AUTOMATIC APPEAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JUAN VILLA RAMIREZ,** **Defendant and Appellant.**	**No. S099844** **(Kern Co. Super Ct. No. SC076259A)**

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF KERN

The Honorable Kenneth C. Twisselman, Presiding

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

California Constitution

United States Constitution

STATUTES

MISCELLANEOUS

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JUAN VILLA RAMIREZ, Defendant and Appellant.	**DEATH PENALTY CASE** **NO. S099844** (Kern Co. Super Ct. No. SC076259A)

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

On August 26, 1997, a criminal complaint was filed in municipal court in Case No. BF083019A, charging appellant, Juan Villa Ramirez, with (1) violating Health and Safety Code section 11370.1, subdivision (a), possession of methamphetamine while armed with a firearm, on August 22, 1997; (2) having a loaded, operable firearm in his possession, in violation of Health and Safety Code section 11550, subdivision (e), on August 22, 1997; and (3) having a handgun in his possession on that same date, in violation of section 12021.5, subdivision (a), having been previously

convicted in 1994 of a prior felony (Veh. Code, § 10851) in 1994. (1 CT 1–3.)[1]

Appellant was arraigned on these charges on July 27, 1998. (1 CT 38; 1 CT 257 et seq.) On that same date, appellant was arraigned in municipal court on three other cases:

1. In Case No. BF86073A [the killing of Chad Yarbrough], appellant was charged with a violation of section 187 [murder], while personally using a firearm, in violation of section 12022.5. It was further alleged that the crime was committed during the course of a kidnapping, a special circumstance within the meaning of section 190.2, subdivision (a)(17)(B); and that the murder was committed during the course of a carjacking, in violation of section 190.2, subdivision (a)(17)(L). He was further charged with a violation of section 209, subdivision (b) [kidnapping] while personally armed with a firearm and with knowing that another principal is personally armed with a firearm, in violation of section 12022.5, subdivision (a) and section 12022, subdivision (d), and with violating section 215, subdivision (a) [carjacking] while personally using a firearm,

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[1] All statutory and section references are to the California Penal Code unless otherwise stated. The Reporter's Transcript will be abbreviated as RT; the Clerk's Transcript as CT; the jury questionnaires as JQ. The augmented transcripts will be referred to as either ACT or ART.

in violation of section 12022.5, subdivision (a), and with conspiracy to commit the murder of Chad Yarbrough, in violation of section 182, while knowing that another principal is armed with a firearm, in violation of section 12022, subdivision (d). (2 CT 325, 328 et seq.)

2. In Case No. LF003885B [kidnapping of Leonel Paredes], appellant was charged with a violation of section 215, subdivision (a), section 209.5, and section 209, subdivision (a) while personally armed with a firearm in violation of section 12022.5, subdivision (a); with a violation of Vehicle Code section 10851, subdivision (a) while personally armed with a firearm, in violation of section 12022.5, subdivision (a); and with a violation of section 666.5, subdivision (a). (1 CT 136; 2 CT 328 et seq.)

3. In Case No. LF 003896B [kidnapping/assault of Juan Carlos Ramirez], appellant was charged with violating section 212.5, subdivision (c), while personally using a firearm, in violation of section 12022.5, subdivision (a); with a violation of Vehicle Code section 10851, subdivision (a), while personally using a firearm, in violation of section 12022.5, subdivision (a); and with a violation of section 209.5, while personally using a firearm, in violation of section 12022.5, subdivision (a). (1 CT 257 et seq.; 2 CT 325.) On August 10, 1998, Michael Gardina was appointed to represent appellant. (1 CT 271–272.)

Efrain Garza was also charged as a codefendant in Case No. BF86073. (2 CT 314, 342, 355.) On September 24, 1998, appellant and his codefendant moved to exclude the media from the preliminary hearing, arguing that "the case has received an extraordinary amount of publicity and such publicity is likely to continue." (2 CT 438, 448.)

Judge Sharon Mettler sent a letter to the press announcing that there would be 5 of 27 available seats reserved for the media. On September 27, 1998, counsel moved to recuse Judge Mettler for cause, on grounds that she had pre-decided the motion to exclude all media from the preliminary hearing. (2 CT 464.)

Judge Mettler replied with a declaration in which she asserted that she could fairly and impartially hear the matter. (2 CT 510.) She wrote that a number of judges had already recused themselves because a municipal court employee was the decedent Chad Yarbrough's aunt.[2] Judge Mettler had reserved seats for the family members and friends of both the victims and the defendants as well as the press, and had not committed herself in her letter; it contained no guarantee that the press would be able to attend.

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[2] Diana Yarbrough was then a supervising clerk of the Kern County Municipal Court. (See Args. I.F.2, and XV, *post.*)

(2 CT 511–512.) On October 1, 1998, the motion to recuse Judge Mettler was denied. (2 CT 508.)

On October 5, 1998, the hearing regarding exclusion of the media began with the presentation of evidence from local school officials and members of the press. (2 CT 526 et seq.) The motion was ultimately denied, and the preliminary hearing was continued until January 26, 1999. At the conclusion of the preliminary hearing on January 27, 1999, appellant and his codefendant were held to answer on all counts of the criminal complaints filed against them. (4 CT 1097.)

An information numbered SC 76259A & B was filed in Kern County Superior Court against appellant and codefendant Garza on February 5, 1999. They were charged with first degree murder of Chad Yarbrough in violation of section 187 in count 1, and two special circumstances: murder committed during the commission of a kidnapping, in violation of section 190.2, subdivision (a)(17), and murder committed during the commission of a robbery, in violation of section 190.2, subdivision (a)(17). Appellant was charged with personally using a firearm during the commission of these offenses, in violation of section 12022.5, subdivision (a). (5 CT 1491–1492.)

Appellant was charged with 10 additional counts, as follows:

Count 2 – a violation of section 209, subdivision (b)(1) [kidnapping], together with the personal use of a firearm in violation of section 12022.5, subdivision (a) [victim Chad Yarbrough];

Count 3 – a violation of section 215, subdivision (a) [robbery of a motor vehicle] together with the personal use of a firearm in violation of section 12022.5, subdivision (a) [victim Chad Yarbrough];

Count 4 – a violation of section 209.5 [kidnapping] together with the personal use of a firearm in violation of section 12022.5, subdivision (a) [victim Juan Carlos Ramirez];

Count 5 – a violation of section 215, subdivision (a), together with the personal use of a firearm in violation of section 12022.5, subdivision (a) [victim Juan Carlos Ramirez];

Count 6 – a violation of section 212.5, subdivision (c), together with the personal use of a firearm, in violation of section 12022.5, subdivision (a) [victim Juan Carlos Ramirez];

Count 7 – a violation of section 209, subdivision (a), and personal use of a firearm, in violation of section 12022.5, subdivision (a) [victim Leonel Paredes];

Count 8 – a violation of section 209.5, and personal use of a firearm, in violation of section 12022.5, subdivision (a) [victim Leonel Paredes];

Count 9 – a violation of section 212.5, subdivision (c), and personal use of a firearm, in violation of section 12022.5, subdivision (a) [victim Leonel Paredes];

Count 10 – possession of methamphetamine while armed with a loaded, operable firearm, in violation of Health and Safety Code section 11370.1, subdivision (a); and

Count 11 – possession of an operable, loaded firearm while unlawfully under the influence of methamphetamine, in violation of Health and Safety Code section 11550, subdivision (e). (5 CT 1491–1498.)

On March 28, 2000, the matter was assigned to the Honorable Kenneth Twisselman, and Anthony Bryan was appointed co-counsel for appellant with Michael Gardina. (1 RT 621; 2 CT 343.) A motion for change of venue due to excessive pretrial publicity was filed on May 9, 2000. (6 CT 1727 et seq.) A hearing on the motion began on June 5, 2000. On June 16, 2000, the motion to change venue was denied without prejudice to being renewed after jury voir dire was completed. (4 RT 1277–1281.)

Appellant filed a motion to recuse the district attorney's office on June 5, 2000. (8 CT 2435.) That motion was denied on June 26, 2000. (4 RT 1327, 8 CT 2938.) On June 14, 2000, codefendant Efrain Garza filed

a motion to sever his trial from that of appellant. (10 CT 2759.) On June 28, 2000, the motion was granted. (5 RT 1553–1554; 10 CT 1953–2954.) Mr. Garza subsequently entered a plea of guilty in return for a sentence of life without possibility of parole. He was sentenced on July 10, 2000. (6 RT 1591.)

Trial began on November 27, 2000, on counts 1 though 9; counts 10 and 11 were bifurcated. (4 RT 1341–1344; 8 CT 2939; 6 RT 1760–1764.) Appellant filed a renewed motion to change venue on December 14, 2000, after questionnaires were completed by prospective jurors, (12 CT 3317), and again on January 5, 2001. (12 CT 3358.) A hearing was held, and the motion was denied on January 16, 2001. (27 RT 6523–6527.) Appellant filed a motion to recuse the judge pursuant to Code of Civil Procedure section 170.1 on January 16, 2001. (13 CT 3719; 27 RT 6351.) The jury was sworn the following day, on January 17, 2001. (28 RT 6701–6702.)

Appellant filed a petition for writ of mandate and request for stay with the Fifth District Court of Appeal on January 26, 2001, along with exhibits of media coverage and transcripts. His petition was supported by a request to file an amicus brief in support of the petition by Romero Cuevas, Consul of Mexico, on behalf of the government of Mexico. The petition was denied on January 30, 2001. (See docket for Case No. F037445.)

Appellant refiled the petition on February 5, 2001, in this Court. The petition was denied on February 9, 2001. (See docket for Case No. S094961.) The motion to recuse Judge Twisselman was denied by the Honorable James Quaschnick of the Fresno County Superior Court on February 28, 2001. (15 CT 4382.) Shortly thereafter, without notice to trial counsel, Judge Twisselman filed a complaint against Messrs. Gardina and Bryan with the State Bar of California. (See Arg. XXIV.C, *post.*)

The jury began deliberating on March 1, 2001. During deliberations, the trial court granted the jury's request that the testimony of Leonel Paredes and Juan Carlos Ramirez be reread. The court denied the jury's requests for a dictionary and to see a cardboard gun made by the prosecutor. (17 CT 4802–4810; 54 RT 12,174; 55 RT 12,431.)

The jury deliberated for 25 hours over the course of seven days. (15 CT 4393, 4417, 4420, 4432, 4478, 4489, 4512.)

On March 12, 2001, the jury returned a verdict of guilty as charged in count 1 (murder) and found true the special circumstances and personal use of a firearm enhancement. (17 CT 4813–4817.) It further found appellant guilty as charged in counts 2 and 3 found that he personally used a firearm in the commission of each offense. (17 CT 4818–4825.)

Regarding Juan Carlos Ramirez (counts 4–6), the jury found appellant guilty as charged in counts 4 and 6, and found the enhancements charged against him to be true, but found appellant not guilty of count 5. (17 CT 4826–4830.) Regarding Leonel Paredes, appellant was found guilty of all charges, and all charged enhancements were found to be true. (17 CT 4833–4839.)

The penalty phase of appellant's trial began on March 19, 2001. (17 CT 4994.) The jury began deliberating on March 23, 2001, and on March 28, 2001, after four days and approximately 20 hours of deliberations, it reached a verdict of death for count 1. (17 CT 5057, 5080, 5082, 5084.)

On April 3, 2001, appellant filed a motion to dismiss counts 10 and 11 of the information. (18 CT 5157.) The prosecutor filed a response and opposition on April 17, 2001. (18 CT 5163.) On April 20, 2001, the trial court denied the motion. (18 CT 5167.)

Trial began on the bifurcated counts 10 and 11 on April 30, 2001. The parties stipulated to a change of vicinage. The jurors were to be drawn from east Kern County in the area around Ridgecrest and Boron; jurors picked from that area for appellant's first trial were less likely to be familiar with the case than jurors drawn from central Kern County. (64 RT

13907–13913; 65 RT 13953–13954.) On May 22, 2001, the jury convicted appellant on both counts 10 and 11. (18 CT 5301.)

Motions for a new trial and modification of the verdict were heard and denied on July 20, 2001. On that same date, appellant was sentenced to death. (19 CT 5529–5535.) This appeal is automatic.

STATEMENT OF FACTS

A. GUILT PHASE

1. The Setting

Arvin and Lamont are two towns southeast of Bakersfield in Kern County, and the scene of the crimes charged in the case at bench. Each was large enough at the time of this trial to have its own newspaper (the Lamont *Reporter* and the Arvin Tiller). The decedent, Chad Yarbrough, was from Arvin, as were his friends, brothers Freddy Gomez and Jose Luis Gomez. Appellant and his family, along with his codefendant Efrain Garza and other associates (Gabriel Flores, Daniel Quintana, Freddie De La Rosa, Hector Velasquez, Carlos Rosales) were all from Lamont.

Late one night in September 1997, Chad Yarbrough and the Gomez brothers, angry at Carlos Rosales over a street incident earlier that night, got in Chad's truck to go find Carlos. They had been drinking. They wanted to "kick somebody's ass." They drove to the Lamont home of Maria Villa, Carlos's mother. They asked her where Carlos was, vandalized her car, frightened her and the children inside the home, and then left.

Carlos Rosales was appellant's cousin; Maria Villa was appellant's aunt.

2. Late September, 1997: "Creeping Up" on Stobaugh Street; "Gooney" Charges Jose Luis with a Knife; Chad Yarbrough and The Gomez Brothers Menace Maria Villa and The Children Inside Her Home

Jose Luis Gomez testified that the incident at Maria Villa's house had its beginnings earlier in the evening. Jose Luis, Chad Yarbrough, and a friend were driving slowly down Stobaugh Street in Lamont, looking for a party, when a car pulled up next to them and someone inside told him to pull over. (43 RT 9689, 9696, 9690.) Instead, Jose Luis sped up, but the other car blocked his way. Gabriel Flores, known as "Gooney," jumped out of the other car and ran toward Jose Luis with a knife in his hand. Carlos Rosales was in the front passenger seat of Gooney's car, and never got out of the car. (43 RT 9696–9697.) Jose Luis testified as follows:

Q. [Def Counsel]: Okay. And Carlos didn't do anything to threaten you, did he?

A. [W, Jose]: No, he did not.

Q: So now Carlos didn't get out of the car, he didn't have a knife, and he didn't threaten you, but you felt that you should go to his house at 12 o'clock at night to kick his ass, right?

THE WITNESS: I mean, he's the only one I knew. If he knew I didn't bang with nobody from Arvin—he knew me, I used to play baseball with him in Lamont, so he would—it would be his—he should have been the one that would have stopped

> Gooney from doing something like that, for being his friend or—you know what I mean?

(43 RT 9698–9699.)

Later on, Jose Luis paged Chad, who called him back; they arranged to meet. (43 RT 9671, 9681.) When they met up, Chad and Jose Luis's brother Freddy Gomez had been drinking a little bit, and Jose Luis himself had drunk around five beers. (43 RT 9672.) With Chad listening, Jose Luis told Freddy about what had happened to him earlier that night. (43 RT 9683.) Chad was angry about what had happened to Jose Luis; Freddy Gomez was very angry about it. (43 RT 9673.) Jose Luis described himself as pretty angry that night, and his intentions were to "kick somebody's ass." (43 RT 9679.) At that point, they all jumped in Chad's truck to go look for Carlos where he lived with his mother, Maria Villa. (43 RT 9671, 9683.)

The three of them parked several houses away from Maria's house. Jose Luis and Chad got out and walked to the house; Freddy stayed in the truck and kept the motor running. When Jose Luis and Chad reached the house they picked up sandbags and threw them on top of a car that was in the driveway. (43 RT 9674-9675.) Their intent was to break the windows of the car with the sandbags, and they threw them hard enough to attempt to do so. According to Jose Luis, Chad threw the first sandbag. (43 RT 9676.)

Maria Villa heard the noise and came out of the house. Freddy, meanwhile, had started slowly pulling up to the house. (43 RT 9674.) Jose Luis asked Maria Villa if Carlos was there; she told him that Carlos was in Bakersfield. Jose Luis testified that he then said asked her to tell Carlos that Jose Luis "stopped by"—and that was it; the three of them left. (43 RT 9675.) Maria was about five or ten feet from Chad's truck, which had a distinctive license plate: CYARBRO. (43 RT 9676–9677.)

Jose Luis denied returning to the house and banging on windows. He denied threatening to Maria that he was going to kick Carlos's ass. He denied that he ran around the house screaming for Carlos to come out. He denied that he and Chad had taken a swing at Maria Villa or pushed her. He denied that the sandbags broke. (43 RT 9675, 43 RT 9679.) He denied pounding on the car. (43 RT 9676.) He denied talking in a loud tone of voice to Maria Villa. He denied picking up toys in the yard and throwing them at the house. Jose Luis maintained that they spoke to Maria Villa "respectfully" when she came out. (43 RT 9677.)

Freddy Gomez's testimony was similar. He had grown up Chad Yarbrough and was with Chad that evening when Jose Luis contacted them. Freddy testified that when Jose Luis told him what had happened earlier,

Chad overheard. Chad got mad and was "pretty angry." (43 RT 9710–9711.)

When they got close to the house, according to Freddy, Chad and Jose Luis got out. Chad told Freddy to drive slowly up to Carlos's house while Chad and Jose Luis walked. After Chad and Jose Luis threw sandbags onto the car that was parked in front, a woman came out. She asked for everyone's names, but no one gave them to her. Freddy heard Jose Luis tell her to tell Carlos that "next time he was going to kick [Carlos's] ass." Freddy testified that he said, "C'mon, jump on, let's go," and the three of them left. Freddy denied that Chad and Jose Luis were standing on the car. (43 RT 9718–9720.)

