See *People* v. *Gardeley* (1996) 14 Cal.4th 605, 617.) In short, she conveyed the information she wanted to convey on the cheap, as it were, without having really to prove it, and with no reasonable expectation of providing proof of her claims she committed misconduct. (*People* v. *Price*, *supra*, 1 Cal.4th 324, 481; *People* v. *Warren*, *supra*, 45 Cal.3rd 471, 480; *People* v. *Chojnacky*, *supra*, 8 Cal.3rd 759, 766.) Needless to say, defense counsel had no basis to object on the ground of prosecutorial misconduct because the court's foundational errors provided the screen behind which the absence of evidence of Ms. Backers' claims was hidden from view.

The effect of the foundational errors and the misconduct was, like the vouching errors, to allow Ms. Backers to inject herself into this case as a witness to Exhibit 46 and its meaning. She was, however, purveying hearsay. She or her correspondents, including Tony Iuli, could not be cross-examined themselves, and these errors thus amounted to a violation of appellant's Sixth Amendment right to confront and cross-examine adverse witnesses. (*People* v. *Bell* (1989) 49 Cal.3rd

502, 533-534; *People* v. *Gaines* (1997) 54 Cal.App.4th 821, 823-825.) Seen from the perspective of the Fourteenth Amendment, this hearsay was so substantial a contribution to the conviction in this case as to amount to a due process violation. (*Bruton* v. *United States* (1968) 391 U.S. 123, 131, fn. 6; *People* v. *Valentine* (1986) 42 Cal.3rd 170, 177-178.) Finally, seen from an Eighth Amendment perspective, this hearsay constituted important evidence so unreliable as to vitiate the right to heightened reliability in the factual assessments in a capital case. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638.)

The illusory impeachment of Tautai, combined with the inflammatory suggestion that "AMERICA'S MOST WANTED SAMOANS" were the four Samoans "wanted" for the murder of Noel Pamintuan, could not but make an unduly emotional impression on the jurors and induce them to reject anything in Tautai's testimony that *they*, and not the trial court, believed. Appellant's alibi defense, purveyed through his wife and less directly through Tautai, was circumstantially plausible, and sufficiently so that it could have warranted an acquittal. The evidentiary errors surrounding Exhibit 46 in this case require reversal whether the errors are deemed to be only a violation of the state law rules of evidence (*People* v. *Watson* (1957) 47 Cal. 2nd 818, 836-387) or whether it is federal constitutional error. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

Finally, as noted in the previous argument, Ms. Backers emphatically adduced Tautai's lack of credibility in court as corroborative evidence his lack of "moral fiber." (17RT 3476-3477.) This allies the evidentiary errors here with the vouching errors discussed in argument I of this brief. If the prejudice from the trial court's evidentiary errors are not sufficient to warrant reversal, in combination with the vouching errors they are. (*People* v. *Hill* (1998) 17 Cal.4th 800, 844; *Chapman* v. *California*, *supra*, 386 U.S. 18, 23-24.)

XI.
IN CROSS-EXAMINING TAUTAI ON AN ALLEGED OFFER BY HIM TO TESTIFY AGAINST HIS BROTHER, THE PROSECUTOR COMMITTED MISCONDUCT BY ASKING QUESTIONS SHE KNEW CALLED FOR INADMISSIBLE EVIDENCE; BY MAKING REPRESENTATIONS IN THESE QUESTIONS THAT SHE DID NOT INTEND TO, AND, INDEED, COULD NOT, PROVE; AND BY KNOWINGLY USING REPRESENTATIONS OF FACT THAT WERE FALSE AND MISLEADING

Like the alleged contract placed on Tony Iuli's life by appellant, and the purported gang list of Exhibit 46, there was another important unit of information brought before the jury without any competent proof and solely by through the representations made by Ms. Backers in her questions. This was Tautai Seumanu's alleged offer to Ms. Backers' herself to testify against appellant if he could also receive the same deal she gave to Tony and Jay. (15RT 3343-3344.) The true state of facts was that Tautai's attorney, William Daley, made a tentative inquiry about this without the authorization of Tautai himself. (15RT 3366-3367.) As stated precisely in the heading of this argument, three forms of prosecutorial misconduct surround this impropriety: 1) Ms. Backers asked questions she knew called for inadmissible evidence (*People* v. *Bonin* (1988) 46 Cal.3rd 659, 689); 2) her questions contained representations she knew would not be confirmed by Tautai and could not be proved otherwise (*People* v. *Warren* (1988) 45 Cal.3rd 471, 480); and 3) she knew that her questions contained false representations of fact (*People* v. *Seaton* (2001) 26 Cal.4th 598, 647).

After Ms. Backers finished with the supposed gang-status list, she turned to the topic of Tautai's guilty plea, establishing that he was sentenced to twenty-five years to life, and knew, as a juvenile that he could not receive the death penalty. This was relevant to suggest that Tautai had nothing to lose by taking the full blame for the murder. (15RT 3338-3341.) She went on to establish that when he

pled guilty, he already knew that Tony Iuli was going to testify against appellant. (15RT 3342.) Tautai denied that he knew Jay Palega also was going to do so (15RT 3342), but he did know that all three of them, he, Iuli, and Palega, had told the police that appellant was the "triggerman." (15RT 3342-3343.)[37] This exchange followed immediately:

> "Q. And you asked me for the same deal to testify against your big brother, didn't you?
>
> "MR. CIRAOLO: Objection. Hearsay, privileged communications.
>
> "THE COURT: Overruled.
>
> "MR. CIRAOLO: No foundation.
>
> "THE COURT: Overruled.
>
> "THE WITNESS: When did I ask you this?
>
> "MS. BACKERS: Q. You wanted the same deal that Tony and Jay got, and I said no way.
>
> "MR. CIRAOLO: Your honor, objection. Counsel is testifying and no foundation.
>
> "THE COURT: Overruled.
>
> "MS. BACKERS: You were willing to come in and say that your big brother was the triggerman if you could get the "L" taken off of your sentence, weren't you?

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[37] Throughout this portion of the cross-examination, Ms. Backers referred to Tautai's entry of a guilty plea as "taking the deal." (See 15RT 3342.) There was, however, no deal; Tautai entered a guilty plea with no promises issuing from the court or prosecution. (8CT 2009-2023.) Ms. Backers' innocuous solecism was (if intentional) harmless and is not part of the claim made in this argument.

"A. I didn't.

"Q. You didn't want the same deal Tony and Jay got?

"A. Hell no.

"Q. Hell no?

"A. No.

"Q. You wanted to go down for life?

"A. No.

"Q. You never wanted to get out of jail?

"A. No.

"Q. You don't want to get out of jail?

"A. No.

"Q. Are you telling this jury that you did not ask me for the same deal Tony and Jay got so you could testify against your big brother?

"MR. CIRAOLO: Same objection, you honor. Could we approach the bench on this?

"THE COURT: Sure." (15RT 3343-3344.)

At sidebar, Mr. Ciraolo objected that Ms. Backers was implying that there was direct communication between her and a criminal defendant represented by counsel. When the court observed, "I don't hear him say it didn't happen. I don't see – Mr. Daley s his lawyer. You cannot assert a privilege," Mr. Ciraolo pointed out that he was asserting an objection for lack of foundation. (15RT 3344.) The court rejected this too: "She asked him if it happened. He said no. I don't see

anybody else asserting any privilege. [¶] The objection is overruled." (15RT 3344.)

The cross-examination continued that day without further touching on the question of Tautai's alleged offer to the prosecution to testify in return for a deal. At the end of the day, however, after the jurors were excused, Mr. Daley addressed the court:

> " . . . My concern is the questions addressed to my client about whether or not he had requested a deal. Obviously, he had no communication with Angela, at least none that I am aware of. I don't think they ever exchanged any words.
>
> "I can say that I did make an inquiry, and was abruptly turned down. And without getting into confidential communications, I can say I did it without any instructions from my client just to see if it was available.
>
> "And I think I communicated that to Angela at the time. Of course, we are going back four or five months at this point.
>
> "There was the implication in the record, at this point –
>
> "THE COURT: Well, Mr. Daley, I didn't hear you objecting at the time.
>
> "MR. DALEY: The objection was whether my client had any communications and requested an offer and he answered no, which is true.
>
> "THE COURT: Okay. So –
>
> "MR. DALEY: The implication –
>
> "THE COURT: Mr. Daley, I can't deal with implications if you don't sit there and don't say anything, okay? So you didn't say anything, he answered no, so that is the end of that story as far as I am concerned." (15RT 3366-3367.)

Like several other evidentiary exchanges discussed in this case, this too was an unruly jumble of simple legal concepts and rules of evidence. Like them too, a little analytical untangling uncovers the clear, simple, and serious improprieties involved.

As soon as Ms. Backers asked the question, "And you asked me for the same deal to testify against your big brother, didn't you?" Mr. Ciraolo immediately entered an objection based on hearsay, privilege, and lack of foundation. As the question was couched, however, none of these objections applied. Whether or not Tautai himself did something presupposes that the foundation of personal knowledge (Evid. Code, § 702(a)) will inhere in the answer to the question. By the same token, if Tautai stated he wanted to testify *against* appellant, this was either a prior inconsistent statement (Evid. Code, § 1235)[38] or inconsistent conduct, which is not hearsay at all, but which is nonetheless relevant for purposes of impeachment. (See *People* v. *Corella* (2004) 122 Cal.App.4th 461, 470-471.) Finally, even if the claim of privilege were for Mr. Ciraolo to assert, a plea offer communicated to the prosecutor is not a confidential communication and not therefore subject to the attorney-client privilege. (*People* v. *Snow* (2003) 30 Cal.4th 43, 88.)

But the problem here is not the absence of the precisely appropriate objection; it is that Ms. Backers even asked the question *at all*. When *she* asked the question, *she* knew that Mr. Daley had inquired about a deal and not Tautai. Although defense counsel's objections demonstrated that he sensed the extreme unlikelihood that Tautai, a represented criminal defendant, would be communicating directly with the prosecutor, the prosecutor knew with certainty

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[38] Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with is testimony at the hearing and is offered in compliance with Section 770." Section 770 requires that the witness be confronted with his statement before extrinsic evidence of the statement is allowed.

that Tautai was not. Clearly and unequivocally, Ms. Backers committed misconduct in asking a question she knew called for inadmissible evidence. (*People* v. *Bonin, supra*, 46 Cal.3rd 659, 689; *People* v. *Chatman* (2006) 38 Cal.4th 344, 379-380.)[39]

For the same reasons Ms. Backers knew she was asking for inadmissible evidence, she knew that Tautai would not confirm the implication of her question and that she could not prove it by other evidence. She knew this because *Tautai* never asked her for a deal or offered to testify against his brother. It was Mr. Daley, who, by his representation made an inquiry about the possibility. Thus, the impropriety had not only the legal aspect of eliciting inadmissible evidence, it had the factual aspect of implying facts that were not going to be proved and were unprovable. This was also misconduct.

The third form of misconduct inhering in this cross-examination was the knowing introduction of false evidence. In the narrow sense, the evidence was false because Tautai himself did not offer to testify against his brother in return for a deal. Again, Ms. Backers knew that, but proceeded with her questions to convey the opposite to the jurors in rather unequivocal terms. In the broader sense, did she know that the communication from Mr. Daley was made without instructions from Tautai and on Mr. Daley's own initiative? It is not clear from the record

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[39] Evidence Code section 1153 arguably provided a meritorious objection to Ms. Backers' question. That section provides in relevant part: "Evidence of a plea of guilty later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature . . . ." There is authority, however, that this does not bar the use of such evidence for purposes of impeachment. (*People* v. *Crow* (1994) 28 Cal.App.4th 440, 450-451.) But a meritorious objection is beside the point, which is that the prosecutor should not have lodged the question at all, and that in doing so she committed misconduct. Thus, the claim here is properly prosecutorial misconduct and not ineffective assistance of counsel for failure to timely assert the proper objection. This is a question distinct from that of procedural default for prosecutorial misconduct, which will be discussed in due course.

whether she knew this at the time she asked the question, but she did know shortly after when Mr. Daley announced the actual facts of the case, and the false representations of her questions were never corrected by her. "Under well-established principles of due process, the prosecution cannot present evidence it knows to be false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted." (*People* v. *Seaton*, *supra*, 26 Cal.4th 598, 647.) Ms. Backers did nothing to correct the falsehoods she purveyed and thereby committed misconduct.

The fact that false information was given to the jury due to Ms. Backers' questions alone, then, cannot be disputed. Indeed, she placed that information before them clearly and vividly, declaring, without even bothering with a question, "You wanted the same deal that Tony and Jay got, and I said no way." (15RT 3343.) The other questions were just barely disguised declarations on her part: "You were willing to come in and say that your big brother was the triggerman if you could get the 'L' taken off of your sentence, weren't you?" (15RT 3343); "You didn't want the same deal Tony and Jay got?" (15RT 3343); and "Are you telling this jury that you did not ask me for the same deal Tony and Jay got so you could testify against your big brother?" (15RT 3344.)

The presentation and use of knowingly false evidence is the fundamental impropriety here, for which the elicitation of legally inadmissible evidence and unprovable facts was subordinate and instrumental. And whether Ms. Backers knew her representations were false when she made them, or whether she learned it shortly after but failed to correct them (if in fact she possibly could), this misconduct in itself constituted a violation of the Due Process Clause of the Fourteenth Amendment (*Giglio* v. *United States* (1972) 405 U.S. 150, 153; *Napue* v. *Illinois* (1959) 360 U.S. 264, 269), and not solely a state law error in the use by the prosecutor of deceptive or reprehensible methods of persuasion. (*People* v. *Espinoza* (1992) 3 Cal.4th 806, 820.) Further, *this* due process violation cannot but be, in a capital case, a violation of the Eighth Amendment (*Beck* v. *Alabama*

(1980) 447 U.S. 625, 638), and in this specific case, a denial of the Sixth Amendment right to confront and cross-examine the only relevant witness here, Ms. Backers. (*People* v. *Gaines* (1997) 54 Cal.App.4th 821, 823-825.) The standard of review is that required for federal constitutional error, but before discussing prejudice, the question of procedural default should be addressed.

The first question this record raises in that regard is whether there was a default during the questioning itself. As noted above, counsel raised objections of hearsay, privilege, and lack of foundation. He did not cite Ms. Backers for misconduct or ask for an admonition. But what objection *could* counsel make at this point? He made the probable assumption that Tautai was represented and that the direct communication between him and Ms. Backers was highly unlikely. His foundational and hearsay objections were therefore well aimed, if not legally precise at this point; and indeed, based on the same probabilities apparent to anyone experienced in criminal law, Ms. Backers questions and counsel's objections should have induced the court to make some inquiries. In any event, defense counsel did not *know* that the evidence was false and had no basis for making the objection based on misconduct. If "[a]n objection *available* in the trial court and not there made cannot be raised on appeal" (*People* v. *Walker* (1968) 266 Cal.App.2nd 562, 567, emphasis added), it is fundamentally unfair to require an objection not apparently available in order to avoid forfeiture of the right to review. (See *People* v. *Welch* (1993) 5 Cal.4th 228, 238.) Stated another way, only Mr. Daley and Ms. Backers herself knew the true facts. The former had no standing to object on the ground of misconduct; the latter had not right to commit misconduct at all. Where only Ms. Backers could prevent the impropriety, it ill behooves the People to raise trial counsel's failure to object on the proper grounds as procedural default. (See *People* v. *Abbaszadeh* (2003) 106 Cal.App.4th 642, 649.)