Maria Villa testified that on a night in September of 1997 she heard three men outside her house, beating her car with sandbags and yelling for her son, Carlos Rosales, to come out: "Carlos, come on out." (44 RT 9794–9798.) Maria went outside. One of the boys told her that he fought with Carlos earlier that day and had been cut on the arm by him; he showed her his arm with a scratch on it. (44 RT 9795.) Another one Maria identified as Chad Yarbrough, told her that Carlos Rosales had called him, and he was going to wait until Carlos came back. According to Maria Villa, Chad then shouted to Carlos Rosales to come out. Maria asked him why they were

banging on the car. Chad said, "We're not doing that," and she said, "I am looking at you." Someone in the truck yelled, "Let's go." Chad tried to push Maria, but she slipped back out of the way. (44 RT 9796–9798.)

Maria asked the men who they were, but they didn't answer. She wrote down the letters on the truck's license plate. (44 RT 9677, 9718.) When they left, she called the police, who arrived 30 minutes later. She told them what happened. The officers did not write anything down, but told her she could call again if the men came back. Maria did not sleep that night. (44 RT 9814.) The next day, she told her other two sons, Alex and Camilo, about the incident. (44 RT 9815.)

That same night, Mary Jane Montero was sleeping over in the living room of her aunt Maria Villa's house in Lamont. Mary Jane, then around 14 years old, was in the house with her 11-year-old cousin Tina, and Junior, who was a baby. (44 RT 9851, 9798.) She woke up when she heard yelling outside; guys were banging on the car. (44 RT 9854.)

She and Tina walked out, but ran back inside when they saw her aunt arguing with someone. Her aunt came in the house, very frightened, and told her to call the police, or call 911. She called the police, but they hung up. Later, she called the police again, but she did not think that they ever came that night. (44 RT 9852–9853.)

Mary Jane testified that later that night, the guys came back, and ran up and down the side of the house, banging on the windows. Mary Jane saw a white truck, but couldn't see any faces. She and Tina stayed on the couch close together, talking with each other all night long. They could not go back to sleep. (48 RT 9853–9855, 9864.)

Camilo Rosales, Carlos's brother and another one of Maria Villa's sons, came back to the house the following morning. He saw broken sandbags and sand all over the rear windshield of his mother's car. Maria told him what happened. Later, he talked with appellant about the incident after appellant got out of jail.[3] (44 RT 9789–9790.)

Daniel Quintana was 16 years old in the fall of 1997. He lived in Lamont, but went to school in Arvin, and constantly had trouble with Arvin kids because of where he lived. He was good friends with Carlos Rosales, and saw Carlos Rosales have trouble with the kids from Arvin as well. (32 RT 7652–7653, 7657.) He learned about the attack on Carlos's mother's house the day after it happened. Carlos's mom as well as his brother and brother's wife were talking about it and asked Daniel if he knew anything

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[3] After appellant was arrested on charges of possessing a weapon and possessing methamphetamine in August of 1997 (1 CT 1–3), he remained in jail until late September of 1997. (See 47 RT 10385; 48 RT 10645.)

about why it happened. They said it happened around two o'clock in the morning. (32 RT 7653.)

According to Daniel, Carlos's mother said some guys came over in the night and they were banging on their windows and doors and scaring them while they were trying to sleep, and they tried to break the car windows with some sandbags. The sandbags were all torn up and sand was all over the place. Daniel saw broken sandbags in the area. Little children were in the house: Carlos's brother's daughter, a little cousin that lives with them, and Mary Montero. The family didn't tell him who came over. They just told him that they wrote the license plate down from the truck. (32 RT 7654–7655.)

Jose Luis testified that around two days after the night in which these incidents occurred, he and Carlos Rosales worked things out at school. Carlos told Jose Luis that Gooney tried to stab him because when Jose Luis and Chad were driving very slowly down Stobaugh Street in Lamont looking for a party, Gooney thought they were "creeping up." (43 RT 9689–9690.)

Alex Saenz was appellant's cousin, and another son of Maria Villa. According to Alex, appellant did a lot of drugs in the summer of 1997, stayed most of the time at his aunt Maria Villa's house, and was "always

loaded." (41 RT 9401.) Alex drove to the county jail at Lerdo to pick up appellant in late September 1997, when appellant bailed out of jail. (41 RT 9372.) Alex wanted to know who had attacked his mom's house. He gave appellant the license plate number of what turned out to be Chad Yarbrough's truck. (41 RT 9373, 9389.)

3. October 4, 1997: Kidnapping of Leonel Paredes

On October 4, 1997, Leonel Paredes was living in Lamont. Late that evening, around 11:30 p.m., he was approached by three men armed with guns and knives after he parked in his apartment complex. One of the men had a shotgun—Leonel could see the front of the barrel from the light by the laundromat—and another had a pistol. He could feel a knife from a third person behind him. The men blindfolded Leonel and put duct tape on his mouth, wrists, and ankles. After driving around with him laid out on the back seat, they moved him to the trunk of his car. (30 RT 7115–7120, 7127.) While Leonel was in the trunk, the men hit him. (30 RT 7132.)

Eventually they asked Leonel who they could call to get ransom money for him. Leonel first gave them the name and phone number of Rosalio Paredes, his cousin. (30 RT 7130.) Rosalio didn't believe them, so they came back demanding that Leonel give them another name. (30 RT

7130.) He gave them the name of his uncle, Victor Paredes, and both Leonel and the kidnappers spoke with his uncle. (30 RT 7131–7132.)

From inside the trunk, he was able to see that the one with the shotgun was wearing a nylon mask. His kidnappers told Leonel not to say anything or they would harm his family, and they named Rocia and Nancy, two of his cousins. After hearing his captors leave, Leonel began trying to free himself and eventually got out of the trunk. He then made a collect call to his uncle Victor, who came to pick him up. (30 RT 7134–7138.)

Victor Paredes testified that he received a call in which someone said that he wanted $500 or he would kill Leonel. Victor said he did not have it; the caller said he would call again. The next call Victor received, however, was from Leonel the following morning, asking Victor to come pick him up. (30 RT 7235–7236.)

At trial, Leonel identified appellant as the man who was carrying the shotgun. (30 RT 7222.) When talking to the police right after he was kidnapped, however, Leonel could not identify any of the men who had kidnapped him. His first identification of appellant took place on October 21, 1997, 17 days after he was assaulted, when he went down to the

sheriff's office.[4] (30 RT 7174.) He told the sheriff's officers that he had had a conversation with his cousin Rosalio about the kidnapping and that Rosalio showed Leonel photographs. (30 RT 7175–7176.)

James Ashley was a Kern County Deputy Sheriff who responded to Leonel's call the day after his kidnapping, along with Deputy Anthony Robert Contreras.[5] Ashley saw residue from duct tape on Leonel. A pair of latex gloves was found in the car. Ashley interviewed Leonel along with Deputy Contreras, who did the talking; Deputy Ashley took notes and wrote the report. (31 RT 7316–7317.) Leonel did not provide the names of any of the suspects, and the report does not indicate Leonel was familiar with any of the people who kidnapped him. (31 RT 7326.)

Leonel described the three suspects as follows: Suspect 1, a Mexican male with a moustache and blue and black striped shirt who had a knife and demanded Leonel's car keys; Suspect 2, who was wearing a nylon stocking over his head, and carrying a shotgun; and Suspect 3, no description. (31 RT 7325–7330, 7341.)

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[4] Deputy Contreras testified that Leonel's identification of appellant took place when he went to see Leonel. (37 RT 8601.)

[5] Deputy Contreras also served as the prosecution's expert on gangs. (See 37 RT 8558 et seq.)

Deputy Contreras believed that Ashley did not include in his report Leonel's statement that he thought he might have known one of the kidnappers from school. (37 RT 8589.) Contreras testified that he didn't have a chance to review the report of that first interview written by Ashley until May of 1998, and although he noticed this omission he did not write down anything on that date seeking to amplify Ashley's report. (37 RT 8607.)

Deputy Contreras testified that on October 21, 1997 (one week after Chad Yarbrough's death), Contreras located Leonel, who Contreras did not think would ever come forward on his own. Contreras showed Leonel a a "six-pack" of pictures of possible suspects, including one of appellant. Contreras testified that he was concerned that Leonel's identification would be affected by television coverage of the murder of Chad Yarbrough. (37 RT 8598–8599.) Nonetheless, Contreras gave appellant's name to Leonel, who then made a tentative identification of appellant as his kidnapper. (37 RT 8600.) Leonel told Contreras he had already learned the name of appellant from another person, whom he did not identify. (37 RT 8604–8605.)

Rosalio Paredes, the first name Leonel gave to the kidnappers, testified that he had received a phone call asking him for ransom money for

"Leonardo"; he thought it was a prank call, and hung up. (32 RT 7502–7503.) Rosalio was dating Melissa Yarbrough, Chad Yarbrough's sister, at the time. He remembers reminding Leonel that he [Leonel] knew Efrain Garza.[6]

Rosalio testified that he had formed a connection between the murder of Chad Yarbrough, a football teammate, and the kidnapping of his cousin Leonel. Rosalio conveyed this to Leonel. Just before Leonel's October 21, 1997, meeting with Contreras, Rosalio told Leonel that the people who were involved in the Chad Yarbrough case were probably involved in his case, and "probably" told Leonel appellant's name and nickname (Loco). (32 RT 7502, 7512–7513, 7517; 37 RT 8606.)

As noted below, appellant testified on his own behalf and denied any part in this kidnapping. He said he was with his cousin Carlos Rosales and Carlos's girlfriend Ashley Medina at the Kern County Fair on the night Leonel was assaulted. (47 RT 10394–10395.) Both Carlos Rosales and Ms. Medina corroborated this testimony. Ms. Medina presented a photograph of the three of them taken at the fair that she had saved. It was the first time she met appellant. (See 41 RT 9341, 9347–9348; 49 RT 10967–10977.)

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[6] According to Jesus Garza, Efrain's brother and a friend of Rosalio, Rosalio told him that Leonel wasn't really sure about whether or not Efrain was involved. (40 RT 9821–9822.)

Dr. Scott Fraser testified as an expert on eyewitness identification. After describing the generally accepted state of research on eyewitness memory (43 RT 9387 et seq.), he described the adverse effects of the lighting described by Leonel on the accuracy of his identification of the kidnappers. Dr. Fraser also testified that after viewing multiple people, chances of error go up when identifying a single individual of the group, and that the presence of a weapon adversely affects identification accuracy. (43 RT 9595–9596.)

4. October 14, 1997: Assault of Juan Carlos Ramirez

Juan Carlos Ramirez testified that he drove a white truck to Shannon Brown's house in Lamont to "get a transmission" around three o'clock in the afternoon. (31 RT 7374–7375.) Shannon lived next door to codefendant Efrain Garza. When Juan Carlos pulled up, Freddie De La Rosa and Hector Valenzuela approached his truck from Garza's house.[7] Hector had a pistol in his hand. (31 RT 7395.) Hector got in the cab with Juan Carlos, and Freddie sat in the back. (31 RT 7396.) Hector told him where to drive, and

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[7] Co-defendant Garza's house was located "right next door" to a rental property owned by Juror No. 1, who approached the trial court after opening arguments because of fears that if she stayed on the jury she might be in danger from "these gangsters." (30 RT 7063–7064.) Appellant's unopposed challenge for cause was denied by the trial court. (See Arg. VI, *post.*)

directed him to a field next to a store called El Mercadito in Lamont. (31 RT 7375–7376, 7395, 7400.)

There, Hector and Freddie took Juan Carlos's personal belongings: his watch, necklace, and glasses. (31 RT 7383, 7433.) They all got back in the truck, and Freddie drove back to Shannon's house. Just shy of the driveway, Freddie had an accident, banging into a yellow car, and Juan Carlos drove the rest of the way. When they got back to the house, Freddie called out to four people, who jumped into the back of the truck: Daniel Quintana, appellant, codefendant Garza, and Carlos Rosales. (31 RT 7403.) Hector still carried his pistol; he told Juan Carlos to drive to an apple field about a mile away. (31 RT 7376.)

When they got to the field, everyone got out of the truck. When Hector asked Juan Carlos if he had any money, he said no, but the men then got his wallet and saw that he had some. They took his money, accused him of being a liar, and began beating him. Juan Carlos remembered being hit by Freddie, codefendant Garza, and appellant. (31 RT 7377–7380.) Someone pointed a shotgun at Juan Carlos while appellant tied him up, and said that he was the devil, and that if Juan Carlos ever said anything to the police, he [appellant] would cut off body parts and stuff them into his

mouth.[8] (31 RT 7381–7382.) Eventually, the men left in Juan Carlos's truck, leaving him tied up on the ground.

Deputy Raymond Mellon met with Juan Carlos later that afternoon, who took him to the place where he had been assaulted. Carlos had the redness, bruises, swelling and blood on him of someone who had been beaten up; he was holding an ice pack on his head. (32 RT 7729–7730.)

Carlos Rosales testified for the prosecution that he was one of those who jumped in the back of Juan Carlos's truck. He skipped school that day with Daniel Quintana and went over to Efrain Garza's house. Efrain was there with his cousin [appellant], Baby [Efrain Garza], Bonkers [Daniel Quintana], and Gizmo [Hector Valenzuela]. (33 RT 7819–7820.) A white truck pulled up next door, and Gizmo went over there to talk to the guy. The truck left and came back. (33 RT 7820–7821.) When it came back, Carlos Rosales was in the front yard; he and the other three got in the back of the truck. Hector and Efrain Garza were up front. The driver was a guy Carlos

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[8] Juan Carlos had made around 10 previous statements to authorities about this incident, and had testified twice, but had never said anything about the "devil" or "body parts" until the trial. (31 RT 7420.) He initially did not identify a picture of appellant in a "six-pack" of photos as one of his assailants. It was after a conversation with his sister, who was present when he looked at the pictures, that he picked out the right picture. Between viewings, she told him about her personal, unrelated problems with appellant. After that conversation Juan Carlos told the deputies to come back. (31 RT 7426–7429.)

Rosales didn't know personally, but he later learned his name was Juan Carlos Ramirez. (33 RT 7821–7822.)

From the back of the truck, Carlos Rosales noticed that Hector had a gun up in the cab. The men stopped in a field near an orchard. (31 RT 7823.) When they got to the orchard, the three in the truck cab got out. (33 RT 7824.) Carlos Rosales and Daniel remained in the back of the truck, while appellant and Efrain got out. There was a lot of arguing. Efrain pulled out a pistol-grip 12-gauge sawed-off shotgun. (33 RT 7825.)

Hector took some money, plus a belt and a necklace from Juan Carlos. The money was in his wallet. Hector was mad because Juan Carlos had lied to him—he said he didn't have any money, but actually he had a hundred dollars. (31 RT 7401.) Hector hit Juan Carlos with his gun, then Efrain hit him with the shotgun. After that, it was one big rumble. Juan Carlos was rolling around on the ground screaming and crying; Carlos Rosales thought they were beating on Juan Carlos for around 10 minutes. (31 RT 7401; 33 RT 7827.)

Daniel Quintana testified that it was Freddie who was doing most of the hitting (32 RT 7577–7578); Carlos Rosales said it was Freddie, Efrain, and appellant who were doing the beating. (33 RT 7830.) Carlos Rosales

thought that Hector kept the necklace, and gave the charm, which spelled out "Juan," as a gift to appellant. (33 RT 7828.)

5. October 14, 1997: Killing of Chad Yarbrough

Carlos Rosales testified that they all went back to San Diego Park after the Juan Carlos incident and ate at the taco truck. Then they went to Carlos Rosales's home, at 9920 Stobaugh Street in Lamont. Eventually, Carlos Rosales, along with appellant, Efrain, and Willie Santiago, ended up at Daniel Quintana's house. (33 RT 7854–7855.)

At Daniel's house, Carlos Rosales saw appellant cleaning a Tec-9 automatic weapon; everyone was looking at it.[9] The last time Carlos saw the weapon, Efrain was holding it. (33 RT 7858.) A couple of hours later, in the evening, Carlos Rosales heard Efrain say, "Hey, there's that guy Chad's truck." Efrain had the Tec-9. He and appellant went up to the truck. Carlos Rosales heard the sound of the gun cocking back. (33 RT 7867–7870.) He saw Efrain get in the truck and Chad Yarbrough's little brother get out. Appellant got in the truck on the driver's side, and the truck drove off. (33 RT 7879.)

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[9] Carlos Rosales had previously seen appellant with a Tec-9 automatic weapon. A few weeks earlier, Carlos, Daniel Quintana, appellant, and Efrain were driving around when Efrain shot the gun at some cows. When Efrain shot it, the gun fired a couple of times and then got stuck. (33 RT 7854.)

Brent Yarbrough was Chad Yarbrough's younger brother. Brent testified that on October 14, 1997, his brother drove him to school in his white truck as usual. (36 RT 8278–8279.) After school, they went to football practice, and then to Carolina [Carol] Castro's volleyball game; Carol was Chad Yarbrough's girlfriend. After the game they took Carol home, to the corner of Ruben and Cheryl Streets in Lamont. (36 RT 8280–8281.)