The sidebar conference is the next event in this cross-examination relevant to consider in relation to the question of procedural default. At the sidebar

conference, defense counsel renewed his objection for lack of foundation. The court, still not curious about the oddity of a direct communication between a represented defendant and the prosecutor, correctly ruled on the narrow question, since whether or not Tautai did or did not do what Ms. Backers' asked had to be within his personal knowledge. (15RT 3344.)

The court also mentioned the issue of privilege in this sidebar conference, noting that Mr. Ciraolo did not have standing to assert it; only Mr. Daley did. (15RT 3344.) It is not clear what the court meant by this since Ms. Backers' questions did not call for any confidential communication between Tautai and Mr. Daley, but rather for a rather *un*confidential and, as it turned out, fictional communication between Tautai and Ms. Backers herself. (See *People* v. *Snow*, *supra*, 30 Cal.4th 43, 88.) If Mr. Ciraolo did not have standing to object based on privilege, Mr. Daley certainly had no standing to object based on Ms. Backers' false representation as to the facts. The situation at the sidebar conference is therefore exactly the same as it was when the initially improper question was asked, and counsel had no basis to make an objection based on prosecutorial misconduct.

But what about at the end of the day, when Mr. Daley revealed the true facts in the presence of a silent Ms. Backers? Defense counsel did not then lodge an objection based on prosecutorial misconduct, but there are nonetheless several observations to make in this regard. First, it was before the court as clear as could be that Ms. Backers' representations made in her cross-examination questions were false in both the narrow and broad sense, i.e., in the sense that Tautai did not have direct communication with her and in the sense that he had not authorized Mr. Daley to offer her anything. In short, it was before the court that Ms. Backers had just committed a significant and serious form of misconduct. This should constitute substantial compliance with objection/admonition requirement. (See *People* v. *Bonin*, *supra*, 46 Cal.3rd 659, 688-689.)

Secondly, the court's response to Mr. Daley renders it crystal clear what the court's attitude would have been to an objection based on misconduct. The court was completely uninterested in what Mr. Daley had just told him. "Mr. Daley, I can't deal with implications . . . ." (15RT 3366) and was content to allow the falsehoods to stand. The only reasonable conclusion on this record is that an objection would have been futile if made. (*People* v. *Abbaszadeh*, *supra*, 106 Cal.App.4th 642, 649.)

Thirdly, even if an objection would have availed, an admonition to the jury to ignore the evidence would have been useless. The representations made by Ms. Backers in one instance took the form of her personal declaration, while the others were personal declarations thinly cloaked in an interrogatory form. As seen from arguments preceding this one, starting with the vouching errors where she injected herself personally as an evidentiary unit in the case, she would not, and by now, could not, be ignored. Further, she could not be ignored on so inflammatory a claim that Tautai, now testifying for his brother, would have testified against him if Ms. Backers had agreed to offer him the same deal as she offered Tony and Jay. From the very first question that was a bell that could not be unrung.

But if this court does find procedural default, it should exercise its discretion nonetheless to review the error. As with the *Doyle* error (see above pp. pp. 95-96), the misconduct here is clear-cut and not subject to any real factual dispute. It is also in itself, independent of the extended context of the specific case (see *Darden* v. *Wainwright* (1986) 477 U.S. 168, 181; see also *Donnelly* v. *DeChristoforo* (1974) 416 U.S. 637, 643) a well-defined federal constitutional error. Finally, as with the *Doyle* error, the prosecutor comes to the table with very unclean hands. In that instance, no objections were lodged at least partly because of the insidious procedural manipulations leading to the Berger stipulations. (See above pp. 47-53.) Here, objections were lodged but the true basis for objection was hidden from the defense, *not* by mere procedural manipulation, but by the false manipulation of substantive facts. Further, when the truth came out, if it was

not absolutely too late to forestall prejudice, the forestalling of prejudice would be extremely difficult. Appellant submits that under the circumstances, refusal of substantive review of Ms. Backers' misconduct would be an abuse of discretion. (*Hale* v. *Morgan* (1978) 22 Cal.3rd 388, 394; *People* v. *Brown* (1996) 42 Cal.App.4th 641, 470-471; *People* v. *Ramirez* (1987) 189 Cal.App.3rd 603, 618, fn. 29.)

Finally, if this court disagrees with all of these arguments, the claim of ineffective assistance of counsel must be advanced to avoid forfeiture. The record shows clearly that the defense wanted this evidence barred. Objections were made. It was clear beyond dispute that counsel had no conceivably reasonable tactical reason for wanting this evidence admitted. Pending a showing of prejudice, then, failure to raise an objection based on prosecutorial misconduct when the true state of affairs was described by Mr. Daley, constituted ineffective assistance of counsel. (*People* v. *Cash* (2002) 28 Cal.4th 703, 735.)

A measure of the prejudice from this evidence is the feckless manner left to the defense to counter the misconduct. All defense counsel could tell the jurors was: "When Ms. Backers was questioning Tautai, she said you came crawling and begging to me for a deal. No evidence of that. He answered no." (17RT 3564.) He in fact answered, "Hell no," but whatever intensive qualifier Tautai might add to the negation, Ms. Backers of course wins the credibility contest, a contest she pushed herself into despite the rules that statements by the attorneys are not evidence.

The benefit to the prosecution, on the other hand, was significant. Tautai, already tarred by the brush of having accepted an offer from appellant – at least according to Tony Iuli's testimony (see above, pp. 125-128) – was shown to be ready to accept a better offer from the prosecution to say *opposite* things. This was so significant that defense counsel felt called on to address it in the best way possible, which, as seen above, was paltry and weak. The undermining of Tautai's credibility in this way significantly contributed to the rejection of his testimony,

which in turn contributed significantly to the rejection of the alibi defense. Ms. Backers' misconduct thus contributed to the verdict and cannot be shown beyond a reasonable doubt to have been harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

This error, too, connects directly with the vouching errors. Ms. Backers, as she declared, did not merely turn Tautai down, she turned him down emphatically: "You wanted the same deal that Tony and Jay got, and I said no way." (15RT 3343.) Why? "Because once you met Tautai, and you saw his lack of moral fiber, I am sure that you could see that there was a big difference between the two in the back seat and the two in the front seat." (17RT 3476-3477.) If the prejudice from falsely representing Tautai as soliciting a deal from Ms. Backers to testify against this brother did not emanate sufficient prejudice to warrant reversal of the guilt verdict, the combination of this misconduct with the vouching errors does. (*Chapman* v. *California*, *supra*, 386 U.S. at pp. 23-24.)

XII.
THE ERRORS SET FORTH IN CLAIMS IX, X, AND XI WERE PREJUDICIAL IN COMBINATION

The improper remark by the trial court ridiculing Tautai's credibility in front of the jury (issue IX), the presentation of a supposed "gang status list" and the interpretation thereof without any competent evidence, and solely through the representations of the prosecutor contained in her questions (issue X), and the misconduct in knowingly purveying, or at least allowing to stand, false representations regarding an alleged offer by Tautai to testify *for* the prosecution, all constituted significant attacks on the credibility of Tautai, and therefore on the defense itself. This unity makes them in that sense a single error whose constituent parts form a prejudicial whole. Thus, if this court does not find prejudice contained in any one of these errors individually, there is prejudice in

their combined effect. (*People* v. *Hill* (1998) 17 Cal.4th 800, 844; *Chapman* v. *California* (1967) 386 U.S. 18, 23-24.) Further, insofar as the issue of Tautai's credibility was tied directly by Ms. Backers, in her vouching argument, to Tautai's "lack of moral fiber" (17RT 3477), all these errors combine with the vouching errors set forth in argument I to generate sufficient prejudice for reversal in this case. (*Hill, supra*; *Chapman, supra.*)

XIII.
THE CUMULATIVE EFFECT OF THE ERRORS, WHETHER PROSECUTORIAL OR JUDICIAL, OR DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL, WAS TO DENY APPELLANT A FUNDAMENTALLY FAIR TRIAL AT THE GUILT PHASE OF THIS CASE

If this Court finds no prejudice inhering in the errors raised, whether individually or in partial combination, the question of cumulative error arises, and it arises easily with errors that so naturally aggregate with each other. They all share a common feature in that they subjected the jurors to information extraneous to the evidence, or influenced the jurors with considerations extraneous to, or in excess of, the evidence.

Indeed, the first claim in this brief is in this sense the most representative of what was wrong with this trial. Ms. Backers' remarkable display of eliciting "evidence" from Tony Iuli regarding *her* state of mind in offering him and Jay Palega a deal was sheer argument, injecting her personally into the case in a way in which she clearly did not belong. The Muraoka evidence, in the form of a stipulation, consisted primarily in *her* declaration "that, while she believed all four defendants were legally guilty of the murder, her review and evaluation of the evidence led her to believe it was appropriate for her to exercise her discretion as the prosecutor of the case, to enter into the plea agreements" with Iuli and Palega. (13RT 3000-3001) Finally, so that none of the implications of this would be lost on the jurors, she interpreted all this "evidence" for them to show that she had

made, not a tactical or strategic decision for the benefit of the case, but a "moral decision" reflecting the relative degree of "moral fiber" between the four defendants. (See above, pp. 43 *et seq.*) The effect of all this ranged from a localized vouching for the credibility of Tony Iuli and Jay Palega, to the more comprehensive vouching for her case and for the guilt of appellant – all this by making herself, her intentions, and her motives a material factor for the jurors to weigh in the balance of "evidence."

The transition for Ms. Backers from being evidence in her person to producing evidence in her person was not difficult. Almost everything we know about the document represented in Exhibit 46, the supposed gang status list, came from no other source than the representations made by Ms. Backers in the thinly disguised form of questions, and indeed in one instance in the naked form of an argumentative assertion. (See above, pp. 148-161.) Everything the jury knew, and knew falsely, about Tautai's supposed solicitation of a deal from Ms. Backers, came only from her. (See above, pp. 162-173.) Finally, the evidentiary errors that created the illusion that there was competent evidence that appellant had taken out a contract on Iuli's life resulted in another unit of information in effect attested to by no one other than Ms. Backers, allowing only for the formality of her method of using Tony Iuli as her sounding board. (See above, pp. 129-139.) These units of evidence were not merely localized problems in this case, but extended to the question of the respective credibility of the prosecution over the defense, and to Ms. Backers' claim of the moral superiority of the prosecution and its witnesses over the defense and its witnesses in a case where she expressly linked forensic credibility and inherent "moral fiber" as different aspects of the same virtue and vice. (17RT 3476-3477.)

These claims were abetted and improperly buttressed by further evidentiary errors and other impropriety. Iuli's claimed statement to his wife, attested only by him, about how "her fucking brother blew some dude away" (11RT 2626) had no probative value except to elevate Iuli's moral standing in a dramatic and lively

manner that disguised the worthlessness of this evidence in supporting his credibility. (See above, at pp. 114-124.) Iuli's incompetent opinion that Tautai accepted appellant's proposition to "take the beef" because he would do this favor for a brother conduced to the same end and the same effect with little or no probative value either. (See above, pp. 125-128.) Iuli's sheer hearsay assertion that he was sitting in jail for four-and-half years because of something Tautai's "fucking brother" had done was incompetent evidence but effective drama. (See above, pp.114-124.) Finally, the best drama of all was the trial court's ironic sympathy, expressed in front of the jury, as to the burden of cross-examining so mendacious a witness as Tautai Seumanu. (See above, pp. 141-147.) The sympathy, of course was sincere, with all the irony aimed at Tautai.

If some "evidence" was based only on prosecutorial representations and assertions, some was based on the exploitation of highly equivocal facts. This embraces Ms. Backers' claim that appellant's silence for four-and-a-half years impeached his alibi. Not only did appellant not testify, however, but he had been *Mirandized* and assured implicitly that his silence would not be used as evidence against him. Moreover, he had waived time for trial with the assurance that the delay was necessary to prepare his case and provide him effective assistance of counsel. (See above, at pp. 89-97.) Yet Ms. Backers could exploit all this on the problematic premise that the only explanation for silence and delay was for the fabrication of an alibi – an imputation that the defense had no practicable way to counter, either in argument or in evidence, without augmenting the undue prejudice.

But these unfair imputations against the defense took other forms, as well. She also impugned defense counsel's integrity and belief in his client. (See above, pp. 97-104.) Moreover, she did this in a case that *she* was primarily responsible for personalizing, making the presenters of evidence, mostly herself, if not the cynosure of the jurors' eye, at least a significant factor. The battle against good and evil took the form of a good prosecutor battling, if not an evil, then a feckless

and amoral defense counsel, who "hedged his bets" in the belief of his client's guilt, and who perpetrated major "shams" to mislead and deceive the jurors.

Finally, the personalization of the case by Ms. Backers went hand in hand with its emotionalization far in excess of the restraint more severely appropriate in the guilt phase of a trial than in the penalty phase, and which invited the jurors to give free reign to passion at the expense of a reasoned response to guilt phase evidence. (See above, pp. 82-89, 104-114.) For Ms. Backers presented herself not so much as the attorney representing the People of the State of California, whose majesty and sovereignty were violated by the most serious transgression of its law, but as the attorney for the family who suffered the loss and for the victim himself murdered on the eve of his wedding day. She elaborated on the pathos inherent in the very facts of this case so that they reached a boiling pitch far in excess of the reasoned necessities of making identifications, authentications, and all the other dry and tedious foundations that must be laid before a finding of guilt based on evidence can occur.

Against all this, appellant presented an alibi defense, concededly on an uphill plane, given the evidence of recent possession of the stolen property. But that defense, coming in through Lucy Masefau and Tautai Seumanu, was, despite the bias and interest of these witnesses, plausible in the context of an obviously communal regimen in the Seumanu house in which property lines were not clearly delineated and in which tribal status required some sort of tribute even without direct or criminal complicity. It is reasonably probable that the defense would have raised a reasonable doubt as to guilt absent the accumulation of so many significant errors in this case. (*People* v. *Hill* (1998) 17 Cal.4th 800, 844; *People* v. *Kronemyer* (1987) 189 Cal.Apop.3rd 314, 349.)

But the accumulation itself goes beyond state error and so pervasively embraces the key issues in the guilt phase of trial so as vitiate the fundamental fairness of this trial. Whether one focuses on the element of due process that a jury decide a case only on relevant and competent evidence before it (*Bruton* v.

United States (1968) 391 U.S. 123, 136, fn. 6), or on the need for jury whose impartiality has not been compromised by factors extraneous to proper evidence (*Smith* v. *Phillips* (1982) 455 U.S. 209, 217), or on the necessity of a meaningful opportunity for the defense to test the prosecution's case (*Olden* v. *Kentucky* (1988) 488 U.S. 227, 231) and to present its own (*Crane* v. *Kentucky* (1986) 476 U.S. 683, 690), or on the Eighth Amendment right to a reliable determination at all stages of a capital case (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638), the cumulative effect of these errors was to deny appellant a fair trial, and this warrants reversal. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

XIV.
INSTRUCTION IN ACCORD WITH CALJIC No. 2.15 UNCONSTITUTIONALLY LIGHTED THE PROSECUTION'S BURDEN OF PROOF TO ESTABLISH THE COMMISSION OF ROBBERY, BOTH IN ITSELF AND AS AN ELEMENT OF FELONY-MURDER

The jurors in the instant case were instructed in accord with CALJIC No. 2.15 as follows:

> "If you find that a defendant was in conscious possessing of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crimes of robbery or receiving stolen property. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt.
>
> "As corroboration, you may consider the attributes of possession, time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, and any other evidence that tends to connect the defendant with he crime charged." (17RT 3642-3643.)