Right after dropping her off, they were stopped by a tall skinny guy and a guy who called himself "Loco." (36 RT 8281.) Brent did not know them, but his brother stopped for them as if he knew who they were, and talked to them like they were all familiar with each other. (36 RT 8282, 8301, 8303.) After they were stopped, the skinny guy pulled out a gun. (36 RT 8284.) The two of them told Brent to get out of the truck and sit on the curb. Chad said, "Guys, I'm cool." Brent got out. The two guys got in the truck with Chad, and they drove off. (36 RT 8284–8286, 8296.)

Brent was told by a couple of guys to just sit still on the curb. After a half hour or 45 minutes, he ran to Carol's house and told her to call the cops, call 911 and tell them his brother had been kidnapped. (36 RT 8295–8296.) Brent later identified appellant as one of the two who got in the truck with his brother. (36 RT 8297.)

Martha Adair, a deputy sheriff assigned to the Lamont substation, contacted Brent at his house. Brent was very upset. (33 RT 7777.) Later that night she and several other deputies went to Carlos Rosales's house at 9920 Stobaugh Street, where she found Daniel Quintana, Carlos Rosales, and Juan Miguel Baltazar. (33 RT 7802.) She removed photographs of several people from the walls, including a picture of appellant, and later showed them to Brent. He identified appellant as one of the two men who had taken his brother.[10] (33 RT 7782–7784.)

Brent drew a picture of the weapon pointed at his brother by the other of the two, who was later established to be Efrain Garza. (36 RT 8285.) Deputy sheriffs and family members gathered at the Yarbrough house, and fanned out looking for Chad. Late that night, his body was found by his uncle, Sam Handel, in an orange grove in Lamont. (37 RT 8533 et seq.)

Deputy Adair arrived at the crime scene with other deputies. She observed a white latex glove laying in the dirt about five feet east of the body, between two rows of trees. (33 RT 7787.) Dr. Donna Brown performed the autopsy on October 16, 1997. Black electrical tape was

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[10] Brent wrongly identified Gabriel Flores as the other. (33 RT 7797–7801.)

around Chad's eyes; his hands were tied behind him with shoelaces. He had three fatal entry and three exit bullet wounds in his skull. (39 RT 9027–9029, 9032.) There was no powder stippling that would indicate the weapon was fired within two feet or closer to the body. (39 RT 9039.)

Dr. Brown testified that she thought the weapon was not fully automatic, because if it were, the wounds would have been closer together. (39 RT 9046.) However, at the preliminary hearing, she had testified that she thought the weapon was an automatic type with a full metal jacket, a very rapid-firing automatic type of weapon that sent bullets through Chad's head before he reached the ground. (39 RT 9056–9057.)

Greg Laskowski was supervising criminalist of the major crimes unit of the Kern County Regional Criminalistics Laboratory in Bakersfield. (39 RT 9064.) He testified that he responded to the crime scene shortly after Sam Handel, Chad's uncle who found his body, called 911. There, he found three live cartridges and three cartridge casings near Chad's body, all chambered from the same firearm, which could have been a Tec-9. (39 RT 9071–9073.) He was familiar with the Tec-9, although he had never seen or fired one. (39 RT 9068, 9084; 40 RT 9198.) That weapon would fire a three-round burst in .24 seconds. (40 RT 9167.)

Laskowski answered a series of hypothetical questions designed to show that the three bullets were not fired in a virtually instantaneous and accidental burst, in order to show that they were each deliberately fired. (40 RT 9170–9177.) According to his measurements, however, the shooter needed to have been about 10 feet from the body when the rounds were fired, and the bullets were exactly on the same plane. (40 RT 9207–9208.)

Chad Yarbrough's truck was found in an alleyway between Quincy and Pacific Streets in Bakersfield. It had been painted red with spray paint. (36 RT 8335–8336.) Salvador Salivar, who pled guilty to receiving a stolen truck (35 RT 8133), remembered going over to Chepa's house in the early morning of October 15, 1997, to get a white truck. Chepa's house was a place where runaway girls stayed, and was frequented by young men. (35 RT 8134.) The keys were inside the truck. Salvador and his friend Sam Ramos drove the truck about 10 blocks to a garage, and tried to change its appearance by painting it a different color. (35 RT 8136.) The next morning, Salvador learned that the truck had been involved in a murder, so he abandoned the paint job and the truck. (35 RT 8141.)

Salvador's denial of knowing about the source of the truck was impeached by Deputy Francis Moore, who testified that Salvador had told him that he saw "Loco" as well as "Baby" over at Chepa's house the night

he got the truck. (36 RT 8450–8452.) Moore also testified that a young girl named either Joamy or Amy Garza had identified appellant as one of the guys who brought the truck to Chepa's, but that she refused to sign the lineup card indicating she had made such an identification. She also had identified Baby as the one who left with the truck's stereo. (36 RT 8440, 8444–8445.)[11]

Detective Rosemary Wahl was called to the scene of the crime in the early morning of October 15, 1997, and was assigned to work on the homicide case and the cases of Leonel Paredes and Juan Carlos Ramirez. (41 RT 9252–9255.) In July of 1998, nine months after the death of Chad Yarbrough, she and her supervisor, Sgt. Glenn Johnson, flew to El Paso to interview appellant, who had been apprehended when trying to reenter the United States from Mexico.

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[11] Joamy Garza testified that she was staying at Chepa's house on the night of October 14, 1997. She was a 14-year-old runaway doing meth several times a day back then. (31 RT 7477–7478.) She thought that two guys she had seen a couple of times before, named "Baby" and "Loco," pulled up in a white truck they wanted to get rid of; she partied with them, like she partied with everyone. (31 RT 7461–7462.) When first interviewed, she lied in order to avoid getting involved, but once she slipped up and said Baby's name, she told the truth after that. (31 RT 7468.) Now, she couldn't remember much at all; she was trying to put that whole time period behind her. (31 RT 7470, 7474.) At an earlier proceeding, she had testified that she hadn't actually seen anyone in the truck, and that the two guys included one named Huero, and that they were cousins who were bald. (31 RT 7479–7480.)

They questioned appellant on July 19, 1998. He admitted having become a gang member in Lamont at the age of 13 or 14, but denied any involvement in the shooting of Chad Yarbrough. (41 RT 9267–9268.) Appellant was then 22 years old. (41 RT 9269.)

On July 23, 1998, Detective Wahl and Sgt. Johnson flew back to El Paso to take custody of appellant and bring him back to Kern County. When they returned to Kern County, they stopped for food, and then took him to a sheriff's interview room. While eating, they talked about the case, but said nothing designed to elicit a statement from appellant. She testified that she was surprised when appellant told them he wanted to make a statement, and acknowledged that he had shot Chad Yarbrough. Wahl then left the room, turned on the recorder, and returned. (41 RT 9269–9272.) The recording of appellant's ensuing statement was played for the jury. (41 RT 9274.)

6. Gangs

Over objections, Deputy Contreras testified as an expert on Lamont gangs. There were two street gangs in Lamont: Varrio Chico Lamont, or VCL, and Lamont Familia Sureños, or LFS. The Mexican Mafia has identified themselves with the letter M and with use of the number 13; and both of these Lamont street gangs have also used the number 13. (37 RT 8558–8559.)

Contreras knew several young men who were arrested in connection with one or more of the crimes at bench, as well as the men's associates and their nicknames. Contreras reviewed photographs of tattoos and posters, and pointed out the symbolism that led him to believe that each of these men were gang members of LFS. (37 RT 8558–8570.)

The LFS congregated and "jumped in" new members at the Myrtle School. Contreras described seeing appellant and Gabriel Flores plus several others leaving that school on the day he believed Efrain Garza was first made a member of the gang. (37 RT 8575–8576.) Contreras reviewed a photograph shown to the jury which depicted appellant and several other young men making gang signs. He told the jury that most of them had since moved away or gone to jail. This picture, removed from Carlos Rosales's wall, was several years old. (37 RT 8617–8620.)

On cross-examination, Contreras testified that he was also familiar with the "Arvinas," a gang from Arvin. Sometimes the Arvinas also aligned themselves with the Mexican Mafia. (37 RT 8611–8612.)

7. **Appellant's Testimony**

Appellant testified on his own behalf. In addition to denying any involvement in the kidnapping of Leonel Paredes, he admitted joining in the assault on Juan Carlos Ramirez without knowing why it was happening, and

acknowledged shooting Chad Yarbrough, saying that it was an accident. Appellant fled after the shooting, and was apprehended while crossing the border and attempting to reenter the United States. He confessed shortly thereafter to two Kern County detectives, Rosemary Wahl and Glen Johnson. He told the jury the background of these events.

Appellant had lived in Lamont until 1995, when he moved to El Paso, and then to Phoenix, Arizona, where he attended the Al Collins Design School, and Lamson Junior College. (47 RT 10380.) In early 1997, he lived with his fiancée and their two young children, then ages one and five, and worked as a forklift operator for Safeway. His fiancée left him in May or June of 1997 for another man and moved to California. Around the same time, he lost his job. (47 RT 10381.)

Since childhood, appellant had suffered from a condition that caused large tumors to appear on the back of his tongue, and in his neck.[12] While he was in Phoenix, the tumors were expanding, and led to excruciating headaches. Over-the-counter medication provided no relief. (47 RT 10382.)

Appellant was deeply depressed after he lost his fiancée, children, and house in Phoenix, and he was plagued by headaches. He took drugs

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[12] The diagnosis of this condition made by the Kern Medical Center during trial was "multiple hemangiomas." (6 RT 1704–1706.)

pretty much non-stop after getting out of jail in late September 1997, mainly to achieve a state of numbness. (47 RT 10387–10388.)

Appellant left Phoenix to return to Lamont in the summer of 1997. Before he did, he purchased a Tec-9 automatic weapon. He liked it, and would fire it in the countryside, "out in the boondocks." It had a habit of jamming after three or four rounds were fired, and it would remain jammed until a shell was manually ejected. (47 RT 10383–10384, 10467.) When appellant returned to Lamont he left the gun behind in Arizona, but his ex-roommate Robert got the weapon along with other belongings from their apartment when they were evicted, and eventually brought it to Visalia. (47 RT 10466.)

Appellant was locked in jail at Lerdo for about 30 days on possession of methamphetamine charges. His brother bailed him out of jail in late September 1997, when he was picked up by his cousin, Alex Saenz. When he got out of jail, he regained possession of the weapon from his former roommate. (47 RT 10385–10386.)

Alex told appellant about people in a white truck trying to run over Carlos Rosales. He also told appellant about what had happened at his aunt Maria Villa's house. Appellant was very close to his aunt: "I loved her a lot. I grew up with her. She'd always take care of me. Anytime I had problems

with my mom, she would explain things to my mom, because my mom didn't know very much English and she didn't know how things would work with us." (47 RT 10389.)

Appellant also described his problems with the Arvinas. When he was attending Arvin High School, he would need to catch the first bus out, or he would be attacked by the local boys who hung around the school. The authorities would rarely intervene, and when they did, they favored the Arvin boys. Appellant described bullets being fired into his house in 1994 when he lived with his mother and nephews, and a Molotov cocktail being thrown into his house. He believed these incidents were carried out by Arvin boys. (47 RT 10389–10392.)

Appellant believed that what had happened to his aunt would happen again unless he took measures to stop it. Appellant investigated the incident, and he came to believe that the three people who had done it were Freddy Gomez, his brother Jose Luis Gomez, and Chad Yarbrough. (47 RT 10393.)

On October 14, 1997, Appellant was at Efrain Garza's house in the afternoon, along with Carlos Rosales, Daniel Quintana, Freddie De La Rosa, and Hector Valenzuela. Appellant had been up for a couple of days, taking meth and PCP, and drinking a lot of alcohol. He had drunk many 40-

ounce "Cobras" that morning, and had smoked marijuana and taken some meth. (47 RT 10402.) He saw a white truck drive up to the house of the next-door neighbor.

Hector and Freddie went over to the truck, and drove off with the driver, whom appellant did not then know. Fifteen or 20 minutes later, the truck came back and crashed into a little yellow car in front of the neighbor's house. Appellant and the others went outside and watched the people in the truck and the neighbor resolve the accident. When Hector and Freddie said, "jump in," they all got in the back of the truck. (47 RT 10396–10398.)

Appellant didn't know "something was up" until he hollered to the front and asked Freddie to take Carlos Rosales home. Freddie replied that they had something they needed to take care of first, and drove the truck along a canal bank into a field. When appellant asked Freddie what was happening, Freddie told him that this guy [Juan Carlos] had beaten up his sister. Appellant had no reason to doubt Freddie, with whom he had grown up. Freddie and Hector were hitting Juan Carlos. Appellant went to the truck and fetched rope from the back, which others used to tie Juan Carlos up. Appellant hit Juan Carlos a few times. When they left, Hector and Freddie drove everyone to San Diego Park; there, Daniel took off walking

and appellant followed him. Hector caught up and gave him $20 and a medallion. (47 RT 10399–10405.)

Appellant and his friends kept drinking that day, and ended up at Daniel's house. Daniel's mother was at church, and his house had a swimming pool. Appellant had gotten his Tec-9 and brought it over. People were playing with it, putting the clip in and cocking it, when someone yelled out, "There's that guy." Appellant walked out with Efrain, who had the Tec-9. The white truck was stopped right there. Appellant knew the driver only as Chad. (47 RT 10408.)

Appellant remembered asking Chad if he know who he [appellant] was. The men told the other person in the truck [Brent Yarbrough] to get out. Then, appellant and Efrain got in the truck. Appellant testified that he wanted to scare Chad, embarrass him so badly he would never harm appellant's aunt again. (47 RT 10410.)

Appellant testified that he told Chad why he was mad. Chad admitted trying to run over Carlos Rosales, but was indifferent to the incident with appellant's aunt, saying only that he was with Freddie and Luis. Appellant told him that he should not be playing with gangbangers, that he was a jock who should not be hanging with guys who cruise around Lamont with big A's on their hats. He promised Chad several times that

nothing would happen to him, and meant it; he intended to leave Chad there while taking his truck to Bakersfield so Chad would have to walk and get it. (47 RT 10415–10416.)

Appellant drove them around for a long time, unsure where to go. They finally stopped in a field. Night had fallen and it was very dark. "Baby" told Chad to take off his clothes, and tied him up. Chad stripped down to his underwear. Chad had not apologized for what happened at appellant's aunt's house; he just kept saying things like "Right," or "Whatever." (47 RT 10409–10411.)

Appellant was slurring his words, not thinking well at all, walking from the scene where Chad was to the truck and back, unsure of what to do. Appellant finally decided to try once more to scare Chad into acknowledging what he had done and apologize for it, and got his Tec-9 out of the truck. (47 RT 10417–10419.)

He went back to where Chad was, but Chad still wouldn't apologize. Then, he told Efrain to go back to the truck and get the clip. The clip made a big noise when it was put into the gun—he thought that if Chad heard that clip, he would "give in." (47 RT 10420–10421.)

He got the clip from Efrain, and put the clip in while standing sideways to Chad, holding the gun against his chest while pushing in the

clip. As soon as he pushed the clip in, the gun went off. He was not aiming it anywhere, being preoccupied with getting the clip loaded. When appellant looked over at Chad, all he could see was that Chad was down, not moving. (47 RT 10421–10422.)

He realized he had just made a horrible mistake, but he didn't know what to do. That wasn't supposed to happen. He was very frightened, and walked around in circles. Efrain was following, yelling and cursing at him. (47 RT 10424–10425.) Appellant recalled,

A. Yes. We left. We left in the truck.

Q. Did you feel there was anything you could do for him?

A. No, there wasn't.

Q. Were you scared?

A. Yes, extremely. I didn't know what to do. I mean, I had lost my head already.

Q. When you say—you say you lost your head. What do you mean?

A. I wasn't thinking straight for nothing. I mean, I got to go. I got to leave. I messed up.

(47 RT 10426.)

He and Efrain drove near to his aunt's house. Efrain left in the truck, and appellant walked to his aunt's house. There, he sat by a window, smoking marijuana and staring outside, imagining he saw members of

Bakersfield's SWAT team, other police, "officers everywhere." That afternoon appellant left with Baby and hitchhiked south; he testified that somewhere along Highway 5 on the Grapevine, he threw the Tec-9 out the window.[13] (47 RT 10426–10431.)

Appellant denied partying with Joamy Garza in Chad's truck after the shooting. (47 RT 10430.) He acknowledged the many tattoos on his body, and said he had got them at different times through high school, and had acquired no new ones since he was 17. (47 RT 10435–10437.)

8. Expert Testimony

Dr. Barry Silverman, a pathologist, testified that the prosecution's theory, advanced by the testimony of criminalist Greg Laskowski, that one shot was fired while Chad was kneeling, while the other two were fired when he was on the ground, could not be correct. (46 RT 10202.) The placement of the bullets suggested that the wounds were simultaneous, consistent with automatic weapon gunfire, and that the decedent's head was above ground. (46 RT 10204.) He agreed with Dr. Brown, who had performed the autopsy on the decedent, when she used the word "instantaneous" twice on the front page of her autopsy report. (47 RT 10218–10220.)

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[13] The weapon was never found.

Dr. Steven Estner described appellant's tumors, and testified that his condition can cause a backup of deoxygenated blood in his brain, which can impair his right brain function. (45 RT 9948.) Photographs of tumors on appellant's tongue and neck were presented to the jury. (45 RT 9925.)

Dr. David Bearman testified that appellant had a hemagioma on the back of the tongue that extended down to his right carotid sheath, which caused decreased blood flow to the brain from the right carotid artery. Dr. Bearman further testified that appellant had pain, secondary to the hemagioma, both in the tongue, and also as it extends down to the neck, cheek, and chin. Dr. Bearman reviewed testimony and reports concerning the nature and amount of drugs appellant was taking in the two weeks prior to the commitment offenses, and concluded that appellant was then suffering from depression, polysubstance abuse, and sleep deprivation, which was due to his methamphetamine use; he also diagnosed post traumatic stress disorder, and an acute stress disorder. (48 RT 10851–10852.)

Dr. Francisco Gomez, a psychologist, spent nine hours testing appellant, and concluded that appellant suffers from low-level chronic depression, as well as polysubstance abuse for PCP, marijuana,

methamphetamine, and hallucinogens. Appellant used drugs extensively to self-medicate for depression. (46 RT 10241–10242, 10246.)

Dr. Jose Lopez was a professor and author of numerous works on the formation of gangs in California's urban and rural areas. (49 RT 10978–10979.) He testified about gangs in Arvin and Lamont. He investigated the nature and history of local gangs by talking to merchants, city managers, and coaches in both towns, and by walking around, taking photographs of graffiti. He showed the jury one photo, taken in Lamont five blocks from the home of appellant's mother, of "AVN Arvina" in green, crossed out, and a picture of the same symbol drawn on a wall in Arvin, not crossed out. (Exhs. N and O, 49 RT 10983–10984.)

In Lamont, there were many small gangs, and one main gang—the Lamont Trece, or Lamont 13. In Arvin, the main gang was called Arvina Trece, or Arvina 13. Dr. Lopez testified that conflicts between Lamont and Arvin began around 1958—when the high school was put in Arvin, and both Arvin and Lamont kids were bussed to Arvin—and remained active in 1997. (49 RT 10988–10990.)

The people from Arvin whom Dr. Lopez interviewed all acknowledged conflicts in the past, but little league coaches and community leaders denied the existence of any present or recent gang problem.

However, this was not a true picture. Dr. Lopez showed the jury a photograph he had taken of Arvin gang graffiti ["AVN"] sprayed onto the walls of buildings in Lamont.[14] People from Arvin think of themselves as a stable community, whereas Lamont is seen by them more as a migrant community, with Lamont kids widely referred to in Arvin as "Lamonsters." (49 RT 10983–10990.)

Dr. Lopez did not believe that appellant was an active gang member in 1997. At that time, he was 21 years old, and hanging around with kids that were 15 and 16 years old. The gang he had belonged to in high school, and that his tattoos reflected, was the Lamont Familia Sureños, or LFS. That gang became defunct in 1994 or 1995. Appellant's peers in that gang had all left town. Dr. Lopez believed the crime was more a product of "machismo," or a cultural imperative originating in countries around the Mediterranean Sea, that required the senior male figures to retaliate harshly when females within the family were believed to have been threatened. (49 RT 10989–10997.)

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[14] See also testimony of prosecution gang expert Robert Contreras delineating the nature of gang presence in Lamont and Arvin. (37 RT 8556 et seq.)

9. Rebuttal

The prosecution recalled Officer Greg Laskowski, who disagreed with Dr. Silverman regarding the simultaneity of the bullets fired by appellant, and questioned Silverman's knowledge of ballistics. (50 RT 11088–11089.) Laskowski thought that the location of casings and the nature of other Tec-9 weapons, implied that the shooter was moving around the decedent and firing from "belly button level." (50 RT 11099–11116.)

Dr. Matthew Lotysch disagreed with Dr. Estner regarding the impact of appellant's tumors on the flow of blood to his brain. After describing the various and redundant methods of circulation devised by the body to get blood from the heart to the brain, Lotysch testified that the tumors would not have had any meaningful impact on the flow of oxygenated blood to the brain, or on appellant's headaches. (49 RT 11027–11028.)

Dr. Lotysch described other possible sources of headaches: when methamphetamine leaves the body, the blood vessels will expand, thereby causing pounding headaches. He acknowledged that nerves are very sensitive to external pressure, and pain could well be felt inside the head from an expanding tumor. (49 RT 11033–11035.) Dr. Lotysch observed that three major cranial nerves traveled through appellant's hemangiomas.

Although appellant's muscle mass around the jaw functions normally, the pressure on these nerves could certainly cause pain. (49 RT 11044–11045.)

B. PENALTY PHASE

1. Prosecution

The prosecution introduced evidence of appellant's drug and gun arrest in August of 1997 that led to his incarceration in the local jail, and evidence concerning the killing of Javier Ibarra in 1995, a crime for which appellant's brother Cipriano Ramirez and Gabriel Flores had previously been convicted. Victim impact evidence was also presented from the decedent's family and his girlfriend.

a. August 1997 Dope/Gun Arrest

Bakersfield Police Department officer Michael Coronado described arresting appellant in an apartment where he was found with two females. Two or three lines of methamphetamine were laid out. A loaded pistol was in a black purse close to appellant, who slurred his words and was cooperative, though very intoxicated. (57 RT 12726–12729, 12735–12738.)

b. March 1995 Shooting of Javier Ibarra

Alma Mosqueda testified that in 1994, she knew Isabel Christina Ramirez, appellant, Cipriano Ramirez (hereinafter Cipriano), Gabriel Flores, and Javier Ibarra. (57 RT 12773.) In March of 1995, Cipriano called

her and asked who was with her. She told him she was with her two children, Christina, and Javier Ibarra. Cipriano then asked her if they could come over, and "take care of business." She said yes, but suspected something bad was going to happen, so she and Christina told Javier to get out of her apartment. Eventually, they all went outside. (57 RT 12781–12782.)

Javier went toward his car. It was dark, around 7 or 8 p.m. Cipriano then pulled up behind Javier's car; appellant and Gabriel were with him. Alma went outside, but then went back in when Cipriano told her to go back to the apartment. She looked back as she went into the apartment, and saw Javier spread his hands out, like he was calling somebody to a fight. She tried to see what was happening, but her view was blocked by a wall. (57 RT 12788.) She heard gunshots, and ran back outside. Javier was face down on the ground; he had been shot in the head. (57 RT 12790–12791.)

Alma knew that Cipriano and Javier had previously fought over Christina, but she didn't know of any pervious problems of Javier or Christina with either appellant or Gabriel Flores. (57 RT 12793–12794, 12801.) She remembered that Gabriel Flores was wearing a white hat, and no one else had a hat on. (57 RT 12807–12808.) Initially, she only gave the

interviewing deputies the names of appellant and Cipriano, because she could not remember Gabriel's name. (47 RT 12809.)

Ysela Nunez, eyewitness to the shooting of Javier Ibarra, was called by appellant. (60 RT 13186.) She described what she saw out her window; three guys, two who fought with the guy who was hanging out with the girls and one who was standing by. (60 RT 13189.) The guy who was not fighting was wearing black pants, a black-and-white checkered Pendleton and a white hat. (60 RT 13191–13192.)

One of the fighters was wearing coveralls. One was wearing jeans and a blue long-sleeved shirt. The guy with the girls was wearing dark pants and a white t-shirt. The guy with the white cap who was standing to the side suddenly lifted a gun and shot the guy who had been with the girls, and continued shooting as the guy fell. (60 RT 13194.)

Daniel Fuqua, sergeant with the Kern County Sheriff's Office, testified that he arrested appellant for the murder of Javier Ibarra shortly after it took place, and seized a white baseball cap. He wrote no report of this incident at the time.[15] (57 RT 12921–12923.)

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[15] Appellant was never tried for this crime.

Deputy Alan Hall testified that he received the white hat from Fuqua, and that on the night of the murder, Alma Mosqueda could only name the Ramirez brothers as suspects. (58 RT 12929, 12934.)

Jesse Ibarra, Javier Ibarra's brother, testified that he went by to see Alma the morning after the shooting, and that he was interviewed by the police. According to Jesse, she told him that appellant was wearing a white hat the night before. (58 RT 12977.) Alma had no memory of saying this to him. (57 RT 12802.)

Gerardo Soto, the common-law husband of appellant's aunt Maria Villa, testified that he was interviewed by the police on the night Javier Ibarra was shot. Appellant and Cipriano had been by earlier that night for 30 minutes or so. He told the interviewer that appellant was wearing dark clothing (a blue Pendleton), and a matching blue cap. (58 RT 12941, 12954–12955.)

c. Victim Impact Evidence

Carolina Castro was Chad Yarbrough's girlfriend in 1997. She related Chad's future plans, and testified that they had talked of marrying and having children. (59 RT 12986–12988.) Chad's brother Brent told the jury how profoundly he had been impacted by the death of his brother. (59 RT 13032–13033.) Cheryl Yarbrough, Chad's mother, told the jury

about her last conversation with Chad, and how a formerly close family had grown apart after Chad's death. (59 RT 13038–13041.)

2. Defense

Esperanza Rodriguez Villa, appellant's maternal grandmother, told the jury that appellant and his mother were both born in Guadalupe, in Mexico. (60 RT 13203.) She described a very hard life. There was not enough food to eat for long stretches, and appellant's father was a violent alcoholic who was often absent. (60 RT 13205–13206.)

Esperanza moved to Bakersfield, and eventually invited appellant's mother, Angelita Villa Ramirez, to come north. Angelita wrote to her often from Mexico, and described hard times and bad treatment in Mexico, including being pushed into a piece of furniture by her husband when she was pregnant with appellant. Angelita moved from Mexico to Bakersfield when appellant was three years old. Appellant's father stayed in Mexico, and eventually died of alcoholism. When Esperanza first saw appellant in Bakersfield he was sickly and weak. His limbs were very skinny and his belly was swollen. (60 RT 13206–13208, 13266, 13279.)

Appellant's mother, Angelita, testified that she worked as a field hand in Bakersfield in the 1980s. She had five kids to support. There were about 20 people living in their three-bedroom Bakersfield house, more or

less. (60 RT 13209.) Esperanza was taking care of her ten kids, and Angelita had five more. (60 RT 13207–13213.)

Angelita identified a photograph of the adobe house in which appellant was born. She described her husband, appellant's father, as a good man when he was sober, but a violent drunk, and a man who spent more and more of his time and money being drunk. They would often have to ask neighbors for food, or go without. (60 RT 13225–13226.) She finally left with her five children and came to Bakersfield. Appellant was the youngest, and he was sick when they arrived. (60 RT 13225–13230.)

Angelita described her typical work day: She rose at 5 a.m., left what breakfast she could for her children, and worked in the fields from eight-and-a-half to nine hours a day, for $2.25 per hour—for 11 years. Lorenzo, the oldest child, was in charge of the house while she was gone. She would need to take appellant to the doctor's office at least twice a month. He had a tumor on his tongue. The doctor thought it would dissolve when he got older, but instead it got bigger. (60 RT 13230–13231.)

Other family witnesses also testified regarding appellant's upbringing in Lamont. Aunt Maria Villa testified that appellant had a swollen stomach when he came to Bakersfield; later, he would come over to her house to avoid being beaten by Lorenzo, his oldest brother. (60 RT

13266–13267.) She testified that appellant later had two children whom he loved very much, and for whom she made clothes. (60 RT 13268–13269.)

Olivia Soto, another of appellant's aunts, remembered appellant fighting with his older brother. He was never bruised that she knew of, but she would intervene to keep appellant from being hit. (60 RT 13306–13308.) Appellant's family never had enough food. (60 RT 13309.)

Appellant's brother Jesus, an inmate at Terminal Island, testified about appellant's early years. There was not much to eat. Lorenzo was harder on the young children, and often hit them. Jesus once broke his hand trying to pull Lorenzo off Cipriano. Appellant became strung out on drugs around age 15. Jesus recalled a Molotov cocktail being thrown into the family's home in 1993. (61 RT 13408–13410.)

Dr. Estner returned to the stand during the penalty phase, and described his disagreement with Dr. Lotysch. Although the two doctors agreed that the numbness or pain appellant was having in his right neck could be due to the pressure of the mass on nerves in the area, Estner thought that in additional to the cranial nerves, the vagus nerve could also be affected. Dr. Estner also opined that appellant's symptoms of light-headedness and headaches could be attributed to vascular obstruction as well as pressure on nerves. (61 RT 13382–13283.)

He described appellant's condition with the tumors as serious, running from his tongue to the back of his throat, subjecting appellant to speech impediments when the tumor swells with higher blood pressure; it is recognized that blood pressure rises when one is under stress. The tumors were not likely to be cancerous, but for appellant, in Dr. Estner's view, cancer was not the primary concern, but rather the extent of the masses, whether they could rupture, and whether they produce significant symptoms. (61 RT 13386–13387, 13394–13395.)

The parties stipulated that appellant had not joined a prison gang since his arrest. (62 RT 13679.)

Dr. Francisco Gomez also returned to testify, and was the final witness. He testified that appellant suffered from depression, and said that causes of depression among Hispanics included poverty, abuse, and neglect. He described how young children are affected by the interactions of adults close to them, how children create alternate structures when there are no adults around, and told jurors that methamphetamine use can be self-medication for depression. (62 RT 13682–13688.)

ARGUMENT

I. THE TRIAL COURT'S PREJUDICIAL ERROR IN REFUSING TO ORDER A CHANGE OF VENUE DEPRIVED APPELLANT OF THE FAIR TRIAL TO WHICH HE WAS CONSTITUTIONALLY ENTITLED.

A. Introduction

The killing of Chad Yarbrough in October of 1997 stunned Kern County. Chad was the captain of the Arvin High School football team and had appeared on local television sportscasts, speaking for his team. Stories about his killing saturated local media for weeks, including accounts of his death, widespread grieving by the Kern County community, the devastating impact on his family, the "cancer" of juvenile street gangs, the manhunt for appellant (a Mexican National and reputed gang leader), and appellant's capture at the Mexican border nine months after the crime's commission.

False rumors of torture and mutilation of Chad's sex organs circulated throughout the community. Though the media reported that rumors of torture were not true, they had been embraced by several members of the jury pool, who believed they had "inside" information. Just before jury selection began, more than three years after Chad's death, football players still touched the memorial plaque for him in the high school gym. A bicycle patrol had been created from memorial funds. Community members said that memories of Chad remained vivid and strong.

Media coverage of this case was inflammatory, pervasive, and sustained. It sprang back to life whenever there was any case development. A survey of the community taken in January 2000 showed that awareness of the case, including details about both Chad and appellant, remained extraordinarily high, as did opinions about what had happened, and what should be the appropriate punishment. Unchallenged expert testimony in June 2000 predicted that this widespread and detailed recognition level was "flat," and would not appreciably decline within the following year. In fact, it remained at the same high level during jury selection in December 2000 and January 2001. Appellant exhausted all peremptory challenges, but his seated jury included several members with detailed awareness of case facts who identified with the victim or with members of the victim's family, or who felt that appellant was a "gangster" before any evidence was presented.

This Court cannot be confident that appellant was tried by 12 impartial jurors.

B. Appellant Could Not Have Received, and Did Not Receive, a Fair Trial in Kern County

"The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

(*Patterson v. Colorado ex rel. Attorney General of Colorado* (1907) 205 U.S. 454, 462 (opn. for the Court by Holmes, J.).)

The Sixth and Fourteenth Amendments "guarantee[ ] to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722.) When a trial court is "unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere[,] . . . due process requires that the trial court grant defendant's motion for a change of venue." (*Harris v. Pulley* (9th Cir. 1988) 885 F.2d 1354, 1361, citing *Rideau v. Louisiana* (1963) 373 U.S. 723, 726.) In California, a motion for change of venue must be granted when "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county" in which the defendant is charged. (§ 1033, subd. (a).)

The Ninth Circuit has identified "two different types of prejudice in support of a motion to transfer venue: presumed or actual." (*United States v. Sherwood* (9th Cir. 1996) 98 F.3d 402, 410.) Interference with a defendant's fair-trial right "is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." (*Harris v. Pulley*, *supra*, 885 F.2d at p. 1361.) Actual prejudice, on the other hand, exists when voir dire reveals that the jury pool harbors "actual partiality or hostility [against

the defendant] that [cannot] be laid aside." (*Id.* at p. 1363; see also *Murphy v. Florida* (1975) 421 U.S. 421 U.S. 794; *Patton v. Yount* (1984) 467 U.S. 1025.)

The United States Supreme Court applied this two-pronged analytical approach in *Skilling v. United States* (2010) 561 U.S. ___ [130 S.Ct. 2896, 2915 et seq.], considering first whether pretrial publicity and community hostility established a presumption of juror prejudice, and then whether actual bias infected the jury that decided the case.

Section 1033, subdivision (a), codifies the principles set forth by this Court in *Maine v. Superior Court* (1968) 68 Cal.2d 375. The trial court's initial venue determination as well as this Court's independent evaluation must consider five factors: "'(1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim.' [Citations.]" (*People v. Famalaro* (2011) 52 Cal.4th 1, 21; *People v. Leonard* (2007) 40 Cal.4th 1370, 1394.)

On appeal, a successful challenge to a trial court's denial of the motion must show both error and prejudice, that is, that "at the time of the motion it was reasonably likely that a fair trial could not be had in the county, and that it was reasonably likely that a fair trial was not had.

[Citations.]" (*People v. Davis* (2009) 46 Cal.4th 539, 578; see also *People v. Williams* (1989) 48 Cal.3d 1112, 1126.) The trial court's determination of the relevant facts will be sustained if supported by substantial evidence, but this Court will "independently review the court's ultimate determination of the reasonable likelihood of an unfair trial." (*People v. Hart* (1999) 20 Cal.4th 546, 598.)

The record evidence in this case at each and every relevant juncture—from the time of the commission of the crimes, throughout pretrial proceedings, after the prospective jurors submitted their questionnaires, after they were examined during voir dire, and finally throughout the trial itself—overwhelmingly demonstrates that the trial court erred prejudicially in refusing to grant a change of venue. There is more than a reasonable likelihood that a fair trial was not had in this case.