The instruction is unconstitutional.

The instruction sets forth for the jurors a permissive inference of guilt based on evidence of conscious possession of recently stolen property. However, before the inference can be made, there must be "slight" corroboration. To tell the jurors that they may make an inference of guilt based on "slight" corroboration is to dilute the constitutionally ineluctable rule that a criminal conviction may be predicated *only* on proof beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.)

The federal courts have come to the same conclusion in regard to the "slight evidence" rule in the crime of conspiracy, wherein, once a conspiracy was proved, the Government need come forward with only "slight evidence" to connect the specific defendant to that conspiracy. (*United States* v. *Toler* (11th Cir.1998) 144 F.3rd 1423, 1427.) The rule is now in disrepute and disavowed as contrary to the due process requirement of proof beyond a reasonable doubt. (See *United States* v. *Marsh* (1st Cir.1984) 747 F.2nd 7, 13 and fn. 3; *United States* v. *Burgos* (4th Cir.1996)(en banc) 94 F.3rd 849, 861-862; *United States* v. *Malatesta* (5th Cir.1979) 590 F.2nd 1379, 1382; *United States* v. *Durrive* (7th Cir.1990) 902 F.2nd 1221, 1228-1229; *United States* v. *Lopez* (8th Cir.2006) 443 F.3rd 1026, 1030; *United States* v. *Dunn* (9th Cir.1977) 564 F.2nd 348, 356-357; *United States* v. *Toler*, *supra*, 144 F.3rd 1423, 1427, fn. 5.) Further, to inform a jury that, once a conspiracy was proved, "[t]he Government need only introduce slight evidence of a particular defendant's participation" is "reversible error" because it "can only be seen as suffocating a reasonable doubt . . ." standard. (*United States* v. *Gray* (5th Cir.1980) 626 F.2nd 494, 500.)

As explained cogently in *United States* v. *Hall* (5th Cir.1976) 525 F.2nd 1254:

> " . . . [T]he [slight evidence] language should not be used in the charge to a *jury* . . . . Despite the lack of provable prejudice to defendant's case because of other instructions giving the reasonable doubt standard, however, the erroneous instruction reduced the level of proof necessary for the government to carry its burden by possibly confusing the jury about the proper standard or even convincing jury members that a defendant's participation in the conspiracy need not be proved beyond a reasonable doubt." (*Id.*, at 1255-1256, fn. omitted, emphasis in original.)

To tell the jurors that they may infer guilt based on conscious possession of recently stolen property if there is *slight* evidence corroborating this fact is no different than the constitutionally deficient "slight evidence" rule of conspiracy in federal court. If the one violates due process, so does the other.

Only one California case addresses this aspect of CALJIC No. 2.15, and does so inadequately. In *People* v. *Snyder* (2003) 112 Cal.App.4th 1200, the Court rejected the claim that CALJIC No. 2.15 lightened the prosecution's burden of proof. According to the *Snyder* court:

> " . . . CALJIC No. 2.15 does not create an improper presumption of guilt arising from the mere fact of possession of stolen property, or reduce the prosecution's burden of proof to a lesser standard than beyond a reasonable doubt. Rather, the instruction 'relates a contrary position: a burglary [or robbery] may not be presumed from mere possession unless the commission of the offense is corroborated.' [Citation.] The inference permitted by CALJIC No. 2.15 is permissive, not mandatory. Because a jury may accept or reject a permissive inference 'based on its evaluation of the evidence, [it] therefore does not relieve the People of any burden of establishing guilt beyond a reasonable doubt.' [Citation.] Requiring only 'slight' corroborative evidence in support of a permissive inference such as that created by possession of stolen property, does not change the prosecution's burden of proving every element of the offense, or otherwise violate the accuser's right to due process unless the conclusion suggested is not one that reason or common sense

could justify in light of the proven facts before the jury." (*Id.*, at p. 1226.)

The *Snyder* court thus relies on an analysis on how permissive inferences do not create irrebuttable presumptions that conflict with the constitutionally imposed burden of proof beyond a reasonable doubt. But this analysis begs the question, because the claim here is *not* that the instruction creates an irrebuttable presumption of guilt in violation of due process (see *Ulster County Court* v. *Allen* (1979) 442 U.S. 140, 167), but that the jury is allowed to draw an otherwise constitutional inference of guilt on an improperly diminished and diluted standard of proof. (*United States* v. *Hall, supra*, 525 F.2nd 1254, 1255-1256; see also *People* v. *James* (2000) 81 Cal.App.4th 1343, 1353.) Thus, the *Snyder* analysis did not answer the contention raised in that case, and does not dispose of the same contention in this case.

The point might be brought home by consulting the language of other limiting and cautionary instructions that purport to protect the interests of the defendant against the undue use of provocative evidence. In assault cases, evidence of the commission of uncharged crimes of this nature is admissible to show the defendant's propensity to commit these kinds of crimes. (Evid. Code, § 1108(a).)[40] In accord with CALJIC No. 2.50.01, jurors are instructed that they are permitted to infer propensity, and then guilt, from this kind of evidence, but are nonetheless cautioned: "If you determine an inference can be properly drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime." (See also CALCRIM No.

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[40] "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by section 1101, if the evidence is not inadmissible pursuant to Section 352." Evidence Code section 1101(a) bars evidence of other crimes "when offered to prove his or her conduct on a specified occasion."

1191.) This language is clear and markedly different than telling the jurors that conscious possession of stolen property alone cannot establish guilt, *unless* there is "slight" corroborating evidence – language that "suffocates" the reasonable doubt standard. (*United States* v. *Gray*, *supra*, 626 F.2nd 494, 500.)

Instruction in accord with CALJIC No. 2.15 was particularly devastating in the instant case. The permissibility of the inference was hardly a question here. Appellant was in conscious possession of stolen property, and the defense did not dispute this. The question here was whether that permissive inference was *dispositive* in establishing guilt beyond a reasonable doubt, not only of the charge of robbery, not only of the element of robbery in the crime of felony murder, but also of the crime of murder itself, since an inference of guilt from conscious possession of stolen property precluded acceptance of the alibi defense. As noted throughout this brief, this defense was based on substantial evidence. On this record, it cannot be shown beyond a reasonable doubt that the unconstitutional instruction was harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.) Appellant's convictions must be reversed.

PENALTY PHASE ISSUES

XV.
THE VOUCHING ERRORS AT THE GUILT PHASE ALSO CONSTITUTED PENALTY PHASE ERRORS

In the very first issue of this brief, appellant demonstrated how Ms. Backers committed vouching errors through her direct examination of Tony Iuli; through the Muraoka stipulation; and through her closing argument that brought all the strands of these errors together to constitute a ringing self-endorsement not only of the credibility of Tony Iuli and Jay Palega, but also of her own integrity and morality, which she improperly injected as evidentiary considerations in this case. Although these events occurred at the guilt phase of trial, the phases of a capital

trial are still a unitary criminal proceeding (*People* v. *Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1233), and the evidence introduced at the guilt phase is still at issue in the penalty phase of trial, especially in reference to factor (a) (§ 190.3(a)), the circumstances of the crime. (*People* v. *Ramirez* (2006) 39 Cal.4th 398, 474; *People* v. *Champion* (1995) 9 Cal.4th 879, 946-947.)[41] The jurors were informed of this through the admonition of CALJIC No. 8.84.1, that they "must determine what the facts are from the evidence received during the *entire* trial . . . ." (20RT 4225, emphasis added), and of CALJIC No. 8.85, that "[i]n determining which penalty is to be imposed on the defendant," they had to "consider all of the evidence which has been received *during any part of the trial of this case*." (18RT 3676; 20RT 4226; emphasis added.)

But it is not merely the formal unity of the proceedings that brings the vouching in this case within the ambit of penalty phase error. It is the inherent nature of the error itself. Ms. Backers was not only vouching for Iuli's and Palega's credibility, and her own in using them as accomplice witnesses, she was vouching for the *morality* of their *punishment*, as well as her own in choosing the appropriate punishment for them. This, in combination with Ms. Backers' obvious endeavor to maximize the emotional elements of this case in the guilt phase as a foundation for her penalty phase case, rendered the vouching errors in this case not merely guilt phase errors with prejudice extending to the penalty phase, but penalty phase errors in themselves. All this will be elaborated, but a brief outline of the law adjusted to the slightly different circumstances of a penalty trial may be helpful to begin with.

As in a guilt trial, a prosecutor in a penalty trial "should refrain from expressing personal views which might unduly inflame the jury against the

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[41] Section 190.3(a) set forth the following capital sentencing factor: "The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1."

defendant." (*People* v. *Ghent* (1987) 43 Cal.3rd 739, 772.) This means at least that he or she "may not state a personal belief that death is proper based on facts not in evidence . . ." (*People* v. *Scott* (1997) 15 Cal.4th 1188, 1219-1220; *People* v. *Rowland* (1992) 4 Cal.4th 238, 280-281; *People* v. *Ghent*, *supra*, 43 Cal.3rd at p. 772.) In short, "[a] prosecutor should not emphasize his or her position of authority in making death penalty determinations because it may encourage the jury to defer to the prosecutor's judgment" (*Weaver* v. *Browersox* (8th Cir.2006) 438 F.3rd 832, 841), and the prestige and integrity of the prosecutor, or his or her experience in office, are not proper or relevant considerations in determining whether or not death is the appropriate punishment. (*People* v. *Bandhauer* (1967) 66 Cal.2nd 524, 529-530.)

Thus, in the instant case, the evidence before the jurors was that Tony Iuli and Jay Palega were promised, not more limited indeterminate terms for a reduced degree of the crime of murder, but determinate terms of 16 years and 8 months for the crime of voluntary manslaughter – a crime that had no reflection in the facts of the case, which ineluctably established Iuli's and Palega's liability for first-degree felony murder. The jurors knew that for this, Jay Palega would have been death eligible, but that Tony Iuli, a juvenile at the time of the crime, would not. (7RT 1822; 11RT 2634-2636, 2643-2644, 2646-2647, 2653-2654, 2657, 2697; 13RT 2920, 2956-2958; 14RT 3166; 15RT 3321, 3339; 17RT 3603.) If the jurors had any confusion about the matter, Ms. Backers stated plainly in her closing argument in the penalty phase, "[B]ecause Jay was 18 years old at the time, technically we could have sought the death penalty on him because he was 18 years old and he was a first-degree murderer." (20RT 4154.)

Through the Muraoka stipulation, the jurors also knew that *Ms. Backers* made the decision that although Iuli and Palega were legally guilty of first-degree murder, "her review and evaluation of the evidence led her to believe it was appropriate for her to exercise her discretion as the prosecutor of the case, to enter into the plea agreements" allowing Iuli and Palega to be sentenced to 16 years and

8 months in lieu of either life without possibility of parole, twenty-five years to life for first degree murder, or even fifteen years to life for second-degree murder. (13RT 3000-3001.)

Finally, to bring matters home, the issue was cast in her guilt phase closing argument in terms of morality – a matter much more pertinent to the penalty phase of a capital case than to the guilt phase of a capital case insofar as " 'the determination of penalty is essentially moral and normative . . . .' " (*People* v. *Smith* (2007) 40 Cal.4th 483, 526; *People* v. *Sapp* (2003) 31 Cal.4th 240, 317; *People* v. *Hayes* (1990) 52 Cal.3rd 577, 643.) This places a more pointed meaning on Ms. Backers' guilt phase closing argument when the considerations of morality flowed into the broader river of penalty phase determinations:

> "The evidence in this case comes forward, it is proven now to you, through stipulation, a prosecutor thoroughly prepares and evaluates her case, and she decides that while all four of them are legally guilty, there are some major differences between the men in that van.
>
> "And the differences are this: the two men in the front seat of that van wanted to let Nolan go. They wanted to let him live. They didn't believe Paki should shoot him. They even told Paki not to shoot him. Even Paki broke their code, their moral code, and they are criminals.
>
> "If somebody gives up their stuff, you let them go. But he broke their rule, too. Instead of letting Nolan go, like they told him to, like they thought they should, he blew Nolan's chest apart.
>
> "There is a moral difference, not a legal difference, but a moral difference between the two in the front seat and the two in the back seat. And that is why there were different offers made. And that is the only reason why.
>
> " . . . .

"So making a deal with Jay doesn't make my testimony with Tony any better. I can't use Jay to corroborate Tony and neither can you. So that tells you that the deal to Jay was made for a very different reason, not because I needed to bolster my case.

"So the offers that were made, which you now have heard so much about, and you heard the actual conditions of the offer read to the witnesses while they were on the stand, is that those two men in the front seat who wanted to let Nolan go, let him live, got 16 years, eight months.

"And clearly, after seeing Tautai testify, I think you can see why there is such a difference between the two in the front seat and the two in the back seat. I am sure you see that that discretion was exercised with a proper amount of integrity. Because once you met Tautai, and you saw his lack of moral fiber, I am sure that you could see that there was a big difference between the two in the back seat and the two in the front seat." (17RT 3475-3477.)

This arguments would not merely resonate in the penalty phase, but would be revived as at least part of the object of Ms. Backers' direct appeals in the penalty phase to make the same moral distinction that she had made between appellant and Tautai on the one hand, and Jay and Tony on the other. The guilt phase argument could not but be just below the surface of her persistent appeals to morality in her closing argument at the penalty phase:

"It would be appropriate for you to say: this murder all by itself is so brutal that the defendant deserves the death penalty based on that alone and that would be a legal, proper, just, moral verdict." (20RT 4134.)

Or again:

"Why should a person who has committed all of these acts of repeated senseless, violence, and years and years of violence, since he was 11 years old, and then murder an innocent man on top of that, and be given leniency, be given the lesser sentence of the two sentences?

"Why should that happen?

"Is that fair?

"Is that just?

"Is that morally correct?" (20RT 4135.)

Or again:

"Do you do this vicious, atrocious, evil crime, and we will reward you with a lighter sentence?

"Is that justice?

"Is that how you choose to measure right from wrong in our society?

"Is that how we value our innocent citizens?

"We know the years of violence that you have perpetrated, we know the horror you created, the pain you continue to cause even to this day, we know the devastation you sent through our community, and yet we give you leniency?

"Tell me, please tell me that is now how we dispense justice in our society.

"You need to answer this cry for justice with an outrage that is declared in your verdict; that kind of reasoning, that kind of result would defy logic, it would grab the very fabric of our society and the notion of personal responsibility.

> "You are charged with returning a moral and just verdict for this crime and for this sweet innocent life that was taken so brutally." (20RT 4148.)

There is more. (20RT 4200 ["Isn't it morally perverted to ask for leniency for somebody like that? . . . "You are charged with returning a moral and just sentence for this horrible crime. . . . "I do not hesitate to ask you for death in this case. You know the morality of your decision."].) The implication was crystal clear: Ms. Backers, who personally vouched for the morality of granting Jay Palega and Tony Iuli a substantial leniency based on moral distinctions in this case that went beyond slight legal adjustments in the indeterminate sentences required for all forms of murder, was vouching for the morality of the death penalty in this case.