C. Procedural History

1. October 1998 Hearing Regarding Inflammatory Media Coverage

On October 5, 1998, the date set for appellant's preliminary hearing, codefendant Garza and appellant sought to exclude the media from the preliminary hearing and presented evidence seeking to show that media coverage had saturated the community with inflammatory coverage that would make a fair trial impossible to achieve. (2 CT 535, 553 et seq.)

They introduced evidence of extensive "first block" television coverage[16] depicting highly emotional grieving by a wide cross-section of the Kern County community, as well as numerous newspaper stories about the killing of Chad Yarbrough, the manhunt, and the capture of appellant. (CT 552 et seq.) The prosecutor agreed that the preliminary hearing should be closed and joined the defense in asking that the hearing be sealed; it was the prosecutor's hope that the community had not already been prejudiced. (2 CT 571.) However, local newspaper and television outlets filed an opposition to any closing of the preliminary hearing, and their opposition was granted. The preliminary hearing was open to the media. (3 CT 606 et seq.)

In addition to voluminous excerpts from television and newspaper coverage of the case, and letters from local businessmen and governmental officials,[17] defendants also presented live witnesses. Blanca Cavasos,

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[16] "First block" stories are those that run at the beginning of a newscast, before the first commercials. They are considered the day's most important stories. (2 CT 558, 562.) The ratings for coverage of the "Yarbrough" case were very high. (23 CT 567.) A televison producer called as a prospective juror remembered that story was covered "three times a day." (14 RT 3306.)

[17] Appellant and his codefendant presented hundreds of pages of televison transcripts and newspapers and other documents in support of this motion. These materials were folded into the exhibits presented to the court by appellant in June of 2000 (see 6 CT 1730), and can be found between 6 CT 1767 and 8 CT 2342.

principal at Arvin High School, testified that Chad Yarbrough was very popular. He had been captain of the football team. His uniform number was 32; after his death, the number "32" was worn on Arvin team helmets for the rest of the year, and opposing teams all marked their 32-yard line or demonstrated some kind of tribute to No. 32. (2 CT 576–577, 581.)

Chad's killing led to a community meeting to stem gang violence that was attended by over 700 people. Chad's photograph was everywhere. This was not the only incident of such violence attributed to gangs, but Ms. Cavasos testified that it was "the straw that broke the camel's back." (2 CT 577–578.)

A memorial service for Chad was held at the football stadium. Thousands of people attended. The school received support from Tehachapi, Delano, the other schools that were part of the Kern County school district, and from Bakersfield. Fundraisers for scholarships in Chad's name were sponsored by local branches of Carl's Jr., and local golf clubs as well. Support came from the supervisors, a chancellor of the college district, and other prominent local citizens. Ms. Cavasos had never seen the death of a youth cause such an intense community reaction. (2 CT 579.)

Charles Chamberlain, teacher and coach at Arvin High, described in detail the community shock and grief triggered by Chad's death. Chad had

just been elected to be Homecoming King. The homecoming game occurred shortly after his death. Chad's brother Brent took his place; 2500 to 3000 people attended the game. The Homecoming Queen was Carolina Castro, Chad's girlfriend. (2 CT 587–588.)

Mr. Chamberlain described the community response as "overwhelming" because Chad was a popular kid on the football team and the team captain, and it was such a shock, particularly to Arvin and Lamont. There were numerous fundraisers for either a scholarship in Chad's name or some other purpose associated with Chad Yarbrough. (2 CT 589.)

The trial court refused to restrict media access to the preliminary hearing but continued the hearing until January 25, 1999. (3 CT 634.)

2. June 2000 Motion to Change Venue

On May 9, 2000, appellant filed a motion to dismiss the charges against him due to excessive media coverage, and in the alternative, to change the venue from Kern County. (6 CT 1727 et seq.) He attached several hundred pages of materials as exhibits in support of the motion. (6 CT 1767–8 CT 2342.)

In addition to the case coverage, appellant attached a summary of California appellate venue cases and materials related to his expert, Dr. Edward Bronson. The materials included a list of venue cases in which Dr.

Bronson had testified; cases where he recommended against a change of venue; and materials related to the methodology, results, and conclusions of a community survey Dr. Bronson and his team conducted between January 6, 2000, and January 16, 2000. (See list of exhibits at 10 CT 2763 et seq., Dr. Bronson's written report and his resume, 7 CT 1770 et seq.)

The prosecution filed a motion in opposition to the motions to dismiss and to change the trial's venue on May 26, 2000. (8 CT 2344 et seq.) A hearing began on June 5, 2000. After the materials regarding publicity were proffered into evidence by appellant, Dr. Bronson testified in support of the motion. (2 RT 744 et seq.)

He conducted a quantitative and a content analysis of the media coverage in this case, and designed a survey to cross-check the impact of that coverage, which was carried out over 10 days in January of 2000. (2 RT 796–805.) He described a hierarchy of prejudicial publicity in this case, including inflammatory, inadmissible, and inaccurate publicity, along with stories that presumed the accused's guilt, and many stories reporting on appellant's confession, that inevitably included a recap of the crime that did not always correspond to the facts of the case. (2 RT 825–857.)

Dr. Bronson discussed how the climate established in a community affects a life-or-death decision. He found many calls for extreme retribution

against appellant, and no mitigating materials—it was unusual for no mitigating evidence to be reported at all. Unprofessional use of racial characterizations when race was not relevant were frequent, as were numerous references to gang activity[18] and carjackings. The many prior charges or cases of those said to be involved in the crime, and their similar or identical names, led to difficulty in separating out identities and actions of the accused in the media. (2 RT 857–866.)

There were references to torture of the victim in press coverage, and to rumors sweeping the community about mistreatment of the victim. (2 RT 836–844, 853–857.) The number of such reports was very high; more than half of the survey respondents had heard that the victim was tortured. This was a striking percentage, and particularly troublesome if the rumors were not true. (3 RT 942.) Dr. Bronson agreed that press accounts had discounted the truth of these rumors, but stated that such rumors were "hard to correct." (3 RT 1035.) Reports of torture, even those discounting it, create vivid, unshakeable imagery. (3 RT 1078–1079.)

There was poignant publicity about the victim. Dr. Bronson described stories that cumulatively had an extraordinary "victim impact" on

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[18] Appellant was never charged with crimes or enhancements related to gang activity.

the community, and discussed how "32," the number on Chad's uniform, acquired iconic significance and appeared in thousands of places all around Kern County. Scholarships in his name kept Chad Yarbrough's memory alive. There were countless benefits held to raise money for his family, or his funeral, or to oppose gangs, or to raise reward money for the capture of appellant. Chad Yarbrough and his family were personalized not just in Lamont and Arvin but throughout Kern County. Although larger counties are less likely to need a change of venue, Kern County in this case responded like a smaller, more homogeneous county. (2 RT 866–880.)

Dr. Bronson testified he did not often recommend that a survey be taken, or that venue be changed. His resume indicated that he recommended against a change of venue more often than not. In this case, he thought a survey was essential.[19] (2 RT 891–896.)

The survey he designed was implemented over 10 days, from January 6 to January 16, 2000, more than two years after the crime's commission. He found that county awareness of this crime, and preconceptions of what had happened, was extraordinarily high, on par with

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[19] Dr. Bronson has helped write standards for change-of-venue surveys that have been adopted and printed in American Society of Trial Consultants (1998, Spring) Proposed Minimum Standards for Survey Research in Connection with Motions to Change Venue. He described the qualifications of others on the relevant committee. (2 RT 896–902.)

national crime stories such as those about Timothy McVeigh and O.J. Simpson. Of 403 respondents, 329, or 82 percent, recognized and remembered the case. For comparison purposes, community recognition of the crime in two cases where this Court found a change of venue necessary, was 65 percent in the first,[20] and 53 percent in the second.[21] (3 RT 920–928.)

Over half those surveyed had heard that the victim was tortured.[22] Forty-two percent had heard that the crime was committed by gang members. Almost 75 percent knew one or more specific details of the crime. Forty-four percent knew two or more, 21.6 percent knew three or more. (3 RT 940–944.)

On any jury, even one person having detailed knowledge beyond a general awareness of the case can be "trouble." (3 RT 44.) Here, 100 percent of respondents who knew four or more specific details about the crimes thought defendants were guilty; 81 percent of those also thought that

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[20] *Williams [Frederick] v. Superior Court* (1983) 34 Cal.3d 584.

[21] *People v. Williams [Kenneth]* (1989) 48 Cal.3d 1112.

[22] Rumors of torture, mutilation and sexual abuse persisted for a year after the survey, well into jury selection, despite official denials. (See 14 RT 3365; 19 RT 4399–4400; 20 RT 4686–4688.)

should received the death penalty. (3 RT 961–962.) Dr. Bronson's content analysis reinforced the validity of survey results. (3 RT 950–963.)

Dr. Bronson discussed survey comments about the victim and the defendants. Ten percent of survey respondents had a fairly close personal connection to the victim—a number rarely found in a community from which a jury pool was to be drawn, and generally only in smaller communities. The status of the victim here, Dr. Bronson believed, led to subconscious prejudice. Even though the survey was done long after the crime (two years and three months), there was a 67 percent prejudgment rate among those who responded. (3 RT 994–998.) The recognition rate was "flat," meaning that more delay would not have a meaningful effect on case recognition or prejudgment.

Dr. Bronson recommended that venue be changed in this case, and testified that such a change, in his opinion, was the only way by which defendants could obtain a fair trial. (3 RT 998–1004.)

The prosecutor called no witnesses, and did not dispute Dr. Bronson's factual assertions or his expertise or the fact that his survey was conducted according to appropriate standards. The prosecutor strongly disputed Dr. Bronson's conclusions and recommendations and placed into evidence records of convictions of other defendants linked to this case who

had been tried in Kern County. He argued that Kern County was a large community that had not responded as a smaller community. He denied that there was a "rumor-mill mentality," and pointed out that no man-on-the-street interviews had been conducted to corroborate that assertion. (4 RT 1234–1237.)

Regarding Dr. Bronson's survey, the prosecutor asserted that Dr. Bronson was a sociological expert, not a legal expert. He argued that the survey was flawed in that it did not ask if the respondents could put aside their preconceptions and follow the law,[23] and that once Dr. Bronson's opinion was set, he was only interested thereafter in maintaining his position. (4 RT 1248–1252.)

On June 16, 2000, the trial court denied the motion. It cited *People v. Hayes* (1999) 21 Cal.4th 1211, a post-trial case, for the principle that the defendants must show a reasonable likelihood that a fair trial cannot be had in a particular venue, and found that defendants had not met their burden of proof because (1) Dr. Bronson's survey did not ask those who were questioned if their opinions about the case were so fixed they could not be

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[23] When asked why he did not ask that question, Dr. Bronson answered that the American Society of Trial Consultants recommended against it because it was a leading question that invites an affirmative response, and does not address the key venue issues of preconceived opinions on guilt or impressions of the accused. (4 RT 936–940.)

impartial, and (2) defendants had not made such a factual showing. (4 RT 1277–1280.) The court indicated it would allow renewal of the motion "at some stage of jury selection" if good cause existed. (4 RT 1281.)

On June 26, 2000, the defendants filed a petition for writ of mandate in the Fifth District Court of Appeal and requested that the proceedings be stayed. (No. F035941.) The petition was denied on July 14, 2000. (10 CT 2990.)

3. December 2000–January 2001 Motions to Change Venue

The parties worked out the jury selection process in late November 2000. Detailed questionnaires were prepared, with hardship information in the front. (9 RT 2194 et seq.) Four hundred and fifty potential jurors were called—twice as many as the prosecutor had ever called before.[24] (7 RT 1790.) The trial court estimated that 180 would be lost to hardship excusals, leaving 270 to fill out extensive questionnaires. The actual total of hardship dismissals was 199, leaving 251 people to complete the questionnaire. (See 1 JQ 1–25 JQ 7386.)

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[24] The trial court expected to complete jury selection by December 22, 2000. The prosecutor correctly asserted that such a feat was impossible. (7 RT 1790.) The jury was impaneled on January 17, 2001. (13 CT 3765.)

On December 4, 2000, jury selection began. At the outset, the trial court directed the prospective jurors in each pool of 75 to give short descriptive answers on their questionnaires and preinstructed them in detail with the ultimate legal principles that would apply at trial. (See, e.g., 10 RT 2429, 2435–2437, 2439.)

A formal hearing on a renewed motion to change venue was scheduled for January 11, 2001. On December 14, 2000, however, counsel filed a motion to change venue based on juror responses to the questionnaire. (12 CT 3317 et seq.) The trial court denied the motion without prejudice to its being renewed. (14 RT 3271.)

Individual voir dire for cause was completed on January 11, 2001. (26 RT 6150.) Of the 251 prospective jurors left after hardship excusal, 166 were excused for cause, the great majority by stipulation. (28 RT 6511.)

Appellant filed a renewed motion for a change of venue on January 11, 2001. (12 CT 3590 et seq.) He augmented the exhibits to his previous motion with new exhibits; a list of these exhibits can be found at 13 CT 3711. They include: copies of newspaper articles that had appeared since the June 2000 motion (Exh. A); a publicity log of the articles published since June 2000 (Exh. B); a publicity analysis of the articles published since June 2000 (Exh. C); a publicity analysis of the 242 articles that were

attached as exhibits to both venue motions (Exh. D); a breakdown of responses to the 251 juror questionnaires filled out by prospective jurors (Exh. E); and selected comments from a review of 72 of the questionnaires (Exh. F). The prosecutor filed an opposition to appellant's renewed motion to change venue on January 9, 2001. (13 CT 3670.)

Dr. Bronson was recalled by appellant to testify on January 11, 2001, in light of the new evidence of publicity, the voir dire of prospective jurors, and the juror questionnaires. (26 RT 6189 et seq.) His direct testimony was divided into four parts: (1) a brief summary of the testimony of the June 2000 hearing; (2) a review of new publicity; (3) a review of the juror questionnaires; and (4) analysis of the voir dire examined from transcripts in this case. (26 RT 6196.)

In brief, he had found an 82 percent recognition rate of the case in the survey; among those who recognized the case, 66 percent prejudged guilt, and 52 percent thought the defendant should receive the death penalty. More than half of the survey respondents had heard that Chad Yarbrough had been tortured. (26 RT 6196–6197.)

As of the previous June there had been 225 articles; 141 of those were in the Bakersfield *Californian*. Seventeen additional articles were included from the year 2000, all from the *Californian*, for a total of 242

articles. Exhibit A contained the articles that had appeared from June 5, 2000, to January 11, 2001. Exhibit B was the publicity log of those articles that had been published in the Bakersfield *Californian*, not including the local Lamont and Arvin papers.[25] (26 RT 6200–6201.) The publicity analysis (Def. Exh. C) identified instances of inflammatory language, the execution-style slaying, the very emotional terms used in reporting this story. (See Exh. C; 26 RT 6200–6202.)

Dr. Bronson summarized the damaging publicity about appellant that had appeared in the days approaching trial and in the midst of jury selection, including the use of inflammatory words in the coverage, and references to appellant's guilt, to his admissions, to his border-crossing, to gang involvement, and to the death penalty. (28 RT 6205–6208.)

Recent publicity about Chad Yarbrough noted that football players still touched the memorial plaque for him in the high school gym. A Lamont

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[25] Dr. Bronson could not personally say whether there were also stories from the Lamont *Reporter* and the Arvin *Tiller*, which had one-third of the coverage in his June numbers, but says he would be more surprised if that coverage had not continued. The prosecutor objected on grounds of "speculation," and the court sustained this objection—despite Dr. Bronson's well-founded basis for his assumption (his experience in general and intensive coverage in Arvin and Lamont prior to June 2000). Elsewhere, the prosecutor repeatedly recognized that coverage and concern were particularly intense in Arvin and Lamont, and suggested in opposition to the motion to change venue that had the jury pool excluded persons from those towns the likelihood of a fair trial would have been increased. (13 CT 3673.)

bicycle patrol had been created from memorial funds donated for Chad. Statements from community members showed that memories of Chad remained strong; one citizen was quoted as saying, "I guarantee one thing—Chad will never be forgotten." (Exh. C, p. 6; 26 RT 6209.)

Dr. Bronson then addressed the questionnaires. The case recognition rate was 79 percent—a very high number, and one that was consistent with survey results of 82 percent recognition that he obtained a year before. There had been very little diminishing of memory. (26 RT 6266.)

The two percent who knew the defendant or his family was a relatively small number. The 11 percent who knew the victim or his family, however, was unusually high. (28 RT 6267.) An unusually high percentage of jurors also knew an attorney connected to the case. This did not go to prejudice, but rather to the network of close connections in this case.

The same was true for the extremely high percentage of prospective jurors who knew a witness connected to this case—37 percent. The figure may have been inflated by the fact that many of the listed witnesses would play a minor role, or no role at all, but it suggested again a large network of connections that are unusual even in a small county. This was especially true for the large number who attended or knew someone who attended a

memorial service for Chad—16 percent. That would be high number even in a small community. (26 RT 6267–6268.)

Eighteen percent stated that they could not be fair or impartial because of the involvement of street gangs. (26 RT 6268.) According to Dr. Bronson, one might say that people are concerned about or prejudiced against street gangs everywhere, so venue change may not deal with the problem. But in this case, "the idea of street gangs, the fear of street gangs, all the associated cases with the carjacking and street gang involvement, become an integral part of the case—it's hard to disentangle how much of that inability to be fair has to do with case-specific factors and how much with the general concern." (26 RT 6268.)

Dr. Bronson described structural problems with the court's approach to voir dire. At the outset, the trial court directed jurors to give short answers on their questionnaires and preinstructed them in detail with the ultimate legal principles that would apply at trial, thereby disrupting the ability of the court to determine what actual biases or beliefs existed in the jury pool. Jurors who did disclose knowledge of the case were largely apologetic, and initially denied or minimized their familiarity with the case, even when it was extensive. (See Arg. II, *post.*)

Dr. Bronson reviewed the voir dire of 75 of the 251 prospective jurors. (26 RT 6277.) A high number (31) were not asked about case awareness. Of the 44 people who were asked, 41 of them, or 93.2 percent, knew about the case. (26 RT 6278.)

Structural problems in the voir dire that made it difficult to discover the pre-existing attitudes for each prospective juror. The court's voir dire, which usually began with a lengthy and correct presentation of what the law required of jurors before questions about juror attitudes, was likely to skew the juror's subsequent statements away from candor, especially given the esteem in which judges are held. (26 RT 6225–6226.)

Defense counsel were repeatedly urged to hurry up, and were faced with limits on their ability to question prospective jurors; concerns about publicity exposure competed with concerns about issues related to the death penalty. (26 RT 6280–6284.)

Dr. Bronson cited ongoing exposure to adverse publicity about defendant even during jury selection (see 14 RT 3395; 15 RT 3763; 16 RT 3804, 3829), and people whose new exposure to prejudicial publicity was disclosed by accident, i.e., it was not volunteered. (26 RT 6302 et seq.)

He concluded by testifying that his view the previous June that a change of venue was warranted was inevitably subject to the possibility that

he was wrong, and that either an effective voir dire or the passage of time might prove that the problems had abated. However, his review of questionnaires, voir dire, and the other recent prejudicial publicity strongly reinforced his previous opinion. He did not believe that appellant could receive a fair trial in Kern County. (26 RT 6299–6306.)

The prosecutor called no witnesses. Argument was held on January 16, 2001. The trial court again denied the motion. After citing *Odle v. Superior Court* (1982) 32 Cal.3d 932, *People v. Proctor* (1992) 4 Cal.4th 499, and *People v. Hayes* (1999) 21 Cal.4th 1211, the trial court found that "the defendant has not proved that it appears there is a reasonable likelihood that a fair and impartial trial cannot be held in the county. The court further finds that the defendant has not met the burden of proof that the jurors chosen have such fixed opinions that they cannot be impartial." (27 RT 6526.)

D. Discussion of Case by Prospective Jurors

On December 21, 2000, during jury selection, Devra Milam, secretary for appellant's counsel Mr. Bryan, was called to the witness stand to describe what she heard in the hallway. She testified that a blonde lady was talking to one other prospective juror, with other prospective jurors around her. The woman said that it "absolutely disgusts her to kill someone

for their property and she hopes there were no pictures because she had heard too many gory details from people involved." (17 RT 4129.)

After inquiry and examination of prospective jurors who had heard this statement, the trial court found that no harm was done because the speaker and all who had heard her had been dismissed, or had not been tainted. (17 RT 4132 et seq.)

On January 9, 2001, prospective Juror No. 200315873 (who was eventually seated as Juror No. 9) told the court and counsel that early on, in a waiting room while "Wheel of Fortune" was on, he had heard other prospective jurors talking generally about the Ramirez case, and that it was a capital case. (24 RT 5741–5742.)

On January 10, 2001, counsel submitted a stipulation regarding the potential testimony of Nancy Berrigan. Ms. Berrigan would testify that she had been on jury duty and was in the large jury room just prior to June 5, 2000, and that the "Yarbrough" case was a topic of discussion among many of the prospective jurors in that room. They had all been saying that it was a horrible crime, and that the pictures of appellant in the paper looked terrible, and that Chad was an all-American boy, and that appellant should be killed. (25 RT 6122.) Ms. Berrigan further testified that she had heard this same opinion from a person who had come into her house within the

past few days to do work for her, and that various other people had given her the same opinions about appellant and Chad Yarbrough which she had heard in the jury room. (25 RT 6122–6123.) The stipulation was presented to the trial court as additional support for the change of venue motion.

E. Appellant's Jury

Peremptory challenges were handled on January 17, 2001. (28 RT 6566–6701.) At the outset of the process, appellant moved for additional peremptory challenges in light of the substantial number of pro-death opinions and widespread awareness of this case among the prospective jurors remaining on the panel after cause challenges had been adjudicated. (28 RT 6677.) The trial court denied his request, noting that it had already allowed 26 peremptory challenges. (28 RT 6680.)

When appellant was near the end of the 26 peremptory challenges he had been allotted, he again asked the court to allow him more peremptory challenges. His motion was denied. (28 RT 6693.)

After he had exhausted all 26 challenges, appellant renewed his motion for additional peremptories, and was again denied.[26] (28 RT 6697.)

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[26] Appellant dismissed, in order, prospective jurors Kellerhals, Ordiway, O'Neill, Cera, Franklin, Moreno, Roper, Turner, Hart, Davis, Epperson, Stroup, Kilby, Caudill, Williams, Lindgren, Bohannon, Brewer, Krotter, McKee, Emms, Benson, Woolfolk, Shaw, West, and Moore. He had unsuccessfully challenged each of these prospective jurors for

Three jurors were seated after he had exhausted his preliminary challenges: Nos. 200061224 [Juror No. 8], 200301163 [Juror No. 6.], and 200316311 [Juror No. 9]. (28 RT 6700–6701.) He had earlier unsuccessfully challenged Jurors No. 8 and 6, both of whom were correctional officers, for cause. (See Args. II.C.11 & II.C.43, *post.*)

Appellant had challenged for cause 9 of the 12 jurors initially seated.[27] On one of these challenges, he was joined by the prosecutor. (16 RT 3888.) On another, the prosecutor did not oppose his challenge. (30 RT 7085.) The replacement of Juror No. 12 with Alternate No. 3 (200322141) on January 19, 2001 (30 RT 7108–7114), made a total of 10 seated jurors appellant had unsuccessfully challenged for cause.

Eleven of the 12 seated jurors had heard about the case before the trial; 10 of them acknowledged prior media exposure.[28]

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cause. (See Arg. II.C, *post.*)

[27] Jurors No. 1, 2, 3, 4, 6, 7, 8, 10, and 11. (See Arg. II.C, *post.*)

[28] All 10 jurors unsuccessfully challenged for cause (Jurors No. 1, 2, 3, 4, 6, 7, 8, 10, 11, and the replacement for Juror No. 12) had heard of or talked about the case. Juror No. 9 (200316311) had heard about it happening some time earlier, and "very vaguely" recalled what it was about. (23 JQ 6788.)

An examination of the responses of the following eight jurors and four alternates underscores the impossibility of maintaining confidence that appellant's jury was impartial.

Juror No. 1 (200151234) knew the decedent had been shot and that the person who shot him was caught in another state; the juror felt that the decedent had been murdered "because the news media said so." (21 RT 5162–5168.) Appellant's initial challenge for cause was denied.

(Arg. II.C.30, *post.*)

On January 19, 2001, after jury selection and opening statements but before evidence was presented, Juror No. 1 tried to talk to the court alone. The trial court refused. (30 RT 7063.) In open court, she then expressed deep fear of continuing on the jury.

After the jury was dismissed, Juror No. 1 testified that she owned rental properties in Lamont, went there once a month to collect rents, maybe more often if repairs were necessary, and feared that she might be "putting myself in some sort of situation," because the case was affiliated with Lamont gangs. She was afraid that if "there was an upset of this case and these gangsters are upset, they might retaliate against me, thinking I was on the jury and I had something to do with it, because they didn't like the way decisions were made." (30 RT 7063–7064.)

The court responded by telling her that in his 13 years on the bench he had never been made aware of the sort of retaliation of which she was afraid. (30 RT 7065.) The juror mentioned that she had concerns, but she ultimately agreed that she was satisfied she could perform her duties. (30 RT 7069.)

After discussion, the parties decided to show her a map with relevant crime scenes or important sites marked, to see if they were close to her properties. One of the locations that would figure prominently in the trial, Efrain Garza's house—the launching place for the assault on victim Juan Carlos Ramirez—was actually located "next door" to one of Juror No. 1's rental properties. (30 RT 7077.) Another critical site, the parking lot from which victim Leonel Paredes was kidnapped, was close to another of her properties. (30 RT 7079.)

After Juror No. 1 was shown a map where crime scenes were located, the trial court asked her if having property that close to crime scenes would cause her to have more concerns. She answered that the trial court's statement of its 13 years' experience had made her more comfortable—but she still had concerns. (30 RT 7079–7080.)

Appellant challenged her for cause. She had close connections with Lamont and was compelled to go there regularly. She believed she was in a

very dangerous situation and that appellant was a very dangerous person connected to other dangerous persons, i.e., "gangsters"—all before any evidence had been presented. (30 RT 7081.) The prosecutor did not oppose the challenge. (30 RT 7085.)

The trial court denied the challenge because she seemed "honest." The court found that she was not substantially impaired. (30 RT 7087–7088.) The trial court did not address Juror No. 1's belief, candidly expressed even before any evidence was presented, that appellant and his associates were "gangsters"; nor did the court caution the juror not to prejudge appellant's character or actions, or explain why this volunteered evidence of bias was somehow not grounds for her dismissal. (See Arg. VI, *post*.)

Juror No. 2 (200336734) had a brother who worked in the sheriff's office. She had overheard a conversation between women expressing sympathy for the decedent's mother; she thought the speaker was a "a sports mother sharing, because her child played football." (23 RT 5548.) She knew the decedent was a football player who was murdered and that his truck was involved. She recalled possible gang influence, and that the suspects were Hispanic. The newspapers had led her to believe that the decedent was murdered. (23 RT 5547–5558.)

Juror No. 3 (200316337) initially wrote that he knew nothing about the case. Gradually, he disclosed on voir dire that he had seen television coverage and heard from his wife that Chad Yarbrough had been shot, that Chad's truck was stolen and then recovered (he had seen a picture of the tow truck), and that the case started with a carjacking. He knew that appellant had been picked up out of state: "It was publicized so big, you know." (21 RT 5041–5042.)

Juror No. 5 (200315873) heard the case being discussed in the jury assembly room even after being called for jury service. (24 RT 5815–5820.)

Juror No. 6 (200301163), a correctional counselor at Wasco State Prison, had prior experience working with street gangs, and felt that their main purpose was crime. (24 RT 5706.) She knew the decedent had been kidnapped, and that his body was found in a field. She knew about memorial services and fundraisers for burial costs. She first learned of the case when the decedent went missing, and the press was reporting that the chances were slim that the decedent was still alive. (24 RT 5717–5721.)

Juror No. 7 (200199345) knew the case happened in Arvin or Lamont. She knew that the decedent was found in an orchard, that his body was found by a family member. She knew that Chad Yarbrough had a girlfriend and a brother who were somehow involved in the case. She knew

that the perpetrators took the decedent's truck to East Hills Mall to paint it. She knew of a prior carjacking that may have been related. She knew that the decedent had been dropping off his girlfriend just before he was kidnapped. She knew that the decedent's brother took over as Homecoming King in his brother's place, and that the decedent's girlfriend was named Homecoming Queen. (17 RT 4194–4197.) This juror became emotional when talking about the decedent's brother taking his place as Homecoming King. (17 RT 4200.)

Juror No. 8 (200061224) began reading an article that was "reiterating the case" while waiting to be called to the jury box. (16 RT 3851–3854.) This juror, a correctional officer, had previously read about the case and remembered photographs when the crime had happened. (23 JQ 6759–6761.) Based on his extensive experience in the correctional system, he did not believe that LWOP truly meant that one would serve the rest of one's life in prison. (16 RT 3855–3856.) He also declared, after indicating to the court a willingness to keep an open mind, that he thought that death should be the penalty for intentional killings. (16 RT 3863–3864.)

Juror No. 11 (200239389) knew law enforcement witnesses Jill Johnson and Steve Urner; Urner was her son's partner when her son worked for the Kern County Sheriff's Office. (23 JQ 6853.) When asked about the

death penalty on her questionnaire, she agreed with the assertion that "the death penalty should be imposed in every case where someone deliberately takes another human being's life." (23 JQ 6855.) At the close of voir dire, she reiterated her feeling that death was the appropriate sentence for an intentional killing or a killing involving kidnapping or carjacking. (15 RT 3580.)[29]

Alternate Juror No. 1 (20026391) knew the decedent was a quarterback for the high school football team, that he had been murdered, and his car taken: "I think it was pretty brutal." (22 RT 5291.) **Alternate Juror No. 3 (200322141)** had learned that the decedent was shot in an orchard "execution-style," after his truck was stolen, and that he had been bound and shot in the head. (14 RT 3439.)[30] **Alternate Juror No. 4 (200016260)** knew that the decedent was carjacked, that the body was found the next day in Arvin, that a couple of suspects fled, that the motive

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[29] Juror No. 11 was challenged for cause during voir dire (see Arg. II.C.8), and was again challenged for cause mid-trial after an incident involving lunch with her father in a crowded restaurant; there, in a loud voice, he asked her effectively why the jury hadn't already found appellant guilty. Both challenges were denied. (See Args. I.F.1, V & VI, *post.*)

[30] After Juror No. 12 was dismissed for medical reasons (see 30 RT 7109), Alternate Juror No. 3 became a seated juror. (13 CT 3780–3781; 30 RT 7108–7114.) Juror No. 12 had not been challenged for cause; however, appellant had unsuccessfully challenged Alternate Juror No. 3 for cause. (See Arg. II.C.4, *post.*)

for the killing was the decedent's vehicle, and that the suspects had Hispanic surnames. (23 RT 5523–5537.) **Alternate Juror No. 5 (200362275)** knew that the case involved a carjacking, that the decedent was shot, and that the decedent's little brother had been in the truck before the carjacking. (21 RT 5089.)

F. Mid-Trial Renewals of Motion to Change Venue

1. Juror No. 11 – Lunch with Her Father

On February 5, 2001, after lunch, the bailiff informed the court that he had been approached by Juror No. 11. She told him she had lunch with her father at a restaurant called Bill Lee's, close to the courthouse. Her father asked her how the case was going, and after she gave him a neutral answer, he said "something to the effect that I don't see why it's taking you so long, we know he's guilty." (39 RT 8978.)

The court then asked for Juror No. 11 to explain. She said that while at lunch with her dad, he asked her if she was getting bored up there. When she said no, he said in a loud voice (because he was hard of hearing) that she was sure everyone could hear, "[W]hat's taking them so long? They know he did it." (39 RT 8978–8979.)

She had not said anything to her dad about the case since being called to be a juror. She and her dad both thought she would be released

because her son is a deputy sheriff. (39 RT 8980.) Juror No. 11 assured the court that her father's views would not affect her own, and she would not worry about what he might think during deliberations. (39 RT 8981–8982.)

Counsel for appellant then questioned the juror. (39 RT 8983–8985.) She said that her father was talking loudly, and that people could hear him because the tables were "two feet apart." After questioning, counsel moved for a mistrial and renewed his change of venue motion. He asserted that the juror was hostile to counsel, irritated and aggravated by normal questions (the trial court agreed that his questions were appropriate), and prejudiced against appellant. (39 RT 8986.)

The court felt that the juror was not hostile, but did have "kind of a look on her face" after counsel asked if she would recognize her fellow jurors had they been at Bill Lee's during lunch. (39 RT 8986.) The court also disagreed with defense counsel's use of the word, "shouting" to described her father's speaking, but rather opined, "I think she said talking loudly, so people at adjacent tables could probably hear him." (39 RT 8987.)

The court found that the juror's expression when questioned by counsel for defendant was more like a surprised expression than a hostile one, and that her response was appropriate given the fact that she was being

questioned about whether or not she recognized people she had been sitting with for three weeks. She had done nothing to violate the court's rules, and had indicated she could remain impartial. (39 RT 8981–8982.)

The court also denied the motion for mistrial, and found no reason to change its prior ruling on the case's venue. The court then agreed to question all the other jurors to see if they heard anything from Juror No. 11's father at Bill Lee's. (39 RT 8983.)

Juror No. 11 was called back to court, and admonished by the court to tell all her family members not to discuss the case in her presence, or ask her questions about it.

THE COURT: The other thing I'm going to be sure that you do is not discuss this incident with any of your fellow jurors. You haven't done that, have you?

THE JUROR: I told them my father said something, that's all, that he wanted to do—know what was going on.

THE COURT: You told your fellow jurors that?

THE JUROR: Yes.

THE COURT: You didn't say what he said?

THE JUROR: No.

(39 RT 8995.)

Juror No. 11 identified the fellow jurors with whom she spoke. She claimed she talked to them immediately after lunch, and had not spoken with any of them since being questioned by the court. (39 RT 8997.)

When the court asked all assembled jurors which of them had either heard the incident at Bill Lee's or who had heard about it from Juror No. 11, Jurors No. 2, 4, 6, 9, and Alt. Juror 2 raised their hands. (39 RT 8999.)

Juror No. 2 said that Juror No. 11 had only said that there was an incident during lunch at Bill Lee's with her father where the conversation was inappropriate, that she needed to share with the court. (39 RT 8999–9000.)

Juror No. 4 heard Juror No. 11 talking with three other jurors after her testimony about what happened, saying that the court was probably thinking about kicking her off the jury. (39 RT 9002–9004.)