Kindler v. *Horn* (E.D. Pa.2003) 291 F.Supp.2nd 323 provides a parallel to the instant case that is illuminating if not dispositive. In *Kindler*, the prosecutor gave the following closing argument at the sentencing phase of a capital case:

> " 'Let me at this point, ladies and gentlemen, tell you the position, the position of the office, the position of the Commonwealth. We in this case seek and urge through lithe evidence and the law the death penalty against Joseph Kindler. In reference to Scott Shaw, I will argue and present both of the sides and it is up to you to decide against both of these particular individuals what penalty you fell appropriate. That would be the case no matter what our office's position is but I felt from the outset here that I would let you know that the urging would be done based on the evidence would be against Mr. Kindler. That does not mean that you cannot or would not, based on the evidence and the law return such a penalty if you felt appropriate, against Mister Scott Shaw. That is your power an dif you find it your duty in connection with what the law is, then I am sure you would do it but I, at least, wanted to let you know that now.' " (*Id.*, at p. 363.)

The Court in *Kindler* found this to be "improper vouching and harmful, constitutional error." (*Ibid.*) The distinction between the defendants Kindler and Shaw mirrors the distinction Ms. Backers made between appellant and Tautai on the one hand and Iuli and Palega on the other. If in *Kindler* the prosecutor was merely non-committal in regard to Shaw's punishment, the instant case is thereby worse because Ms. Backers presented herself as *personally* committed to a significantly lesser punishment for Iuli and Palega. It is true that in *Kindler*, the Court characterized the vouching as inhering in the implication that the prosecutor and her office had extra-evidentiary reasons for its restraint. (*Ibid.*) But if the Pennsylvania prosecutor was silent about those reasons, Ms. Backers' open announcement of her moral distinctions were nonetheless extra-evidentiary in reference to a proper, legal understanding of what is and what is not "evidence."

It is not only by connecting her personal morality to what in effect was a sentencing decision that Ms. Backers rendered her vouching a penalty phase error. It was also because the facts that she urged as showing most saliently a brutality deserving of the death penalty were facts that came only from Tony Iuli and Jay Palega. After her introductory remarks to her closing argument, she cast the major question presented to the jurors in this form:

> "The first question you should ask yourselves in focusing on your task in this case is: what punishment does the defendant deserve for deliberately kidnapping, robbing, terrorizing, and then murdering an innocent, young bridegroom who gave his captors absolutely everything that he had and then begged them for his very life.
>
> "That is the first question you are duty bound to answer, and the only question.
>
> " . . . .
>
> "So another way to approach the same question is to ask yourselves: is it fair that the defendant can choose to kidnap, rob,

> terrorize, and brutally murder an innocent young man who begged for mercy and still be left to live his own life?" (20RT 4128-4129.)

It was appellant, according to Ms. Backers, who "chose not to let Nolan go" and "not to listen to his gangster comrades who told him to let Nolan go." (20RT 4141.) It was appellant who "denied the pleas for mercy form Nolan telling his comrades: No, he was the man in charge, he was making the decisions. He was making a deliberate decision to commit first degree deliberate murder." (20RT 4141.) She emphasized the terror of Nolan's last

> "torturous moments. Imagine the terror of the barrel of that shotgun so close to your heart and seeing the defendant's finger on the trigger and hearing how even his crime partners are unable to convince him to let you live. No matter how much you plead, absolute fear of knowing there is no one that can help you. The murderer is not going to let you go. And every time you beg for your life, he just cocks that gun again or threatens you because he is mean and you are so afraid." (20RT 4196-4197.)

This is what distinguished this crime from other murder, for "[t]here is nothing worse than the murder of an innocent person, but to terrorize and frighten and scare that person before you murder them in the last minutes of his innocent life." (20RT 4201.)

This reconstruction was based on facts, if facts they were, from Iuli's and Palega's testimony that they tried to stop appellant from killing Nolan as Nolan begged at least three times for his life. (11RT 2585-2987; 12RT 2836-2838.)[42]

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[42] However, Ms. Backers' seems to have preferred the Iuli version, since in the Palega version, the latter had urged appellant in Samoan not to shoot Nolan, but in English said only, "Hurry up, let's go." (12RT 283-2837.) It was hardly probable that Nolan understood Samoan, which thus at least somewhat deflated Ms.

Iuli went even so far as to helpfully inform the jurors of the rule of the street that a victim who voluntarily surrenders his money should not be killed and then, like any expert apply the principle by helpfully affirming Ms. Backers' leading question: "And this is why you think it was bullshit that Paki shot this guy, right? A. Right." (11RT 2699.)

Thus, even in the narrower sense of vouching for the credibility of Iuli and Palega, the vouching errors in the guilt phase were also penalty phase vouching errors. Iuli and Palega were accomplice witnesses who obtained an extraordinary deal not only for the contribution that their testimony made to a guilt conviction, but also for the contribution that their testimony made to a death judgment.

Thus too, the vouching errors analyzed in the first claim of this brief are also penalty phase vouching errors whether viewed narrowly as vouching for the credibility of Iuli and Palega, or broadly as vouching personally for the appropriateness of the death penalty for appellant. In regard to any claims of procedural default or, if necessary, of ineffective assistance of counsel, the analysis is the same. Further, the description of these errors as having federal constitutional scope fits the penalty phase just as well as it does the guilt phase of trial, although the observations on Eighth Amendment error should be expanded somewhat.

The general requirement of the Eighth Amendment is that a penalty determination in a capital case consists in "a reasoned moral response to the defendant's background, character, and crime." (*Roper* v. *Simmons* (2005) 543 U.S. 551, 603, quoting *California* v. *Brown* (1987) 479 U.S. 538, 545 (O'Connor, J., concurring.) It is the moral response of course of the jury and not that of the prosecutor, and the reasoning must be active on their part and not the acceptance of what appears to be the "reasoned" authority of the prosecutor.

Backers scene of Nolan's hearing how even appellant's crime partners could not dissuade appellant. (20RT 4196-4197.)

In addition, insofar as the vouching errors in general, and the ones especially made in this case, injected the prosecutor's personal morality and prestige as factor of evidentiary weight in itself, they effectively brought before the jurors a completely irrelevant and gratuitous factor as though it were of import and consequence in the case. This too renders the vouching errors constitutionally impermissible under the Eighth and Fourteenth Amendments in relation to the penalty phase of trial. (See *Brown* v. *Sanders* (2006) 126 S.Ct. 884, 890-891; see also *Zant* v. *Stephens* (1983) 462 U.S. 862, 885-886.) The question then is prejudice.

One might begin the discussion by anticipating the possibility of respondent's first response (after claming procedural default) being that any effect of vouching from the guilt phase was prevented by the following limiting instruction given in the penalty phase:

> "In deciding the appropriate penalty for the defendant, you should consider the character and record of the individual offender on trial before you and the circumstances of his particular charged offenses. The sentences of the accomplices is not a factor in mitigation and it has no bearing on the defendant's character or record and it is not a circumstance of the offense. Therefore, the sentences of the accomplices should not be considered in your determination of the appropriate penalty for the defendant in this case." (20RT 4228.)

This was a special limiting instruction requested by the prosecution (11CT 2734) and accepted by the trial court. (20RT 4122.) This is a correct statement of law (*People* v. *Belmontes* (1988) 45 Cal.3rd 744, 811), and perhaps also a reasonable jury instruction in a case in which the prosecutor has not vouched for the respective penalties for the accomplices and the defendant. But in the instant case, this limiting instruction only aggravated the prejudice from the error. The

limitation existed solely in a single direction: "[t]he sentences of the accomplices is not a factor in mitigation and it has no bearing on the defendant's character or record and it is not a circumstance of the offense." This did not bar the jury from using the *vouched* for sentences Ms. Backers conferred on Iuli and Palega as a foil for measuring what was aggravated about the crime or what was not mitigated about it in relation to appellant. (See 20RT 4154.) To state the matter another way, the instruction did not prevent the jurors from considering Ms. Backers' personal assessment of the appropriateness of the sentence as consideration favoring the imposition of the death penalty. Any argument that this instruction neutralized the vouching errors that occurred in the guilt phase is simply spurious, and the only question for the analysis of prejudice is the degree to which the vouching errors skewed the determination of the actual facts before the jurors at the penalty trial.

Although the prosecution's evidentiary case in chief at this phase of the trial was devoted primarily to factor (b) evidence, i.e., uncharged criminal activity that was violent or that threatened violence (§ 190.3(b))[43], the predominant case for the prosecution was, as Ms. Backers' emphasized, in her closing (20RT 4134, 4143, 4186, 4188), factor (a) evidence, i.e., evidence related to the circumstances of the charged crime. Appellant has already discussed the facts attested by Iuli and Palega, which she used in the penalty phase to characterize the commission of the crime as exhibiting a brutality deserving of death. Her vouching for their credibility could not but handicap the defense, as it did at the guilt phase, in denouncing their credibility at the penalty phase. The impeachment of Iuli and Palega, who received consideration not only for guilt phase testimony, but also for penalty phase testimony as part of the bargain, was completely defused by Ms. Backers' vouching for their credibility. Defense counsel tried, arguing lingering

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[43] "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

doubt as to who was the shooter, and the inconsistencies in the accomplice testimony. (20RT 4208-4212.) But the effectiveness of this could only be blunted by the errors that had already stolen, as it were, a huge march on the defense.

But Ms. Backers' vouching in the broader sense was equally and unduly burdensome on the ability of the defense to meet the sharply emotional salients thrown up by the prosecution. For the prosecution, as seen in the analysis of the vouching issue, began in the guilt phase not only to exploit the potential emotion inhering in the facts closely related to the actual committing of the crime, but also to exploit, as far as possible, what could only be denominated as victim-impact evidence, especially in her opening argument containing such rhetorical manipulations as the use of the "to-do" list to evoke the entire pathos surrounding the bridegroom murdered on the eve of his wedding. (See above at pp. 84-85, 106-110.)

But the factor (a) evidence was not confined narrowly to the facts closely related to the committing of the crime, but extended, as Ms. Backers informed the jury, to victim impact evidence proper. (20RT 4188.) Thus, the momentum of the guilt phase emotion was consummated in the penalty phase with evidence of Nolan's funeral at the very church he was to be married, officiated by the same priest who was to marry him – a scene supported by a photograph of Rowena holding Nolan's hand as he lay in an open casket dressed in his wedding tuxedo. (18RT 3805; 19RT 3916-3917.) Ms. Backers prominently displayed this photograph to the jurors in her closing argument and announced, "This right there is the enormity of this crime." (20RT 4191; 74CT 20707-08, No. 14.)

Or the broader relevance of the penalty phase gave scope for the scene of Nolan's mother insisting on viewing her son's unprepared body and beholding the raw, fatal wound to his chest before the coroner even released the body. (19RT 3973.) It took very little in closing argument to bring home the pathos of this scene, and Ms. Backers could do it with simply, "Now think about that kind of love where a mother wants to be with her son so badly because he needs her that

she goes to him in that condition[,]" and, "You've seen the pictures of what she saw. Her son torn apart by a shotgun." (20RT 4194.)

But there were cogent and rational arguments to be lodged against this, and arguments based on a morality with at least a substantial, if not equal, claim compared with those based on the private experiences of marriage and motherhood. There is a civic morality, also arising from fundamental experience, that abhors the pernicious effect of rating the victim of a crime or of finding grounds for excess punishment in accord with accidental factors beyond the commission of the crime itself. This murder would be the same crime whether Nolan was about to get married or had been married for twenty years. It would be the same if he were a grandfather surrounded by a large and thriving family, or a middle aged failure, divorced and disappointed in life.

Defense counsel tried to argue this point: "I can see me arguing in another case: well, the victim was only this homeless man that nobody cared about and had no family. [¶] Think Ms. Backers would take that? [¶] A life is intrinsic. That tragedy, that grief comes along with every homicide. It doesn't particularly make this a more aggravated robbery, kidnap, murder." (20RT 4217-4218.) But the point could only be obscured by the vouching error, which in this case, presupposes and implies that Ms. Backers herself, who had personally rated the defendants, had also rated the victims based on her professional experience and personal integrity. (See *People* v. *Bandhauer*, *supra*, 66 Cal.2nd 524, 529-530.) The countervailing moral considerations would otherwise have been more evenly balanced.

The factor (b) evidence in this case did not significantly contribute to the strength of the prosecution case for death. Although this evidence painted an unappealing portrait, it was more that of a brawler and street thug, whose gang activity had more to do with adolescent *machismo* than with the more cold-blooded and mercenary aspects of gang life. Some of the incidents, though relevant as factor (b) evidence, were of questionable probative value, such as the

schoolyard fistfight when appellant was 13 or 14. (19RT 3871-3875.) Some of the incidents were of questionable relevance as factor (b) evidence, such as the possession of a tattoo gun in jail, which was charged against appellant as possession of tattoo paraphernalia and not as possession of a tattoo gun. (18RT 3725-3730.) At least one of them had no relevance and even no competence as proper evidence, such as Daryll Churish's mere assumption that appellant would "probably" strip a passerby of his Raider's jacket if Churish wanted the jacket. (18RT 3783-3784; see below, 217-218.) Indeed, in connection with the factor (b) evidence, Ms. Backers' vouching may have rebounded on the prosecution's case, since Tony Iuli's 18 robberies (20RT 4172; see also 19RT 3953-3954) seemed not to diminish the his moral claims to a 16 year 8 month sentence.[44]

Finally, the defense case in itself was substantial, whatever relative weight was assessed for it in relation to the prosecution's case. Within the circle of his family, and by the narrow norms of tribal culture, appellant acted responsibly and was loved and appreciated for this quality. He was the sub-head of the family, the heir to his father, who was the chief. He underwent the physical agony of the tattoo initiation and he was directed to some extent by this sense of responsibility. He tended to the younger children in the family; he provided advice and counseling to his sisters; and he tended to an old and dying grandfather not only out of necessity, but out of love. These were factors of moral weight that could make an impression on the scale that determined punishment. For the question for the jurors was whether the factors in aggravation were "*so* substantial in comparison with the mitigating circumstances" (CALJIC No. 8.88, emphasis added), or whether, despite the relative weight of factors, leniency in the form of a life term without parole should be conferred. (*People* v. *Milwee* (1998) 18 Cal.4th 96, 163.)

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[44] On the other hand, Ms. Backers' had immunized her case from this untoward possibility by obtaining the limiting instruction discussed above.