Juror No. 6 said that Juror No. 11 was "a little upset" when she came back from lunch because of something her father said. (39 RT 9006.)

Juror No. 9 said that there were four jurors sitting over in the sun on a bench when Juror No. 11 came up, and said she was so mad at her dad, and that she would have to talk to the judge. (39 RT 9007.) After Juror No. 11 was questioned about the incident, she came out of the courtroom

and said she probably shouldn't have said anything at all to the court, that she didn't do anything wrong. (39 RT 9009.)

Alternate Juror No. 2 testified that, as Juror No. 11 was on the way to talk to the bailiff or the court, she said that her father had just blabbed out in front of everybody, in a crowded restaurant, something about the case, and the name Yarbrough. (39 RT 9011–9012.) The juror could not remember hearing anything from Juror No. 11 after her appearance before the court. (39 RT 9012–9013.)

Counsel for appellant then renewed his motions. He asserted that Juror No. 11 was not candid. She answered the court's pointed question about whether she had talked about her father's remark with jurors after her appearance by denying it. But other jurors recalled her talking after being questioned by the court about how she might be dismissed from the jury, and that she should not have volunteered anything to the court; she obviously felt abused by the process of inquiring into what had happened. Another juror also remembered her describing what her father said out loud differently, that her father said the name "Yarbrough" at Bill Lee's. (39 RT 9015–9016.) Because of evidence that a "circus atmosphere" was continuing, and the case was being talked about all around town, including

by jurors and their families, counsel for appellant renewed the motion for a change of venue. (39 RT 9015–9016.)

The prosecution maintained that it wasn't like the juror was talking to anyone in particular when she emerged from the courtroom, and that there was nothing in what Juror No. 11 said that affected the impartiality of herself or any of the other jurors. (39 RT 9017–9018.)

The trial court denied all motions. Regarding Juror No. 11's prevarication, he considered it an understandable and human response to the pressure-laden position she was in. (39 RT 9022.) The court called in all jurors for a general admonition as to the need to avoid discussing the case outside the courtroom. (39 RT 9024–9025.)

2. Diana Yarbrough

On June 5, 2000, counsel filed a motion to recuse the prosecutor's office in this case. One of the reasons was Diana Yarbrough, aunt of the decedent in this case, and who was then the supervising clerk in the Municipal Court. She worked in the 1215 Truxtun Avenue building, next door to the courthouse in which appellant was being tried, and home of both municipal courtrooms and the offices of the Kern County District Attorney.

In counsel's declaration, he wrote upon information and belief that municipal court judges had recused themselves from this case because of

their working relationship with Ms. Yarbrough, and that she was present at most or all of the public hearings in this case during regular county business hours. Counsel argued that the close working relationship of the county offices had compromised the impartiality of the prosecutor's office. (4 RT 2439.) After argument on June 26, 2000, the trial court denied the recusal motion. (4 RT 1327.)

Ms. Yarbrough continued to attend nearly every session of the trial, along with other Yarbrough family members. (8 RT 1978–1982.)

On February 9, 2001, counsel reported that on the previous day, they encountered Diana Yarbrough in Courtroom No. 2, presided over by the Honorable Clarence Westra, who oversaw section 987.9 funding throughout appellant's trial. After concluding one of three pending motions, Judge Westra left the bench briefly to look for the other two motions. As counsel were talking, Diana Yarbrough came into the courtroom. Since the session was ex parte and secret, the front door was locked. She entered the courtroom via Judge Westra's chambers, and stayed for several minutes, speaking to both the courtroom clerk and reporter before leaving. Counsel moved for a mistrial, and renewed appellant's motion to change venue. (43 RT 9662–9666, 9724–9725.)

After further argument, Ms. Yarbrough was called to testify. The trial court first placed on the record that it did not know the witness, and had only greeted her from time to time when passing her during appellant's trial. (43 RT 9731.) Ms. Yarbrough testified that she had been transferred from the Municipal Court building at the first of the year, and became a supervising clerk for the court clerks of Department 2. (43 RT 9732.) She had made arrangements with Pat Chandler of the clerk's office for any issues related to her nephew's case to be handled by someone other than herself. (43 RT 9732–9733.)

Ms. Yarbrough confirmed that she had entered Judge Westra's courtroom but said that it had nothing to do with the present case. She thanked the clerk for helping another clerk with a juvenile matter, and asked her about her workload. (43 RT 9733.) She saw both Mr. Bryan and Mr. Gardina there, but did not hear anything they said, nor did she look at any records related to this case. She testified that she had never received or tried to get information related to this case, and had never tried to provide the prosecution with any information. (43 RT 9734.)

Ms. Yarbrough prepared a statement about this incident at the request of Pat Chandler. She gave a copy of it to her supervisor, Terry McNally. She then printed an extra copy of it and gave it to Mr. Barton, the

prosecutor. (43 RT 9376.) She was the one who informed Mr. Barton that if there was any matter involving this case, Ms. Chandler was supposed to handle it. (43 RT 9736–9737.) No one had told her that Mr. Barton was not supposed to know anything about the ex parte hearings. (43 RT 9736.)

Ms. Yarbrough testified that her connection to this case became an issue when she was transferred from the justice building at 1215 Truxtun Avenue to the superior court building at 1415 Truxtun Avenue, at the beginning of the year (2001). She and Ms. Chandler decided that she would have no contact with Sandy Cotton, clerk of the court where appellant was being tried, Judge Twisselman's courtroom. (43 RT 9737.) Although Ms. Yarbrough was never told not to be behind the courtrooms on the first floor in the hallway, she and Ms. Chandler thought it would be better if she were not in those areas. (43 RT 9738.)

Ms. Yarbrough also testified that she had heard counsel for appellant make references to Department 2, either allowing or disallowing money for this case, but that the case at bench never came up when she was assigned to Department 2 as a supervisor. (43 RT 9738–9739.) To her knowledge, she was the source of all the knowledge that Mr. Barton had about what happened the previous day, February 8, 2001, in Department 2. (43 RT 9739–9740.)

She prepared her summary of what happened at the request of Pat Chandler and gave it to the prosecutor that morning before she came into the courtroom a little after nine o'clock.[31] Ms. Chandler told her that someone had asked her to report to Judge Westra about the incident. (43 RT 9743.) Ms. Yarbrough was not present the previous afternoon when counsel said that they were going over to Department 2 for a hearing. (43 RT 9743.)

After Ms. Yarbrough's testimony was concluded, the prosecutor made an offer of proof. He stated that while he had been in contact with Ms. Yarbrough, it was as a family member of the decedent. The only interaction he had with her regarding her duties as a clerk was in the previous summer when counsel had questioned the propriety of her being paid a full-time salary while she attended every session of this trial; the prosecutor had told her that it was none of opposing counsel's business. (43 RT 9746.)

After argument, the trial court denied the motion for mistrial and the renewed motion for change of venue. The trial court found that Ms. Yarbrough had not learned any confidential information, and directed her not to interact with any of the courtroom clerks, but placed no further restrictions on her. (43 RT 9765, 9770, 9772.) She had been present and continued to be present for most sessions of appellant's trial.

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[31] The document was marked as Court's Exhibit 2. (43 RT 9747.)

3. Bias in Favor of Yarbrough Family Members

On November 28, 2000, counsel for appellant informed the court that deputy sheriffs were personally escorting Yarbrough family members to the parking lot. He added that at previous hearings, Hispanic people were held back and were subject to warrant checks while the Yarbroughs were escorted by deputies to the parking lot. (8 RT 1988.)

The prosecutor disputed some of these facts, and said that threats to the Yarbrough family had been made, which justified the escorts.[32] (8 RT 1992.) The trial court placed no additional restrictions on attendance at the hearing, and said it would control the courtroom. (8 RT 2114.)

Counsel then presented allegations of improper behavior by deputies. Friends and family members of appellant were intimidated, and were no longer coming to court. Counsel for appellant specified that by statements about preferential treatment of the decedent's family, he did not mean the court's bailiff; it was Deputy Chavez whose practice was to ask Hispanics for ID and run warrant checks on them before they were allowed to enter

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[32] No evidence of any such threat was ever presented during these proceedings.

the courtroom, and Deputy Mitchell, who escorted the decedent's mother and aunt from court.[33] (8 RT 2105.)

The trial court asked to be informed of any inappropriate behavior, and said it would take action. The court asked for a formal motion; counsel duly made a motion for evenhanded treatment of friends and family of both the decedent and the defendant. He described obvious favoritism shown to the decedent's family by bailiffs from other departments, which would be prejudicial if seen by jurors. (8 RT 2114.)

On November 30, 2000, counsel for both parties presented to the trial court a proposed stipulation of neutrality, asking that court personnel and police officers treat family members and friends of the decedent and the defendant in a neutral manner. (9 RT 2336.)

The court accepted the stipulation, but confined it to the courthouse, saying that it was too broad. It did not intend to confine law enforcement in any manner that might interfere with their ability to do their job as they deemed necessary, regardless of any stipulations by the parties. (9 RT 2338.)

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[33] The warrant checks of Hispanics who came to the trial was noted in the Bakersfield *Californian*. (Def. Exh. D, publicity analysis, p. 3.)

Counsel thought there needed to be something specific to limit the practice of checking appellant's family members and friends, or potential witnesses for appellant, for outstanding warrants without doing the same for anyone connected with the decedent's family. The parties were ultimately able to create a stipulation and an order that was signed by the trial court. (11 CT 3282–3283.)

During trial, this case was identified by a sign on the courthouse door saying, "Yarbrough case." (36 RT 8385.) On January 31, 2001, counsel complained about the "circus atmosphere" of the case, and reported witnessing a uniformed deputy commiserating with the Yarbrough family just outside the courtroom door. (36 RT 8386.) Drew Patrick, the official in charge of the courthouse bailiffs, later testified that he had personally talked to the Yarbrough family "to see how they were doing." (36 RT 8456.)

G. Application of the Criteria Considered by this Court in Assessing Whether Rulings on Venue Motions Were Correct Establishes that Appellant's Trial Should Have Been Moved From Kern County

1. Nature and Gravity of Crime

Murder alone is not enough to warrant a change of venue. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1125.) But when a murder is especially "gruesome," it can rise to this level, particularly if it is a death penalty case;

"the factor of gravity must weigh heavily in the determination regarding the change of venue." (*People v. Hernandez* (1988) 47 Cal.3d 315, 334.)

The bare outline of the prosecutor's case in chief is as follows: Chad Yarbrough was kidnapped and robbed. He was stripped, tied up, gagged, blindfolded, and then shot in the head. The perpetrators were alleged gang members. One of them, appellant, was charged with a potential death sentence.

These facts on their own are inherently sensational. But the media coverage also included other alleged carjackings. Appellant was said to have gone on a "carjacking spree," and to have been part of a "rash of carjackings," an "ongoing series of carjackings," a "spate of carjackings," an "epidemic of carjackings." (Def. Exh. D, publicity analysis, p. 3.) The number of carjackings, and appellant's reported role in them, was confusing. Many prior cases and the similar or identical names of suspects led to difficulties in the media coverage in separating their identities and actions from those of appellant. (2 RT 884–887.)

Moreover, it was widely reported that appellant had been involved in another murder. Family members of a slain youth named Javier Ibarra were quoted as expressing regret that appellant had somehow got away with murdering their relative, and did so by witness intimidation. A juror from

the trial of Gabriel Flores, who was convicted of the second-degree murder of Mr. Ibarra, was quoted as regretting the fact that Flores had been acquitted of Ibarra's murder.[34] (See, e.g., the front-page story, "Juror's Worst Fears Realized," at 8 CT 2237, and stories listed at Def. Exh. D, publicity analysis, p. 6.)

The inflammatory nature of the coverage fostered an environment in which false rumors spread quickly, and were widely believed. The press noted rumors of torture, and occasionally said they were not true (2 RT 844–846; Def. Exh. D, publicity analysis, p. 10); but segments of the community, including prospective jurors who remained in appellant's venire despite challenges for cause, believed, for example, that Chad's penis had been cut off and stuffed into his mouth, and that he had been subjected to anal penetration. (See, e.g., 14 RT 3363; 20 RT 4686.)

A vivid example of the contaminating effect of such widespread false information can be seen in the voir dire of Wardena Pullam (Juror No. 200361827). When asked if there was any reason why she should not serve on the jury, she answered that she was working part-time in Lamont at

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[34] This depiction of the Flores trial's outcome was flatly erroneous but nevertheless powerful coming from a juror who sat on the case. In point of fact, Gabriel Flores was convicted of the second-degree murder of Javier Ibarra and his convictions were affirmed on appeal. (See Arg. XVI, *post.*)

the time and there was "quite a bit of discussion about the incident." (18 RT 4393.) She was then running a reading lab at Myrtle Avenue School. After instruction from the court on her duty to set aside opinions she may have formed about the case (19 RT 4394–4395) she averred that she would be able to perform her duty.

The court then asked her if there was any other reason why she should not be on the jury, and she answered, "I also worked at Kern Medical Center. And though I worked on a floor other than the emergency room, I did—it was quite—it was what people were talking about at the time, yes." She heard specifics about the condition of the decedent's body from people who were in the emergency room when the body was brought in. When asked if she could honestly set all that aside and rely only upon evidence presented in court, she answered, "I presume I can set it aside." (19 RT 4396.)

The court asked her to give a summary of her prior knowledge of the case.

> A: Okay. I understand that he was driving with his brother. They were carjacked. The brother was put out of the car. Chad Yarbrough was taken to—I'm not sure whether an orchard or vineyard in the Lamont area, and abused and murdered.
>
> Q: All right. In what way was he abused? And be specific, please.

A: Okay. I understand that he was sexually assaulted.

Q: In what way? I'm not asking you to say things that embarrass you, but I need to know specifically in what way you understand that he might have been sexually assaulted.

A: I understand it was a homosexual assault.

Q: Referring to genital homosexual assault?

A: That's what I was told, yes.

. . .

Q: Okay. Now did any of the people that told you this say they had personal knowledge because they were there and saw some of these things?

A: People had heard things. That's what. And I seem to remember someone in the hospital saying something about the body.

(19 RT 4399–4402.)

There was a shared horror at the nature and gravity of this crime that passed from person to person and from trusted authorities in the community. Prospective juror Joan Ortiz, in the course of responding to question No. 47 [have you seen any photographs of the victim or defendant], answered that she had not, but that such photographs would affect her ability to be impartial because "talking with friends—I found out how the murder was committed." (4 RT 937.) Harmonia Dado wrote, "I

heard specifics about what happened to him. It was awful." (6 JQ 1512.) James Calloway could not be fair and impartial because "between my wife and I—discussed what was relayed to her by some detectives." What he heard would affect him because "the way in which Chad died as described to her." (1 JQ 237; see also 17 RT 4242–4243.)

Not only did prospective jurors report hearing the most damning of all possible facts—facts that were completely false—but they reported hearing them at their workplaces (correctional facilities, mental health buildings, hospitals), and attributing the rumors to sources with real authority, like the local sheriff's deputies. (See 20 RT 4687–4688.)[35]

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[35] The most common employer of prospective jurors was the Department of Corrections. (See 10 RT 2478; 12 RT 2859; 14 RT 3432; 15 RT 3666; 16 RT 3791, 3832, 3849 (seated juror), 3980; 20 RT 4735, 4677; 21 RT 5144 (relative); 22 RT 5237, 5326 (applicant for job at CDC); 23 RT 5338 (former deputy at county jail), 5435; 24 RT 5705 (seated juror), 5805; 25 RT 6133.) When correctional officer Sherry Williams reported to the court and counsel that she had heard talk at work about this case, and case details, three times after her voir dire in late December and the day she was called to serve on the jury (Jan. 17, 2001), a frustrated counsel moved to have all correctional officers struck from the panel as hopelessly tainted. The motion was denied. Earlier, in response to the same motion made after the voir dire of officer Sam Lozano, who reported talk of sexual mutilation of the body at his workplace, ostensibly based on statements of "inside" information from a Deputy Sheriff, the court noted, "I will confirm that the Legislature, in their wisdom, has not excluded correctional officers from the prospective jury pool." (20 RT 4729.) (See Arg. VII, *post.*)

Dr. Bronson predicted that the nature and extent of publicity in this particular case were such that rumors of torture, with their vivid imagery, would likely persist despite official denials. (2 RT 845–848; 3 RT 1078–1079.) The prosecutor pointed out that he was a sociological expert and not a legal expert. (4 RT 1242.) The nature and persistence of rumors, however, is precisely the sort of thing studied in depth by sociologists.[36] Dr. Bronson's prediction was right.

Although Dr. Bronson was not allowed to render a legal determination of whether venue should be changed, he was very well qualified to address issues of community behavior under certain kinds of stress. These issues have been studied by social scientists for decades. It should be no surprise that his predictions, and not the prosecutor's predictions, of whether time would meaningfully lessen community awareness and cause rumors to diminish in this particular case, were borne out by questionnaires and by voir dire.

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[36] See, e.g., Rosnow & Fine, Rumor and Gossip: The Social Psychology of Hearsay (1976); Allport & Postman, The Psychology of Rumor (1947); Anthony, *Anxiety and Rumor* (Feb. 1973) 89(1) J. of Soc. Psychology 91–98; Iyer & Debevec, *Origin of rumor and tone of message in rumor quelling strategies* (Fall 1991) 8(3) Psychology and Marketing 161–175; Stewart, Witchcraft, Sorcery, Rumors and Gossip (2003).