The vouching errors in this case partly immunized the factors in aggravation from the defense's ability to mute their force or even deflate some of them, while magnifying the force of many of them. When this is considered against what were nonetheless substantial factors in mitigation, the possibility that the vouching errors contributed to the finding of death cannot be precluded, and appellant's sentence must be reversed. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

XVI.
THE TRIAL COURT'S REPEATED ADMONITION TO THE JURORS DURING JURY SELECTION THAT THE STANDARD FOR WEIGHING AGGRAVATION AND MITIGATION WAS "AMBIGUOUS" CONSTITUTED AN INACCURATE MISLEADING, AND CONFUSING GLOSS ON THE LAW, REASONABLY LIKELY TO INTERFERE WITH THE JURY'S DUTY TO FORMULATE A REASONED MORAL RESPONSE TO MITIGATING EVIDENCE

In *People* v. *Brown* (1985) 40 Cal.3rd 512 (rev. on o.g. *sub nomine* *California* v. *Brown* (1987) 479 U.S. 538) this Court set forth clearly the weighing process that governs capital penalty decisions under California law. The Court noted that "weighing" was meant metaphorically to refer to "a mental balancing process" of relevant considerations. (*Id.*, at p. 541.) These considerations are not accorded by the law a predetermined weight, nor are they so discretely defined that they can be treated quite as counters on a scale. (*Ibid.*) Rather, "[e]ach juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider . . . ." (*Ibid.*)

But the freedom of the jurors to assess what considerations weigh in the mental balance is still governed by a rational structure, indeed, a structure that is formulated *as a ratio*, allowing the imposition only if "the aggravating circumstances are *so substantial* in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88, emphasis added.) For at the penalty trial, the defendant has already been convicted of an intentional first-degree murder with a special circumstance, which renders him at least punishable by life without possibility of parole, but also eligible for the death penalty. (*Brown, supra.*, at p. 541, fn. 13.) This fact is the source of the curative ratio embodied in the "so-substantial" formulation, which comes from *Brown* itself (*ibid.*) and was made part of the guiding instruction of CALJIC No. 8.88 in accord with which the jurors were instructed in this case. (18RT 3678-3679; 20RT 4239-4240.)

The trial court used the *Brown* formulation of CALJIC No. 8.88 during jury selection to explain the structure of the penalty trial to the prospective jurors. But the court added its own gloss to the instruction:

> "The jury in the penalty trial will be instructed they can assign whatever moral or sympathetic value they want to the evidence that they receive in the penalty trial. The jury is instructed they are to weigh the aggravating circumstances against the mitigating circumstances. Again, it is not a numerical weighing process. I can't give you a percentage. It is a moral weighing process.
>
> "The instruction that is key to the penalty trial indicates that in order to return a verdict of death, each juror must be persuaded or satisfied that the aggravating circumstances are so substantial when compared to the mitigating circumstances that it warrants the death penalty rather than life without parole.
>
> "The key phrase in that instruction is: 'are so substantial.' *And that is a fairly ambiguous phrase.* And the law intends it to be

> such because the law recognizes that you will be engaging in the moral weighing process when you weigh that type of evidence." (1RT 124-125, italics added.)

This, or the variant "pretty ambiguous," would be repeated another twenty-four times (1RT 193, 225, 261, 296; 2RT 417, 472-473, 514, 550, 574-575; 3RT 599, 716, 769, 801; 4RT 835, 883, 927, 996, 1044; 5RT 1152, 1192, 1241, 1298, 1411; 6RT 1448), with one instance of "kind of an ambiguous phrase" (4RT 1110-1111), and one instance of "very ambiguous phrase" (5RT 1358), for a total of twenty-seven times.

It is appellant's contention that the trial court's explanation of the so-substantial standard was inaccurate and misleading. It in fact created an ambiguity where none existed, and there was a reasonable likelihood that it caused the jurors to misunderstand and misapply the law governing the process of penalty selection in this case. (*Estelle* v. *McGuire* (1991) 502 U.S. 62, 72; *People* v. *Clair* (1992) 2 Cal.4th 629, 663.)

The problem of defining elemental abstractions that a jury or judge is called on to apply to specific facts is simply perennial and even commonplace in the law. As this Court observed in construing a water-use statute, "There would seem to be no more difficulty in ascertaining what is a reasonable use of water than there is in determining probable cause, reasonable doubt, reasonable diligence, preponderance of evidence, a rate that is just and reasonable, public convenience and necessity and numerous other problems which in their nature are not subject to precise definition but which tribunals exercising judicial functions must determine." (*Gin S.* v. *City of Santa Barbara* (1933) 217 Cal. 673, 706.)

The word "substantial" and its adverbial form "substantially" is one of those elemental abstractions used again and again in the law to mean what it means in ordinary English: "considerable" or "to a large extent" or "a considerable amount, value, or worth" (see *Toyota Motor Mfg., Kentucky, Inc.* v.

Williams (2002) 534 U.S. 184, 196-197.) It can take on different colorations so that, for example, "substantial evidence," in reviewing the sufficiency of the evidence for a criminal conviction, will mean evidence "of ponderable legal significance . . . reasonable in nature, credible, and of solid value" (*People* v. *Johnson* (1980) 26 Cal.3rd 557, 576); but this is contextually descriptive rather than definitional, and the word "substantial" in its context is " 'sufficiently intelligible to any layman to furnish an adequate guide to the jury, and it is neither possible nor desirable to reduce it to lower terms.' " (*Mitchell* v. *Gonzales* (1991) 54 Cal.3rd 1041, 1052.)

Here the context is moral assessment in determining which of two severe punishments is appropriate. The injunction that "the aggravating circumstances [must be] so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole" (CALJIC No. 8.88) is neither unclear nor ambiguous, and this Court has repeatedly rejected claims that the so-substantial instruction is vague or unclear, incapable of providing a structured discretion on the part of the jurors making a capital penalty determination. (*People* v. *Sully* (1991) 53 Cal.3rd 1195, 1244-1245; *People* v. *Breaux* (1991) 1 Cal.4th 281, 315-316; *People* v. *Arias* (1996) 13 Cal.4th 92, 171; *People* v. *Smith* (2005) 35 Cal.4th 334, 370.)

By characterizing the so-substantial standard as "ambiguous," however, the trial court confounded the lack of precision that attends the application of an abstract standard to specific facts with an ambiguity in the standard itself. For by informing the jurors that the *standard itself* was ambiguous and thus subject to their subjective evaluation, the court was informing them that the scale itself does not measure, as it were, but only registers the subjective impression and impact of evidence and argument, which, without objective contradiction, the jurors may denominate as "so substantial." In short, it allowed the jurors to avoid the curative ratio while creating the illusion that it was being applied.

This places too great a burden on mitigation. All that is required of mitigation is that it "shed [a] different moral light on the appropriateness of the death penalty" so as to diminish the substantiality of the circumstances in aggravation. (*Smith* v. *McCormick* (9th Cir.1990) 914 F.2nd 1153, 1169.) For if aggravation had merely to outweigh mitigation on a scale initially in equipoise, then, as this Court noted in *Brown*, it is virtually impossible for mitigation to achieve a sufficient mass to offset the defendant's having committed a murder, which the jury has already found beyond a reasonable doubt to be the case. (*People* v. *Brown*, *supra*, 40 Cal.3rd 512, 541, fn. 13.) Stated another way, if the jurors, at the outset of trial, are led to believe that the so-substantial standard itself is "ambiguous," calibrated subjectively in accord with the heft of anything that impresses them, then there is indeed a substantial risk that the mitigation to be presented will not be placed in its proper legal context or meaningfully assessed.

In this regard, the obfuscation of the so-substantial standard by the trial court's comments was exacerbated here also by the trial court's use of "good" and "bad" as synonyms for mitigation and aggravation. The Court repeated told the prospective jurors, "From the prosecution you will hear what we call circumstances in aggravation, or, if you will, bad things about the defendant," while "[t]he defense presents evidence we call circumstances in mitigation, or, if you will, good things about the defendant." (1RT 124-125; see also 1RT 192, 224, 259-260, 294-295; 2RT 550, 573-574; 3RT 598-599, 715, 768-769, 800-801; 4RT 834-835, 926-927, 994-995, 1110-1111; 5RT 1151-1152, 1190-1191, 1240-1241, 1297-1298, 1357-1358, 1410-1411; 6RT 1447-1448.) But "the balance is not between good and bad but between life and death" (*People* v. *Brown*, *supra*, 40 Cal.3rd 512, 541, fn. 13), and often mitigation in a capital case cannot properly be characterized as "good," even though it may qualify, modify, or extenuate the gravity of circumstances inherently aggravating and morally bad. (See *People* v. *Osband* (1996) 13 Cal.4th 622, 706; see also *Brewer* v. *Quarterman* (2007) 127 S.Ct. 1706, 1710 [mental health evidence is a "two-edged sword."].) With the so-

substantial standard rendered equivocal by the court's comments, the simplistic characterization of aggravating and mitigating circumstances as, respectively, "bad" and "good" only increased the likelihood that the jurors would misunderstand the weighing process as an even balance between two considerations rather than an assessment mediated by a ratio necessitated by the premise that a *penalty* hearing is convened in order to punish what is bad *ab initio*.

In this same vein, Ms. Backers would later equate mitigation with a plea for mercy, compassion, lenity, or even forgiveness in a way that buttressed the suggestion that aggravation and mitigation were weighed on a scale that started out evenly balanced:

> "You may also hear a lot from the defense about mercy, compassion and sympathy. Maybe even forgiveness. And when the defense speaks about mercy and compassion and sympathy, they will be asking you for leniency and asking you for the lesser sentence.
>
> "I just ask that you consider this: try to separate out what they are saying. It is not your job to decide whether or not there should be a death penalty if she is saying you can't have a death penalty at all because it is not merciful, it is not kind, it is not forgiving, it is not compassionate. But if she is talking about this particular defendant that somehow he deserves your mercy or compassion, ask yourselves this: only the defendant in this case -- excuse me -- only the victim in this case is entitled to forgive. So if she is asking for forgiveness for Paki, only Nolan can forgive.
>
> "As you are thinking about mercy and compassion, whether he should be granted leniency, ask yourself whether he showed mercy and compassion to Nolan, who was so frightened and begged for his life.
>
> "What compassion did he show to those students at Arroyo High School when he kicked them and beat them and stomped them?

"What kind of compassion did he show to Jacqueline Romero when he threw a pipe at her?

"What mercy did he show all of us in our community when he walked around for years with a loaded gun?

"And what compassion was shown to that man looking into D's car when he ended up bloody and beaten in the hospital?

"What mercy has he shown to any of his victims who were at the receiving end of the one hitter quitter or any of his victims that he stomped into the ground and left bloody?

"What mercy did he show to Tony when he put out a contract on his life, when Tony decided to come forward?

"What kind of mercy do you show to a person who continues to be violent in jail, who threatens the custodial officers who watch over him or inmate that are housed with him?

"Isn't that morally perverted to ask for leniency for somebody like that?" (20RT 4198-4200.)

"Mercy" and "lenity" are considerations that transcend mitigation properly speaking. To characterize mitigation as "mercy" or "lenity" is to imply that the aggravation inhering in the commission of a first-degree special circumstance conviction is the norm against which mitigation is to be weighed on a scale at least evenly calibrated in equipoise if not weighted favorably for death. If the above-quoted argument was otherwise a conventional, or even commonplace, piece of prosecutorial rhetoric for a capital penalty trial (*People* v. *Demetrulias* (2006) 39 Cal.4th 1, 31-32; *People* v. *McDermott* (2002) 28 Cal.4th 946, 1003-1004), in a case in which the so-substantial standard has been severely distorted, such an argument would tend both to reflect the error and then refract it back only to increase the risk of misunderstanding and misapplication.

Such error was not merely a violation of California law. In the selection of a capital sentence *vel non*, the Eighth Amendment requires that a jury be able to give "a reasoned moral response to the defendant's background, character, and crime." (*Roper* v. *Simmons* (2005) 543 U.S. 551, 603, quoting *California* v. *Brown*, *supra*, 479 U.S. 538, 545 (O'Conner, J., concurring); *Brewer* v. *Quarterman*, *supra*, 127 S.Ct. 1706, 1709; *People* v. *Crew* (2003) 31 Cal.4th 822, 855-856.) Without the curative ratio of the "so-substantial" standard, the California's system is structured inevitably to blunt and obscure the force of mitigating evidence, and that structure thereby becomes a vehicle that interferes with a "reasoned moral response." Again, this constitutes a violation of the Eighth Amendment. (*Penry* v. *Lynaugh* (1989) 492 U.S. 302, 323; *Brewer* v. *Quarterman*, *supra*, at pp. 1709-1710.)

The error here is parallel to the giving of a misleadingly ambiguous instruction on reasonable doubt at a guilt trial. Because such error vitiates the fundamental structure by which the jury is to make its determination, it is reversible per se. (*Sullivan* v. *Louisiana* (1993) 508 U.S. 275, 279-280.) Here, an instruction that conveys the sense that penalty is determined by weighing aggravation against mitigation directly, without the intervening ratio by which the *relative* weights are to be distributed, goes to the fundamental structure of a California capital penalty trial. Thus, appellant's death sentence must be reversed without regard to a harmless error analysis that could only hypothesize the verdict of a correctly instructed jury as opposed to the actual verdict of the actual jury in this case. (*Ibid.*)

On the other hand, if this Court takes the view that the error was somehow less than structural, there are specific and pertinent considerations to weigh in assessing the prejudice in this case, and these considerations come from Ms. Backers arguments, as much in this case does.

In previous portions of this brief, there have been extensive quotations from Ms. Backers' arguments, and her extraordinary emotionalization of the guilt phase

of trial was so persistent and obvious as to reveal itself as a deliberate strategy. Her opening statement at the guilt phase was nothing so prosaic as the conventional "roadmap" of evidence, but was a narrative propelled by the pathos of the murdered bridegroom whose gift from his bride becomes the "murderer's trophy." (6RT 1554-1555.) Her closing statement was not merely about applying legal principles to facts, but about "good and evil," about the "joyful . . . bliss of our wedding day" cut short by "sheer and unending terror," about an "innocent bridegroom" and a "bride's gift to her handsome husband that became a murderer's trophy," and about "a wedding that becomes a funeral, a plea for mercy that is denied with an intense explosion that rips your heart apart" (17RT 3249.)

Some of this emotion constituted an improper appeal to passion and prejudice within the context of a guilt determination, but would have been within the bounds of proper argument in a penalty trial (*People* v. *Leonard* (2007) 40 Cal.4th 1370, 1418); some was not proper at all, such as the vouching arguments or the *Doyle* error, or the imputation against defense counsel. But even if the guilt phase emotion would have been proper in the penalty phase of trial, Ms. Backers' endeavor to steal a march, as it were, created an even greater disproportion between aggravation and mitigation going into the penalty phase of trial. Without any rational focus on penalty phase considerations, the jurors were incited to penalty phase emotions, and if the penalty selection process is best described by metaphor (*People* v. *Brown*, *supra*, 40 Cal.3rd 512, 541), then how could they properly hear any evidence or argument in mitigation after emerging from the deafening wind-tunnel of Ms. Backers' guilt phase rhetoric? This rendered even more urgent the need for a clear instruction at the penalty phase that imparted to the jurors the true rational structure of the selection process, and not the impression that the process consists in the weighing of moral considerations on a scale in perfect equipoise.

Thus, at the penalty phase, when Ms. Backers posited for the jurors in relatively restrained language the questions that informed their penalty assessment, her formulations took full advantage of, not only the emotionalization of the guilt phase, but also the dilution of the "so-substantial" standard:

> "The first question you should ask yourselves in focusing on your task in this case is: what punishment does the defendant deserve for deliberately kidnapping, robbing, terrorizing, and then murdering an innocent, young bridegroom who gave his captors absolutely everything that he had and then begged them for his very life.
>
> "That is the first question you are duty bound to answer, and the only question.
>
> " . . . .
>
> "So another way to approach the same question is to ask yourselves: is it fair that the defendant can choose to kidnap, rob, terrorize, and brutally murder an innocent young man who begged for mercy and still be left to live his own life?" (20RT 4128-4129.)

Both the first and second question draw their context only from the guilt phase of trial, and not only from the actual evidence, but from the emotionalized rhetoric used in that phase of trial. On the basis of the guilt trial alone, a juror could unhesitatingly answer the first question with "death" and the second question with "no" without regard for anything else. A juror unrestrained by a proper understanding of the so-substantial standard was likely to have done so. Here, there was evidence in mitigation, which, considered in itself, was substantial and was capable of "shed[ding] [a] different moral light on the appropriateness of the death penalty." (*Smith* v. *McCormick*, *supra*, 914 F.2nd 1153, 1169.) Thus, the trial court's instructional error, if not structural, was nonetheless prejudicial,

contributing to the death verdict in this case, and requiring reversal of that judgment. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

XVII.
THE PROSECUTOR'S GUILT PHASE MISCONDUCT IN IMPUGNING THE INTEGRITY OF DEFENSE COUNSEL HAD REFERRED FORWARD TO THE PENALTY PHASE AND THEREBY ALSO CONSTITUTED PENALTY PHASE MISCONDUCT

In the previous claim, appellant quoted Ms. Backers' penalty argument about mercy and lenity, which ended with the rhetorical question, "Isn't that morally perverted to ask for leniency for somebody like that?" (20RT 4200; see above at p. 188.) In claim **III** (see above, pp. 97-104), it was argued that Ms. Backers' committed misconduct in the guilt phase when she argued that defense counsel knew that appellant was guilty, and that he, counsel, manipulated the presentation of evidence to "hedg[e] his bets." (17RT 3437.) "Hedging bets" had no specific reference at the time, but the strongest possibility was, of course, a "hedge" for the penalty phase of trial. Since there could be little question that the straw man of Ms. Backers' mercy and lenity argument was defense counsel, this sealed the guilt phase reference with an even clearer certainty, and rendered the guilt phase misconduct of impugning the integrity of defense counsel a penalty phase error as well.

The effect of all this was of course to undermine defense counsel's argument, *not* on the basis of evidence, but rather on the basis of an extra-evidentiary animadversion against the integrity of the defense counsel. It was of course augmented by the further guilt phase misconduct in accusing defense counsel of perpetrating various "shams" to impose on the jurors. (17RT 3604-3605.) If the substance of those alleged "shams" pertained only to the guilt trial, the substance of the slander against defense counsel's integrity hovered over the

entire trial, where the argument in favor of mitigation, characterized as a morally perverted supplication for mercy, could only be interpreted as a further impeachment of counsel's integrity. This would be especially effective in a case in which the shift from an alibi and third-party culpability defense to an extenuation case in penalty had to be made.

Needless to say, such animadversion against defense counsel is not a cognizable factor in aggravation, nor is it in any way a relevant or pertinent consideration in assessing the appropriateness of the death penalty, so that both statute (§ 190.3) and the constitution (U.S. Const., Amend. 8) were violated by Ms. Backers' guilt phase misconduct considered in light of factors pertinent to the penalty phase: it interfered with "a reasoned moral response to the defendant's background, character, and crime" (*Roper* v. *Simmons* (2005) 543 U.S. 551, 603) thereby rendering the integrity of the death verdict unreliable in this case. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628.)

As for prejudice, the relevant considerations have been set forth in the previous arguments. (See above, pp. 193-197, 204-207.) The handicap imposed on the defense by the vouching errors could only be magnified by imputation directly on the integrity of the defense. There were indeed in this case pertinent moral considerations on the defense side of the ledger that realistically and substantially cut into the balance favoring aggravation so as to warrant a life sentence in this case. To the extent that the jury's view of this was obscured and distorted by Ms. Backers' misconduct from the guilt phase, the death sentence in this case must be reversed. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

XVIII.
THE EVIDENTIARY ERRORS IN ALLOWING INCOMPETENT EVIDENCE AT THE GUILT PHASE OF AN ALLEGED CONTRACT ISSUED ON BY APPELLANT ON TONY IULI'S LIFE WAS EXPLOITED AT THE PENALTY PHASE IN THE PROSECUTOR'S CLOSING ARGUMENT

Also from Ms. Backers' "mercy and lenity" argument was the rhetorical question: "What mercy did he show to Tony when he put a contract on his life, when Tony decided to come forward?" (20RT 4200.) But as demonstrated in claim **VII** (see above, pp. 129-139), the proof of a contract on Tony Iuli's life was based only on the assertions contained in Ms. Backers' questions and on incompetent and irrelevant answers issued by Tony Iuli in response to those questions. In short, the jurors were invited by Ms. Backers to use this alleged contract as a factor in aggravation when there was no competent evidence to support it. The Fourteenth Amendment was violated in this (*Bruton* v. *United States* (1968) 391 U.S. 123, 131, fn. 6; *People* v. *Valentine* (1986) 42 Cal.3rd 170, 177) and, in the diminution of factual reliability for the penalty determination in this case, the Eighth Amendment was violated. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638.)

As to prejudice, it will be argued that the jury would not use this as factor (b) aggravation as manifesting a threat to use force or violence (§ 190.3(b)), since this was not listed as a factor (b) crime for the jurors, whether in Ms. Backers' opening statement (18RT 3679-3697) or in the trial court's instruction listing the factor (b) crimes presented for consideration. (20RT 4228-4229.) However, the alleged contract was easily seen as a factor (a) circumstance "of the crime of which the defendant was convicted in the present proceeding . . . ." (§ 190.3(a).) For if, as Ms. Backers expressly told the jurors, factor (a) was broad enough to include victim-impact evidence and loss "to this society, to this family, to this fiancée, to all his friends and loved ones," (20RT 4188), then the jurors could

surely infer that factor (a) was broad enough to include nefarious acts designed to corrupt the very proceeding in which the defendant was eventually convicted of the capital crime at issue, whose "circumstances" were legally ponderable in the choice of a penalty.

Thus, there was legal scope for the prejudice from the evidentiary errors that resulted in the illusion of evidence of a contract against Tony Iuli's life, and then there was indeed actual scope for this prejudice. In a case in which there were substantial factors in mitigation for the jurors to consider, any improper addition to the weight of aggravation contributed to the death verdict and requires reversal of that judgment. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

XIX.
THE GUILT-PHASE EVIDENTIARY ERRORS AND PROSECUTORIAL MISCONDUCT SURROUNDING EXHIBIT 46, THE LIST OF "AMERICA'S MOST WANTED SAMOANS," WERE NOT ONLY PENALTY PHASE ERRORS IN THEMSELVES, BUT WERE PREJUDICIALLY AUGMENTED BY THE PROSECUTOR'S FURTHER MISCONDUCT IN *MISSTATING* THE EVIDENCE THAT SHOULD NOT HAVE BEEN ADMITTED IN ANY EVENT

In issue **X** (see above, pp. 149-161), it was noted that the trial court rejected Ms. Backers offer, *in limine*, of Exhibit 46, the list of "AMERICA'S MOST WANTED SAMOANS," as a party admission connected to the murder of Nolan Pamintuan, and, anticipating a penalty trial, as evidence of appellant's lack of remorse for this murder. The trial court rejected this as at the time as "a stretch" (6RT 1540-1541), but allowed her to use the exhibit to impeach Tautai's testimony at the guilt phase of trial over repeated and meritorious foundational objections lodged by defense counsel. In the course of her cross-examination of

Tautai, she conveyed unproven information to the jurors, not only as to the authentication of the exhibit, but as to its character as a list showing gang status, and as a boast about the murder.

In that argument, appellant also adverted to Tony Iuli's testimony at the penalty phase about Exhibit 46 in order to show that Ms. Backers' guilt phase cross-examination of Tautai was also misconduct, since Iuli's testimony showed that she could not, and did expect to, prove the assertions contained in her cross-examination questions of Tautai. Although at the penalty trial Iuli finally authenticated Exhibit 46 as appellant's design, he testified there that appellant never explained to him the meaning of the list; that the list, as far as Iuli was concerned, merely showed their friends in order of age; and that being on the list was only in some general sense a "badge of honor." (19RT 3943-3945, 3952-3953; see above p. 149.) In short, Iuli failed to establish a foundation of personal knowledge as to the meaning of the list to appellant (*People* v. *Anderson* (2001) 25 Cal.4th 543, 573), while *Iuli*'s understanding of the meaning of the list was not a fact that was "of consequence to the determination of the action." (Evid. Code, § 210.)[45]

Thus, the evidentiary error at the guilt phase was revived at the penalty phase of trial in the form of Tony Iuli's testimony, and the same issue is cognizable on appeal in connection with the penalty phase because the very foundational objections that would have been appropriate at the penalty phase had already been overruled at the guilt phase during the cross-examination of Tautai. In other words, objection would have been futile (*People* v. *Chatman* (2006) 38 Cal.4th 344, 380; *People* v. *Thornton* (2007) _Cal.4th _, S046816, Slip Op., p. 86), and the evidence admitted in the guilt phase was already before the jurors in the

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[45] Evidence Code section 210 proves: "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

penalty phase and open for comment by Ms. Backers. (*People* v. *Cunningham* (2001) 25 Cal.4th 926, 1018-1019.)

And comment she did in her penalty phase closing argument:

> "Now that you know the real truth, the real evidence, the brutality of this crime, and you know how it not only destroyed a single life, not only a single human being's life, not only a kind unselfish, compassionate young person's life, but his whole family and his bride's family, and it turned his wedding day into a day of unending despair.
>
> "All of those who know and love Nolan will never wake up from this darkest nightmare. *And this nightmare is the handiwork of Afatia Ropati Seumanu, for which he has named himself one of America's most wanted Samoans, a badge of honor he awarded to himself for blowing Nolan's chest to pieces.*" (20RT 4133-4134, italics added.)

No one attested to Exhibit 46 being an award "for blowing Nolan's chest to pieces." Iuli did not testify to this even under Ms. Backers' skillful tutelage; she did not ask Palega about Exhibit 46 when he testified either at the guilt or penalty phase; and when she asked Tautai in the guilt phase, he answered that he had no knowledge of the list. If an expert could resolve this, she did not call one to the stand. If anything, Exhibit 46 pointed in a different direction from Ms. Backers' assertion. There were ten names on the list, six of which belonged to persons whom no one claimed had anything to do with the robbery and murder of Nolan. One of the persons, Tony Iuli, moreover, was a Blood and not a Crip. At most, Exhibit 46 manifested a sense of some sort of ethnic solidarity, and constituted a generalized "badge of honor" rather than a boast about the murder of Noel Pamintuan.

Thus, in this argument, Ms. Backers was not merely exploiting the trial court's evidentiary errors in connection with Exhibit 46, she was also *misstating* the erroneously admitted evidence, providing a new twist on the form of prosecutorial misconduct consisting of a misstatement of evidence. (*People* v. *Davis* (2005) 36 Cal.4th 510, 550.) But "misstatement" here mutes the character of the impropriety, which fits much better with the general definition of prosecutorial misconduct as a deceptive or reprehensible means of persuading the jury. (*People* v. *Samayoa* (1997) 15 Cal.4th 795, 841; *People* v. *Espinoza* (1992) 3 Cal.4th 806, 820.) This argument was both deceptive *and* reprehensible, and failure to object does not forfeit review of Ms. Backers' contribution of misconduct to the trial court's evidentiary error. (See *People* v. *Cunningham*, *supra*, 25 Cal.4th 926, 1018-1019.)

Thus, again the jurors were given the illusion of real evidence without the reality of it. And Ms. Backers saw to it that however illusory it was, it would be inflammatory. Exhibit 46, whatever it actually was, was presented to the jurors not only as a hierarchical list of members of the Sons of Samoa, a Crip gang, but in terms of the timing of its composition, as a boast of the murder of Noel Pamintuan. Obscured beneath the rhetoric of Ms. Backers' questions to Tautai and to Iuli, and beneath the gross inflation and misstatement of her argument, was the fact that Exhibit 46 was never in any relevant way established as a list of gang members, was never in any relevant way connected to the murder of Noel Pamintuan, and was never any relevant way connected to any violent or threatening act. But it was the questions and the argument that were before the jury in the guise of aggravation supported by supposedly substantial evidence – a misimpression that violates not only state law but also the Eighth and Fourteenth Amendments of the United States Constitution. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638; *Bruton* v. *United States* (1968) 391 U.S. 123, 131, fn. 6; *People* v. *Valentine* (1986) 42 Cal.3rd 170, 177.) This bloated and hollow, yet inflammatory, aggravation contributed to the obfuscation of an otherwise substantial case in

mitigation. In short, it was prejudicial, contributing to the death verdict in this case, and requiring its reversal. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

XX.
THE PROECUTOR COMMITTED MISCONDUCT IN ARGUING, CONTRARY TO THE TRIAL COURT'S ADMONITION, THAT APPELLANT'S WEARING OF JAIL CLOTHES WAS AN INSULT TO THE JURY; IN COMPARING THIS "INSULT" WITH THAT ISSUED BY RICHARD ALLEN DAVIS TO HIS CAPITAL JURY, THE PROSECUTOR COMPOUNDED HER MISCONDUCT

After the guilty verdict, and *in limine* of the penalty trial, the defense informed the trial court that appellant no longer wanted to wear civilian clothing, and chose to continue the trial in jail garb. The trial court inquired of appellant personally if this was the case, and appellant corroborated that this was his desire. (18RT 3673.) The court, without objection or opposition from Ms. Backers, announced that it would instruct the jurors that they were to draw no inferences or take appellant's choice of clothing into consideration in their penalty deliberations. (18RT 3673.) When the jury was brought in, the court gave that instruction:

> "THE COURT: Good morning, ladies and gentlemen.
>
> "Couple of things. First of all, Mr. Seumanu has chosen not to dress in civilian clothes. He is here in jail clothes. That is the defendant's choice that they can make. You are not to consider that in any way during your deliberations, and that is not a factor that should be considered by you in nay way during you deliberations.
>
> "Is there anybody that has a problem with Mr. Seumanu wearing jail clothing during this part of the trial?

"Seeing no hands." (18RT 3675.)

In her closing argument, Ms. Backers made the following reference to appellant's wearing jail clothing:

> "The guy – do you remember what Richard Allen Davis did to his jury after he got convicted?
>
> "Same thing Paki did to you. You convicted him of first-degree murder and specials. And guess what? He thumbed his nose at you, took down his hair, put his jail clothes on and said: You can't touch me. I am not afraid of you." (20RT 4166.)

This was misconduct.

First, the trial court issued at least an implied, but clear, order that there was to be no reference to appellant's jail clothing as a consideration against him in the penalty phase. For Ms. Backers then to argue that appellant's jail clothing was a factor to be used against him constituted misconduct and, worse, a deliberate flouting of the court's admonition. (*People* v. *Crew* (2003) 31 Cal.4th 822, 839; *People* v. *Bonin* (1988) 46 Cal.3rd 659, 689.) Further, insofar as jail clothing was constitutionally irrelevant to the issue of capital penalty selection (*State* v. *Finley* (W.Va.2006) 639 S.E.2nd 839, 841-844; see also *Deck* v. *Missouri* (2005) 544 U.S. 622), this aspect of Ms. Backers' misconduct violated the Eighth Amendment. (*Zant* v. *Stephens* (1983) 462 U.S. 862, 885-886; see also *Brown* v. *Sanders* (2006) 126 S.Ct. 884, 890-891.)

The second aspect of Ms. Backers' misconduct was to invoke the infamous name of Richard Allen Davis, whose murder of 12-year-old Polly Klaas in 1993 "galvanized support for the three strikes initiative" which "[w]ithin days . . . was on its way to becoming the fastest qualifying initiative in California history." (*Ewing* v. *California* (2003) 538 U.S. 11, 14-15.)

"In general, prosecutors should refrain form comparing defendants to historic or fictional villains, especially where the comparisons are wholly inappropriate or unlinked to the evidence." (*People* v. *Jablonski* (2006) 37 Cal.4th 774, 836, internal quotation marks omitted.) Of course, there was no "evidence" given the trial court's admonition to the jurors, but what was the comparison the prosecutor was making here?

It was to Richard Allen Davis's obscene gesture of contempt to the jurors in his capital case when they returned a guilty verdict against him on June 18, 1996. When the guilty verdict was announced, Davis turned to the TV camera in the courtroom, "winked, pursed his lips, and raised both hands with his middle fingers extended." (San Francisco Chronicle, June 18, 1996.)[46] The comparison was clearly inappropriate. For even if the jurors could consider the wearing of jail clothing as a pertinent factor in choosing a penalty, there were many interpretations possible other than an expression of contempt for the jurors. There was the resignation of an innocent or even guilty man to his perceived fate; there was the indifference or indignation of an innocent man to any further contumely of injustice; there was the redemption of a guilty man accepting what he deems to be justice; there was simply an innocent or naive belief that comfort should be a consideration when the presumption of innocence was no longer in play as a factor. (See *People* v. *Bradford* (1997) 15 Cal.4th 1228, 1363.) Any of this could exist quite independently of the intent to insult the jurors.

By contrast, Richard Allen Davis's gestures were unequivocal: they were the odiously arrogant expression of utter contempt for the honesty and decency that is worlds removed from the murder of a little girl. For Ms. Backers to invoke Richard Allen Davis was misconduct, and to the extent that it added an emotional

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[46] Appellant would request judicial notice of these occurrences as "[f]acts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute." (Evid. Code, § 452(g); see also Evid. Code, § 459(a).)

heat to the constitutionally irrelevant evidence of the jail clothing, it too partook of the Eighth Amendment violation.

There was no objection. However, an objection or admonition would have been useless. If the violation of the trial court's admonition to the jurors might have been cured by an admonition directly to Ms. Backers, the prejudice was ineffaceable with the mention of Richard Allen Davis and the reference to his notorious insult to the jurors and to the Klaas family. This was a reference so inflammatory that no admonition could have extinguished the harm. (See *People* v. *Wash* (1993) 6 Cal.4th 215, 281, fn. 2.) For the same reason, the misconduct was prejudicial. Its strong tendency to inflate the emotions of an already over-emotionalized case could only contribute more to the suppression by improper considerations of appellant's otherwise substantial case in mitigation. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

XXI.
THROUGH EVIDENTIARY ERROR AND PROSECUTORIAL MISCONDUCT, DARRYLL CHURISH WAS ALLOWED TO GIVE A SPECULATIVE OPINION ON APPELLANT'S INTENT TO COMMIT A ROBBERY

It was recounted in the statement of facts how Daryll Churish testified to his *assumption* that appellant would forcibly take a Raider's Jacket from a passerby at the mall if Churish wanted the jacket. The testimony was as follows:

> "Q. Now, Mr. Churish, had Paki ever offered to you that he would take somebody's coat from them so he could give it to you?
>
> "A. I don't know if he like came out straight up and said offered, but like one time, I guess I looked at a jacket. And his is like – we were at the mall – and he asked me if I wanted it. I was

like, no, that is all right. Because I would have to take it home to my mom and explain how I got it.

"Q. What kind of jacket were you admiring?

"MS. LEVY: Your honor, I will object and ask the answer be stricken. Speculation on the part of the witness.

"THE COURT: Objection overruled.

"MS. BACKERS: You can answer.

"A. I think it was a Raider jacket.

"Q. Was somebody wearing that jacket?

"A. Yes.

"Q. And so you admired that jacket.

"What do you say to Paki?

"A. I probably looked at t, said: that's a nice jacket. And he might have come back and said like: do you want it, or – and I said no.

"Q. Mr. Churish, did you say he might have come back, or he did? Didn't you tell me he did?

"Q. So what does he say to you when you admire the jacket?

"A. He says: do you want it? I was like: no.

"Q. He was going to take it off that guy for you, right?

"A. Probably, yeah.

"Q. And you said no?

"A. Yes." (18RT 3783-3784.)

"No witness may give testimony based on conjecture or speculation." (*People* v. *Chatman* (2006) 38 Cal.4th 344, 382.) Daryll Churish was obviously speculating about Paki's intentions, and the trial court erred in overruling defense counsel's objection. Furthermore, by the time Ms. Backers asked her leading question, "He was going to take it off that guy for you, right?" she *knew* she was attempting to elicit a speculative answer, which constitutes misconduct (*People* v. *Bonin* (1988) 46 Cal.3rd 659, 689), against which an objection would have been futile, since the overruled evidentiary objection rendered the misconduct possible. (*Id.*, at p. 380.)

Thus, the jurors were presented with a supposed inchoate robbery as factor (b) evidence based only on the incompetent conjecture and speculation of Daryll Churish, encouraged by Ms. Backers' leading questions to her own witness. This is evidence that should not have been before the jurors as a factor to consider in assessing the penalty. Further, that it was before them again diminished the reliability of the assessment. The error thus also constitutes a violation of the Eighth Amendment (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628), but whether as state-law error or as federal constitutional error, it contributed to the death verdict in this case and requires reversal of that judgment. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

XXII.
GUILT PHASE ERRORS RESULTING IN PENALTY PHASE PREJUDICE AS FACTOR (a) EVIDENCE OF THE SUPPOSED CORRUPTION OF THE TRIAL PROCESS BY APPELLANT, OR AS AN UNWARRANTED IMPUTATION AGAINST THE INTEGRITY OF THE DEFENSE

In claim **XVII** (see above, at pp. 207-208), appellant showed how Ms. Backers' guilt phase imputation against defense counsel was revived in the penalty phase and constituted an all-embracing slander against the discharge of any and all

duties of the defense. In claim **XVIII**, appellant demonstrated how the jurors could understand as factor (a) evidence such otherwise inadmissible information as the alleged contract on Tony Iuli's life. (See above, pp. 209-210.) The following guilt phase errors presented under the heading of this argument resulted in prejudice at the penalty phase in either of these two ways or in some cases in both ways.

1. *Doyle* Error

Imputations against the defense are not far-removed from imputations against the defendant, and the theme of abuse of trial process was, in the guilt phase, *Doyle* (*Doyle* v. *Ohio* (1976) 426 U.S. 610) errors, the subject of claim **II** above (see pp., 89-97), brought to bear on Ms. Backers' claim that appellant abused his Fifth Amendment right to silence and his Sixth Amendment right to effective assistance of counsel to provide him the time and means to concoct his defense. It is in the implication that the defendant, as well as the defense, was abusing the trial process that *Doyle* error entered the penalty phase. As in the case of the alleged contract on Iuli's life, the manipulation of the alibi evidence could be deemed a factor (a) consideration once Ms. Backers explained to the jurors how factor (a) was broad enough to include far-ranging considerations of victim impact. (20RT 4188.) Ms. Backers' rhetorical question in her penalty phase closing argument, "Isn't that morally perverted to ask for leniency for somebody like that?" (20RT 4200), needed only a slight adjustment in syntax to embrace the shift in focus from defense to defendant: "Isn't it morally perverted for somebody like that to ask for leniency?" Thus, the *Doyle* error in the guilt phase illuminated the prosecution's penalty case as well, and it did so in the false light that emanates from error.

Thus, the Eighth Amendment (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628) and Fourteenth Amendment (*Doyle* v. *Ohio*, *supra*, 426 U.S. 610) errors of the guilt phase of trial were as much the same constitutional errors of the penalty phase of trial. For the reasons adduced in the previous penalty phase claims, the

error requires reversal of the death sentence. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

2. Judicial Misconduct in Commenting on Tautai's Credibility

Appellant contended above in claim **IX** (see above, pp. 141-147) that the trial court committed misconduct when it sustained an objection against Ms. Backers' argumentative questioning of Tautai, but did so with the gratuitous comment, "Ms. Backers, I know the temptation . . . ." (15RT 3327.) But if this was intended only as a comment on Tautai's credibility, it could not but be heard or at least recollected by the jurors as a comment on the defense as well, which presented Tautai as, in Ms. Backers' words, one of the "several shams that have been put forward to you in the hopes you might believe one of them." (17RT 3604-3605.) In short, the judicial comment contributed to the broad-based factor (a) consideration outlined in the previous section of this argument, comprehending the abuse and manipulation of the trial process. This too constituted an Eighth Amendment violation (*Roper* v. *Simmons* (2005) 543 U.S. 551, 603; *Beck* v. *Alabama* (1980) 447 U.S. 625, 628), and one that was prejudicial. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

3. Improper Opinion Evidence and the False Evidence that Tautai Personally sought a deal from the Prosecution

In claim **VI** (see above, pp. 125-128) appellant demonstrated how Tony Iuli was improperly allowed to give an opinion that Tautai was "going for" appellant's proposal that he, Tautai, "take the beef" for the murder. In claim **XI** (see above, pp. 162-173), appellant demonstrated how Ms. Backers falsely asserted to the jurors that Tautai offered to testify against appellant in return for the same deal she offered Iuli and Palega. These of course reflected on Tautai's credibility, but in the penalty phase they were part of theme of the immorality of the defense, which

re-entered the case through the expansive factor (a). For Tautai, again, was a "sham put forth" by the defense, and the cold calculated immorality of fraternal betrayal, whether Tautai by appellant or appellant by Tautai, reflected, and was intended to reflect, the excessive immorality of the crime itself. Yet the evidence of this immorality was incompetent, consisting in nothing but the biased and untrustworthy opinion of Tony Iuli and in Ms. Backers' assertions of her supposedly extrajudicial knowledge, which she in any event falsely represented. To allow this to add to the weight of aggravation was constitutional error (*Roper* v. *Simmons* (2005) 543 U.S. 551, 603; *Beck* v. *Alabama* (1980) 447 U.S. 625, 628), whose prejudice contributed to the death verdict in this case. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

XXIII.
THE CUMULATIVE ERRORS OF THE PENALTY PHASE AND OF THE GUILT PHASE THAT AFFECTED PENALTY CONSIDERATIONS VITIATED APPELLANT'S RIGHT TO A FAIR PENALTY TRIAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

The accumulation of incompetent and irrelevant evidence in this case was impressive. It begins with Ms. Backers's vouching misconduct, by which she staked her personal integrity on the morality of putting appellant to death, and provided the jurors her own personal example of appropriate mitigation and lenity in conferring a determinate term of 16 years on Tony Iuli and Jay Palega. (See above, pp. 182-207.) The complementary sentiment she conveyed was that the defense of appellant was "morally perverted," rendering her misconduct in impugning the integrity of defense counsel merely a continuation of her vouching errors. (See above, pp. 207-208.) But a morally perverted defense requires a morally perverted defendant, and Ms. Backers' juxtaposition of appellant in his

jail clothing with Richard Allen Davis with his middle fingers extended to the jury who had just convicted him of murdering a twelve-year-old girl added a vivid and compelling, if entirely irrelevant and misleading, image for the jurors to contemplate in choosing whether appellant should live or die. (See above, pp. 214-217.)

Then there was the evidence attested to by no one with percipient or competent knowledge, but purveyed confidently to the jurors by the apparently omniscient prosecutor sometimes with the help of a witness docile and sufficiently intelligent to follow the prosecutor's unsubtle lead. This applies to the alleged contract on Tony Iuli's life (see above, pp. 209-210) and to Daryll Churish's opinion that appellant would have committed a robbery if Churish had allowed it. (See above, at pp. 217-219.) This applies less to the distortions of Exhibit 46, but only because Tony Iuli would not quite characterize "AMERICA'S MOST WANTED SAMOANS" in the way that Ms. Backers wanted him to. She made up for that lack of actual evidence with a blatant and overwrought misstatement of his testimony in her penalty argument, so that Exhibit 46 became appellant's boast for the murder of Noel Pamintuan. (See above, pp. 210-214.)

Finally, there were the errors resulting in the implied claim that appellant or his defense team, morally perverted as they were, were manipulating the process, whether it was by concocting an alibi under the shield of the Fifth and Sixth Amendments (see above, pp. 219-221) or whether it was trumping up a third-party culpability defense through Tautai and keeping him somehow in line despite his eager attempt at a tergiversation fatal to the defense – a real "sham put forth" by Ms. Backers. (See above, at pp. 221-222.)

On top of all this, the basic standard by which the penalty was to be assessed, requiring that aggravating factors be "so substantial" when compared with mitigating factors, was distorted by the trial court's repeated admonition to the prospective jurors, which included those who would become the petit jurors in this case, that that standard was "ambiguous;" and effectively, that the scale from

the outset was in equipoise. The result of a weighing process in a capital penalty trial with a scale so calibrated is inevitably death. (See above, pp. 197-207.)

Against all this, there was a substantial case in mitigation that should have been heard and evaluated in its proper perspective. Appellant elicited loyalty and love from those closest to him. His criminality and gang activity was closely aligned to his virtues, which-were tribal in nature and conditioned by a cultural heritage from the Pacific Islands awkwardly transplanted to the sub-urban milieu of Hayward. Within this heritage, appellant met the moral demands imposed on him, which in some cases, such as submission to *pa* through the ritual and painful tattooing, was demanding.

In addition, it was important for the defense to advance moral principles that could at least offset the compelling pathos of the victim-impact evidence presented in this case. It was important that the jury hear the salutary caution that, within the context of penalty selection, the tragedy of murder with its pain to the relatives of the victim is a given; that the circumstances of the victim's life do not necessarily augment or add to the defendant's immorality in committing murder (see *People* v. *Love* (1960) 53 Cal.2nd 843, 856-857); that the moral consideration of victim-impact risks a sort of rating of victims – something that contains its own kind of immorality; and that victim-impact evidence invites the jurors to rate the murderer against his victim in choosing between two already severe penalties.

None of this – either the case in mitigation or the counter-case against aggravation – could be adequately heard or considered in the accumulation of error that occurred in this case. These errors combined undoubtedly contributed to the death verdict in this case, and they require reversal of that verdict. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

XXIV.
VICTIM IMPACT EVIDENCE WAS NOT MADE ADMISSIBLE AS FACTOR (a) EVIDENCE UNDER THE 1978 DEATH PENALTY STATUTE, WHOSE RULE OF PRECLUSION IN THIS REGARD WAS DERIVED FROM THE 1958 STATUTE, WHICH PROHIBITED SUCH EVIDENCE

The penalty consideration of victim-impact began in this case with Ms. Backers' guilt phase opening statement, where the contrast between the raw brutality of death by shotgun blast and the sweet expectations of a wedding were contrasted for their full emotional and moral effect. The guests of the wedding, listed on the tuxedo rental receipts or mentioned in the last-minute to-do list became victims affected by the murder. (See above, pp. 106-110.) The guilt phase closing argument continued this stream of emotion in regard to the suffering of the family (see above, pp. 85, 110-111), and culminated in the compelling image of a mother hovering over her son's torn body at the coroner's office and the fiancée bidding adieu to her bridegroom lying in an open casket dressed in his wedding tuxedo. (See above, at pp. 194-195.) Undoubtedly some degree of so-called victim-impact evidence is admissible under the Eighth Amendment (*Payne* v. *Tennessee* (1991) 501 U.S. 808, 829), but whether it is admissible under California's death penalty statute is another question.[47]

Appellant recognizes that this Court has held that indeed the evidence is admissible under section 190.3(a) as evidence related to "[t]he circumstances of

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[47] The constitutional limits of victim-impact evidence, which were exceeded with such images as the open-casket photograph and Mrs. Manio's vigil at the coroner's office, cannot be tested on the appellate record in this case. Trial counsel lodged no objections to any of the victim impact evidence presented. (17RT 3661-3662; 18RT 3674, 3803-3805.) This forfeits the issue for appeal (*People* v. *Lewis* (2006) 39 Cal.4th 970, 1058), leaving for collateral proceedings the determination of whether the failure to lodge an appropriate objection constituted effective assistance of counsel. (*People* v. *Visciotti* (1992) 2 Cal.4th 1, 47, fn. 17; *People* v. *Pope* (1979) 23 Cal.3rd 412, 426.)

the crime of which the defendant was convicted in the present proceeding . . . ." (*People* v. *Edwards* (1991) 54 Cal.3rd 787, 835; *People* v. *Lewis, supra*, 39 Cal.4th 970, 1056-1057.) Nonetheless, in these cases, the history and intent of the language was not argued or presented to the Court, and it is fundamental that a case is not authority for a proposition neither presented nor considered. (*In re Tartar* (1959) 52 Cal.2nd 250, 258; *Ginns* v. *Savage* (1964) 61 Cal.2nd 520, 524; *People* v. *Gilbert* (1969) 1 Cal.3rd 475, 482, fn.7; *People* v. *Dillon* (1983) 34 Cal.3rd 441, 473-474; *People* v. *Toro* (1989) 47 Cal.3rd 966, 978, fn. 7; *Roberts* v. *City of Palmdale* (1993) 5 Cal.4th 363, 372; *American Federation of Labor* v. *Unemployment Appeals Bd.* (1996) 13 Cal.4th 1017, 1039.) Thus, if that history demonstrates a contrary construction, *stare decisis* should not foreclose a different view.

Of course, in ascertaining the intent of a statute, the "usual and ordinary" meaning of the words govern, and resort to extrinsic aids for construction is warranted only if the meaning is unclear or ambiguous. (*Estate of Griswold* (2001) 25 Cal.4th 904, 910-911; *Marshall* v. *Pasadena Unified School District* (2004) 119 Cal.App.4th 1241, 1254.) Certainly, the murder of a human being extinguishes and abates all that person's hopes and endeavors and rips apart the fabric of his relationships. But does the language, "circumstances of the crime of which the defendant was convicted in the present proceeding," in the ordinary and usual meaning of these words embrace these matters?

The phrase "circumstances of the crime" connotes an intense focus on the immediate criminal act. To further qualify it with, "of which the defendant was convicted in the present proceeding," reinforces the intensity of focus by implying that *legally* defined commission of the act is the basis of the factor (a) consideration. Or can the phrase "circumstances of the crime" embrace what the guilt evidence legally relevant to the commission of the crime incidentally shows, such as the victim's family or, as here, the victim's upcoming wedding? (See *Payne* v. *Tennessee*, *supra*, 501 U.S. 808, 839-840 (Souter, J., conc.).) Or does it

also embrace matters more far afield, such as a television interview the victim once gave to a local television station discussing her accomplishments and interests (*People* v. *Prince* (2007) 40 Cal.4th 1270, 1287), or photographs of the victim's daughters accompanied by testimony that he was very close to them (*People* v. *Cook* (2006) 39 Cal.4th 566, 609), or as here, the mother's testimony about viewing the raw wounds of her dead son at the coroner's office, or the testimony and photographs about the funeral held at the same church the wedding was to have taken place? Clearly, resort to extrinsic aids of statutory construction is warranted.

The current law governing the selection of penalty in a capital case, Section 190.3, was enacted by voter initiative in November, 1978. (*People* v. *Howard* (1988) 44 Cal.3rd 375, 443-444.) The language, "circumstances of the crime" was taken directly from the language of section 190.3 of he 1977 statute, which in turn was derived from section 190.1 of the 1958 death penalty statute, which provided that in determining punishment in a capital case, the jury could consider "the circumstances surrounding the crime, . . . the defendant's background and history, and . . . any facts in aggravation or mitigation of penalty." (Former § 190.1, added by Stats. 1957, c. 1968, p. 3509, § 2, amended by Stats. 1959, c. 738, p. 2727, § 1; see also *People* v. *Terry* (1964) 61 Cal.2nd 137, 146; and *People* v. *Ray* (1996) 13 Cal.4th 313, 346.)

Although "circumstances surrounding the crime" was not defined in the statute, it was construed by this Court in a way that made clear that victim-impact evidence was strictly precluded. Thus, in *People* v. *Love* (1960) 53 Cal.2nd 843, the Court held that under the 1958 law, the harm caused to the victims could not be admitted absent evidence showing that the defendant intended to inflict that harm. There, defendant was convicted of shooting and killing his wife. At the penalty phase, the state sought to introduce photographs of the victim at the hospital, and a tape recording of the victim made there shortly before her death – both in order to show that she suffered great pain before she died. On appeal,

defendant argued that the evidence was inadmissible; the state argued that it was admissible under state law "to demonstrate the enormity of the crime that defendant had committed." (*Id.*, at p. 856.)

The Court rejected the state's argument, noting that "[t]he prosecution did not suggest that defendant intended to cause such pain . . . " (*id.* at p. 855), and ruling that in the absence of such a showing of intent, the evidence was inadmissible. (*Id.*, at pp. 856-857 and fn. 3.) Evidence showing the consequences of a murder was, according to this Court, of "doubtful" relevance to choosing between life and death unless the defendant intended those consequences." (*Id.*, at p. 857, fn. 3.) Several years later in *People* v. *Floyd* (1970) 1 Cal.3rd 694, this Court upheld a death verdict against a claim of prosecutorial misconduct, but relied on *Love* to find impropriety in the prosecutor's arguments about victim impact "without reference to the [defendant's] intent." (*Id.*, at p. 722.)

Thus, this Court conferred on the phrase "circumstances surrounding the crime" a construction that would preclude all victim impact evidence not traceable to the defendant's intent to cause the specific harm constituting victim impact evidence. This gives rise to the settled principle of statutory construction, that "[w]here . . . legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the same construction, unless a contrary intent clearly appears." (*Estate of Griswold, supra*, 25 Cal.4th 904, 915-916.) This principle of construction also applies to legislation enacted by the initiative process (*In re Jeanice D.* (1980) 28 Cal.3rd 210, 216), and therefore applies to the 1978 death penalty law. Not only does a contrary intent *not* appear in section 190.3(a) from this law, but the phrase "circumstance *of* the crime" suggests an even *narrower* focus than "circumstances *surrounding* the crime." If the latter is construed as narrowly as possible, the former cannot be construed any more broadly. Under section 190.3(a) of the current death penalty law, victim impact evidence is inadmissible.

Much of the factor (a) evidence in this case was thus excludable in fact under factor (a) properly understood. There could be no testimony at the penalty phase from Nolan's fiancée, from his brother, or from his mother; there would not be the emotional elaborations on a wedding transformed into a funeral; and if there would still be evidence of a shotgun blast to the heart as a vital organ, there would not be the argument about "a hole in his heart that his mother will later touch her fingers to." (20RT 4147.) The list can be extended from both the guilt and penalty phases, and such evidence and argument pervaded the entire trial, so that it cannot possibly be shown beyond a reasonable doubt that the use of victim impact evidence in this case was harmless. (*People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

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

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

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that

system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, fn. 6.)[48] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

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

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most

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

deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A.
Appellant's Death Penalty Is Invalid Because Section 190.2 Is Impermissibly Broad

The Eighth Amendment requires that a death penalty law 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.3rd 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make <u>all</u> murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative

statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-six special circumstances[49] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

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

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

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the

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

arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.[50]

B.
Appellant's Death Penalty Is Invalid Because Section 190.3(A) As Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution

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

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. (*People* v. *Dyer* (1988) 45 Cal.3rd 26, 78; *People* v. *Adcox* (1988) 47 Cal.3rd 207, 270; see also CALJIC No. 8.88 (2006) ¶ 3.) The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support

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[50] In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman* v. *Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime (*People* v. *Walker* (1988) 47 Cal.3rd 605, 639, fn. 10), or having had a "hatred of religion" (*People* v. *Nicolaus* (1991) 544 Cal.3rd 551, 581-582) or threatened witnesses after his arrest (*People* v. *Hardy* (1992) 2 Cal.4th 86, 204), or disposed of the victim's body in a manner that precluded its recovery. (*People* v. *Bittaker* (1989) 48 Cal.3rd 1046, 1110,fn. 35.) It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

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

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

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S.

420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C.
The Lack Of Procedural Safeguards To Avoid Arbitrary And Capricious Sentencing Deprived Appellant Of The Right To A Jury Determination Of Each Factual Prerequisite To A Sentence Of Death In Violation Of The Sixth, Eighth, And Fourteenth Amendment To The United States Constitution

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

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire

process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

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

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

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 296, and *Cunningham v. California* (2007) 127 S.Ct. 856.

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

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances

sufficiently substantial to call for leniency. (Id., at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.*, at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. *Any* factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

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

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

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory

sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham v. California, supra*, 127 S.Ct. at p. 871.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

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

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[51] As set forth in California's "principal sentencing instruction" (*People v.*

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[51] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative

Farnam (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (18RT 3678-3679; 20RT 4239-4240), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[52] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[53]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey*

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determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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

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

(2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.) The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[54]

In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Id.*, pp. 862-863.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra,* at p. 868.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the

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[54] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* 127 S.Ct. at p. 868.)

point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. 870):

> "The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* 'bright-line rule' was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham, supra,* at p. 869.)

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

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

This holding is simply wrong. As section 190, subd. (a)[55] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 862.)

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

> " . . . . This argument overlooks *Apprendi*'s instruction that the relevant inquiry is one not of form, but of effect.' 530 U.S., at 494, 120 S.Ct. 2348. In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151." (*Ring* v. *Arizona*, *supra*, 536 U.S. 584, 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal

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

sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

In addition, the reasonable doubt standard must be applied to the relation between aggravation and mitigation so that the former must be found beyond a reasonable doubt to outweigh the latter. For a determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital

murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Az.2003) 65 P.3rd 915, 943; accord, *State v. Whitfield* (Mo.2003) 107 S.W.3rd 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State*, *supra*, 59 P.3d 450.[56])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[57] There can be no doubt that "[c]apital defendants, no less than non-capital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (*Ring* v. *Arizona*, *supra*, 536 U.S. at p. 589.) Further "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death." (*Id.*, at p. 609.)

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs

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

[57] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2. The Due Process and Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require that the Jury in a Capital Case be Instructed that They May Impose a Sentence of Death Only if they are Persuaded Beyond a Reasonable Doubt that the Aggravating Factors Exist and Outweigh the mitigating Factors and that Death is the Appropriate Penalty

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

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

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

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3rd 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3rd 306 (same); *People v. Thomas* (1977) 19 Cal.3rd 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3rd 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

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

> " . . . . [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citation omitted.] The stringency of the 'beyond a reasonable doubt' standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.'" (*Id.*, at p. 455.)

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

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson* v. *North Carolina* (1976) 428 U.S. 280, 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

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

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

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

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

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

at p. 267.)[58] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (§ 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2nd 417, 421; *Ring v. Arizona*, *supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

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

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

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced

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

by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

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

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

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances.

(*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing. Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3rd 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Prosecution May not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even if it Were Constitutionally Permissible for the Prosecutor to do so, Such Alleged Criminal Activity Could not Constitutionally Serve as a Factor in Aggravation Unless Found to be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under 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; *State v. Bobo* (Tenn. 1987) 727 S.W.2nd 945.) Here, none of the factor (b) crimes adduced as evidence in aggravation had been adjudicated and reduced to a conviction.

The U.S. Supreme Court's recent decisions in *U. S. v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

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

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.) In the instant case, Ms. Backers went through the entire list of possible factors in mitigation to show how they *did not* apply, and in this she relied on the qualifications in the language in which these factors were set forth. (20RT 4149-4154.)

7. The Failure to Instruct that Statutory Mitigating Factors were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and evenhanded Administration of the Capital Sanction.

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

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

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

> "The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47

> Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, '*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*' (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)" (*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3rd 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2nd 1295, 1300 [holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2nd 512, 522 [same analysis applied to state of Washington].)

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

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

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings* v. *Oklahoma* (1982) 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D.

California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms Of Humanity And Decency And Violates The Eighth And Fourteenth Amendments.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S.

361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the

law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot, supra*, 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[59] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

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

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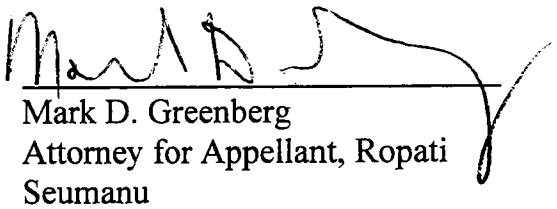
[59] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

CONCLUSION

In a case so dominated by the prosecutor's misconduct, abetted at crucial points by trial error, the standards of a fundamentally fair trial under the Fourteenth Amendment, and for a fundamentally fair capital trial under the Eighth Amendment, were seriously and prejudicially violated. Judgment in this case should be reversed in its entirety, and, at the very least, the sentence of death must be reversed.

Dated: July 30, 2007

Respectfully submitted,

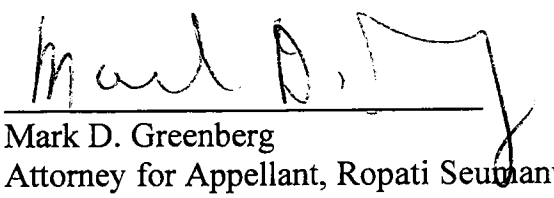


Mark D. Greenberg
Attorney for Appellant, Ropati Seumanu

CERTIFICATION OF WORD-COUNT

I am attorney for appellant in the above-titled action. This document has been produced by computer, and in reliance on the word-count function of the computer program used to produce this document, I hereby certify that, exclusive of the table of contents, the proof of service, and this certificate, this document contains 81,388 words.

Dated: July 30, 2007



Mark D. Greenberg
Attorney for Appellant, Ropati Seumanu

[CCP Sec. 1013A(2)]

The undersigned certifies that he is an active member of the State Bar of California, not a party to the within action, and his business address is 484 Lake Park Avenue, No. 429, Oakland, California; that he served a copy of the following documents:

APPELLANT'S OPENING BRIEF

by placing same in a sealed envelope, fully prepaying the postage thereon, and depositing said envelope in the United States mail at Oakland, California on July 30, 2007 addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 30, 2007 at Oakland, California.

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