The prosecutor called no expert of his own to refute any of Dr. Bronson's testimony. He argued that Dr. Bronson had not proved the existence of rumors because he did not follow up his survey with other man-on-the-street interviews. The prosecutor made no effort to engage with the evidence showing that vivid nightmares percolated through the community at the time appellant's jury was selected, and that memories of this case had not faded at all.

In sum, the nature of and gravity of the crimes alleged here were extremely serious, and weighed toward granting venue change—particularly in Kern County, where the nature of what crimes actually occurred was contaminated by a web of other serious charges and poisonous rumors that would not have been present in any other part of California.

2. Size of the Community

Kern County was moderately large in 1999; its population was 648,000, making it the 14th largest of 58 counties in California. In this case, however, it responded like a small town. In his opposition to appellant's motion to change venue, the prosecutor argued that:

> [T]he only group that acted like a "small-county" or "shared" the experience, was the local high-school football community, and the towns of Arvin and Lamont. If the jury commissioner had heeded the suggestion made by the prosecutor to the court, they could have excluded jurors from those towns entirely, and the recognition percentage would have been

> much less, since all of those who worked or lived there have been excused . . . many from Bakersfield had only a passing recollection.

(13 CT 3673.) This is an illustration of why a change of venue should be granted (failure to follow prosecutorial advice) rather than a reason why it should not be granted.

The personalized nature of the publicity in this case led many prospective jurors to identify with Chad Yarbrough, or with his mother, or another member of his family. (See, e.g., Patricia O'Neill [Juror No. 200336322], who thought of her brother when she read about the decedent; see also seated Juror No. 2 [200336734], who heard a conversation in which a "sports mom" identified with his mother.)

An extraordinary number of people knew Chad or a member of his family, or had attended a memorial service or other function in the decedent's name. The community connections to the family resembled those of a much smaller town. (4 RT 1203; Def. Exh. E, data from 251 questionnaires.)

Comparison with other Kern County cases where motions to change venue were denied is instructive. Here, the prosecutor relied on *People v. Martinez* (1978) 82 Cal.App.3d 1 in asserting that Kern County was too large a county for venue to be changed. (See 8 CT 2350–2351.) The

Martinez case, however, did not so hold. Instead, it underscores how exceptional is the present case.

In *Martinez*, the Kern County District Attorney's Office conducted its own survey. It concluded that 88 percent of those persons polled failed to recognize the name of the case. Of those 88 percent, nearly one-half failed to recall having read or heard about the case. Fewer than 8 percent of the persons polled had formed any opinion about the guilt or innocence of the defendant; of those, about 3 percent believed they could not be fair. (*People v. Martinez, supra*, 82 Cal.3d at p. 14.)

The *Martinez* court held that a venue change was not warranted:

> [T]he relative obscurity of appellant, the lack of prominence of the victim, the absence of public expression of prejudice, the limited circulation of the pretrial news coverage relative to the population of Kern County, and the large number of prospective jurors called who had not heard of appellant's case, negates any reasonable likelihood that appellant did not get a fair and impartial trial.

(*People v. Martinez, supra*, 82 Cal.3d at p. 14.)

Here, the relevant factors are materially different in every respect. Recognition of the case, according to Dr. Bronson's survey taken a year before a jury was chosen was 82 percent. According to the questionnaires, the recognition rate was 79 percent—and *recognition of the case by actual seated jurors was 83 percent.* Five seated jurors had detailed "knowledge"

obtained from the media or from conversations about the case before being presented with any evidence. The victim was well known and widely loved, while the accused was a member of a despised element—a "juvenile street gang"—and a Hispanic. Coverage here, particularly by television, saturated the county. Under the principles followed in *Martinez*, the trial court committed reversible error in not changing the venue of appellant's trial.

The prosecutor also relied on another Kern County case, *People v. Balderas* (1985) 41 Cal.3d 144, where denial of a motion to change venue was affirmed by this Court. (8 CT 2352.) This case, too, supports appellant and not respondent.

In *Balderas*, "defendant makes no general claim that the pretrial publicity was unusual, unfair, or inflammatory." (*People v. Balderas*, *supra*, 41 Cal.3d at p. 178.) There was no confession repeatedly written about in the papers and talked about on television, no denunciation of the accused by the sheriff, no gang allegation, and no evidence of false and damning rumors. It took examination of only 59 members of the venire to obtain 12 jurors and three alternates. Nine of them were excused on medical or financial hardship grounds. Out of these 59, only 22 had prior knowledge of the case.

In *Balderas*, the defendant "*used only 13 of his 26 peremptory challenges*." (*People v. Balderas*, *supra*, 41 Cal.3d at p. 189, emphasis in the original.) Though one of the jurors knew a family member of the decedent, no juror reported any knowledge of or opinions about case details. (*Ibid.*)

Here, Dr. Bronson noted the community response to the death of Chad Yarbrough: "I don't think I've ever come across anything that even approached that in terms of number of people that made that kind of special effort [pertaining to tributes and to fundraisers]." (3 RT 868.) Appellant is unable to find anything comparable done for the victims in the venue cases decided by this Court in recent years. Appellant was castigated as part of an alien "cancer" even though he had lived in Kern County since age three.

In sum, while Kern County is a moderately large county, it is not exempt from venue motions, and was not so treated in either *Martinez* or *Balderas*. (See also *Powell v. Superior Court* (1991) 232 Cal.App.3d 785 [venue changed from Los Angeles County].) The factors that make a fair trial difficult in a small county are all strongly present here.

3. Nature and Extent of Publicity

Heavy media coverage weighs in favor of a change of venue, but does not necessarily require a change of venue. For example, in *People v.*

(Richard) Ramirez (2006) 39 Cal.4th 398, this Court upheld the trial court's denial of a motion for change of venue by an accused serial killer, even though the trial court itself had "described the media coverage of the murders and defendant's arrest as 'saturation.'" (*Id.* at p. 434.)

In *Ramirez*, this factor was outweighed by the facts that neither defendant nor the victims were known to the public prior to the crimes and defendant's arrest, and the trial was held in one of the most populous and diverse communities in the United States, Los Angeles County. The jurors had "only the most general familiarity" with the case. (*People v. Ramirez*, *supra*, 39 Cal.4th at p. 435.) Finally, it is worth noting that press coverage of "the Nightstalker" occurred statewide, while the intense media coverage in this case did not spill beyond county boundaries.

The sheer quantity of reportage in the case at bench was extraordinarily high. There were a total of 242 newspaper articles by the time of the second venue hearing, with 97 front-page articles and 30 more articles on the front-page of an interior section. Pictures accompanied 148 articles. (Exhs. A–E.) Counsel noted more than a thousand television stories had been submitted as exhibits. (4 RT 1197–1198.)

The prosecutor asserted, without any authority, that Dr. Bronson should not have counted separate newspaper stories with the same content

(3 RT 1021), but Dr. Bronson's method is the universally recognized way to tally the number of news stories. Each story is read by a different audience, and repetition is a key component of how stories permeate public consciousness.

The media coverage was also confusing, covering a large number of crimes and suspects with similar names. (2 RT 884–887; Exh. D, publicity analysis, p. 20.) The original suspects for the crime were Gabriel Flores and appellant. Flores was eventually dropped and replaced by codefendant Efrain Garza. While Flores was a suspect, though, news stories about him told readers that he had committed a previous murder.[37] (Exh. D, publicity analysis, p. 7.)

Before Efrain Garza was charged with the instant offenses, he was tried on two carjacking cases in January of 1998, the same two of which appellant was convicted during this trial, including one that took place on the day Chad was killed. The stories described the carjackings as having been committed by a gang of young Hispanics called the Lamont 13, or "Lamonsters." (Exh. D, publicity analysis, p. 7.) Appellant was a suspect from the outset, but was not apprehended for nine months. During that time,

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[37] As noted, Gabriel Flores was convicted of second-degree murder for shooting Javier Ibarra.

the media repeatedly identified him as one of "Kern County's Most Wanted," the object of a "manhunt," thumbing his nose at the police. (Exh. D, publicity analysis, pp. 12–13.)

The leading factor in media coverage tending to prejudice the community is the use of inflammatory language in reportage of the crime. (2 RT 825–835.) In *Williams v. Superior Court* (1983) 34 Cal.3d 584, this Court noted that "'execution-style' killing was referred to 12 times (variations were used 3 additional times)." (*Id.* at p. 590.) In this case there were 20 references to "execution-style slaying" and characterizations of the killing as "planned execution-style." (Exh. D, publicity analysis, pp. 12–13.)

This language was echoed by prospective jurors in voir dire, and by a seated juror. (14 RT 3439, 3505; 19 RT 4512–4513.) Prospective juror Sherry Williams, a correctional officer, testified that between her voir dire (January 3, 2001) and being called for jury selection (January 17, 2001), she heard fellow officers at her workplace talking about how the decedent had been killed "execution-style." (28 RT 6627.) This term was part of the televison coverage of the case. (4 RT 1197.) Stories about this case were filled with strong, emotional language, such as "brutal," "horrible," "nightmarish," "heinous," "evil," "sickening," and "cowardly." (Exh. D, publicity analysis, p. 3.)

Several stories referred to suspects as Hispanic males when references to their race was gratuitous.[38] Appellant's nickname "Loco" appeared repeatedly in the press, along with depictions of him and his brother, Cipriano, as "bad seeds" responsible for other crimes. (Exh. D, publicity analysis, pp. 13–14; 2 RT 857–866; 3 RT 1046–1047.)

Appellant was routinely referred to in media reports as a gang member. There were dozens of reference to gangs, the arrogance of gangs, the "cancer" of gang violence, the prowling of gangs like a pack of wolves—and how the community could stand up against gangs, and cause gangs to crumble, send gang-bangers crawling back under the rocks from which they came, and the need to declare war on gangs. (See Exh. D, publicity analysis, pp. 7–8.)[39]

There were not only stories and broadcasts generally describing appellant as armed and dangerous, but Sheriff Sparks was quoted as saying,

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[38] During the course of covering this case, the local newspaper formally adopted a policy of mentioning race only when it was relevant to the story. (3 RT 1046–1047.)

[39] "The word 'gang' . . . connotes opprobrious implications. . . . [T]he word 'gang' takes on a sinister meaning when it is associated with activities." (*People v. Perez* (1981) 114 Cal.App.3d 470, 479.) Given its inflammatory impact, this Court has condemned the introduction of gang evidence if it is only tangentially relevant to the charged offenses. (*People v. Cox* (1991) 53 Cal.3d 618, 660; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.)

"we have this sucker in custody and we're going to bring him back to Kern County." (Exh. D, publicity analysis, p. 12.)

A key issue, according to this Court, is not the extent of initial coverage of a crime, but whether community awareness of the crime remained high even after the coverage subsides. (*People v. Hayes*, *supra*, 21 Cal.4th at p. 1251; *People v. Williams*, *supra*, 48 Cal.3d at p. 1127.) Dr. Bronson testified in June 2000 that due to the nature and the extent of coverage here, that awareness remained quite high as late as January 2000, the date of his survey more than two years after the crime, and would remain high. (3 RT 998–1004.) Again, his prediction was correct. Juror questionnaires and voir dire disclosed that *community awareness was as high at the time of trial as at any previous point since the crime's commission*. This factor should have weighed decisively toward a change of venue.

4. Status of the Defendant

In both his argument and written opposition to the motion to change venue, the prosecutor ignored entirely the extensive discussions of how gangs were at that time plaguing Kern County. Reporting on this case focused on the gang angle, and routinely labeled the accused as a gang member. Reports continually referred to the crime as a gang-related crime.

(See Def. Exh. D, publicity analysis, pp. 7–8, for citation to dozens of such articles, and 7 CT 1892 through 8 CT 2224 for the word "gang" spread throughout transcripts of the televison coverage.)

In a remarkable example of selective memory, the prosecutor asserted that the press simply portrayed appellant and his cohort as "locals of Lamont!" (8 CT 2354, exclamation in original.) He then cited language from this Court's ruling in *People v. Fauber* (1992) 2 Cal.4th 792, 818, that, ironically, entirely undermined his case against moving the trial outside of Kern County:

> Defendant makes much of the fact that he is, and was reported in local media as, a New Mexico resident. However, *he fails to show that he was associated with any organization or group that aroused community hostility*." *People v. Adcox* (1988) 47 Cal.3d 207, 233 [253 Cal.Rptr. 55, 763 P.2d 906].

(8 CT 2354, emphasis added.)

The prosecutor knew full well if he succeeded in keeping the trial in Kern County, he would bend all his efforts toward portraying appellant as a sinister gang leader—which in fact he did. (See Args. IX & XIV, *post.*) At one point during colloquy between counsel over the prosecutor's blocking defense access to witnesses, the prosecutor exclaimed in exasperation, "Has anyone forgotten here, this is a gang case where witnesses kill each other?" (32 RT 7641.)

There were few, if any, groups that aroused more community hostility in Kern County than local gangs. The prosecutor inexplicably ignored such media coverage, even though the charged crime directly led to anti-gang fundraisers and a long wave of publicity that ranged from the county sheriff's description of appellant and his associates to letters in the newpaper warning about the dire threats posed to the community by gangs, a "cancer" on the community, and appellant's identity not only as a gang member but worse, a gang leader. It is safe to say that *no* group in Kern County aroused more community hostility that "juvenile street gangs."

In *People v. Famalaro*, *supra*, this Court wrote,

> The fourth factor—community status of the defendant—did not weigh heavily for or against a change of venue. There is no evidence that defendant or his family was well known before defendant's arrest for the murder; he grew up in Orange County, had no criminal record, and *was not associated with any group (such as a disfavored racial minority or juvenile street gang) towards which the community was "likely to be hostile*." (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 940, 187 Cal.Rptr. 455, 654 P.2d 225; compare with *People v. Williams* (1989) 48 Cal.3d 1112, 1131–1132, 259 Cal.Rptr. 473, 774 P.2d 146.) Thus, this was a "neutral factor[ ]." (*Odle*, at p. 942, 187 Cal.Rptr. 455, 654 P.2d 225.)

(*People v. Famalaro*, 52 Cal.4th at p. 61, emphasis added.)

Here, in stark contrast, appellant, a Mexican national, was implicated in a prior murder by the press as well as an unknown number of carjackings,

and was both a member of a disfavored racial minority and identified in the media as a member of a "juvenile street gang." His status could hardly be lower.

5. Status of Victim: The "Yarbrough Case"

Media depiction of Chad Yarbrough was warm, glowing, and extensive. It praised his youth and vigor, mourned his passing, and noted the remarkable number of memorials, scholarships, fundraisers and plaques dedicated to him. (See stories listed at Exh. D, publicity analysis, pp. 14–18.)

The prosecutor, in arguing that the victim's status did not weigh in favor of a change of venue, argued that the decedent "was only a popular kid at Arvin High School." (8 CT 2355.) He compared him to the murdered boys in *People v. Harris* (1981) 28 Cal.3d 935, who were "popular among their friends[,] and their families were respected in their neighborhood," and the victims in *People v. Pride* (1992) 3 Cal.4th 195, and *People v. Edwards* (1991) 54 Cal.3d 787, 808, who were also relatively young. "The victim's status would likely engender sympathy wherever the case was tried." (8 CT 2356.)

However, in this case Chad Yarbrough's status would not have had comparable significance anywhere else in California. For example, not long

before his death, TV reporters had interviewed Chad; these interview clips appeared in the media after his death.[40] None of the cases cited by the prosecutor contained such a unique circumstance: film clips of the victims being interviewed by local TV reporters available to be shown again and again. His mother, father, brother, girlfriend, uncle, grandmother, and great grandmother were contacted and interviewed on Thanksgiving, on his birthday, on the anniversary of his death, and upon the arrest of appellant. (See, e.g., television coverage included at 7 RT 1936–1939, 1946, 1952, 1972, 2050–2051, 2107–2108.)

Chad was extraordinarily personalized, as was his family. No similar degree of empathy occurred in *People v. Hamilton* (1989) 48 Cal.3d 1142, 1159–1160, where this Court wrote, "The publicity surrounding the trial did nothing to vilify or denigrate defendant's status, nor to personalize the victim. As a result, the jurors do not appear to have had a stake in the outcome of the trial."

In stark contrast, the record here demonstrates that the members of the community who had been exposed to information about Chad's death—as an overwhelming number of venire members had been—identified with

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[40] Chad appears on television in his football uniform, saying, "Whenever hometown sports we never get seen like other schools (*sic*) we got to try to play harder to get as much respect as we can." (7 CT 1892.)

this young man's plight and the sorrow it inflicted on his family. It was as if Chad reflected, represented, and embodied the very soul of this community. His accomplishments, his promise, and his strong family network strongly indicate that the factor of status of the victim should have been resolved toward venue change.

Chad Yarbrough's status was intrinsic to the particular community from which appellant's jury would be drawn. It would not have followed the trial outside Kern County. (Contrast, *Odle v. Superior Court*, *supra*, 32 Cal.3d at p. 942 [victim's status as a police officer propelled him to prominence; that status would follow him anywhere the trial took place].)

The status of the victim cried out for a change of venue.

H. Jurors Do Not Automatically Qualify for Service If They Agree That They Can Set Aside Their Own Beliefs and Preconceptions

The majority of the seated jurors brought detailed awareness of this case with them, derived from media reports and from conversations. However, all of them either stated, or acquiesced to the court's direction, that they could set aside their own views and preconceptions and apply the law to the facts as given to them. The trial court believed that such a statement, or acquiescence, *by itself*, insulated that juror from all challenges,

regardless of all other relevant factors, and regardless of the nature of their responses during voir dire. Not so.

In exceptional cases, "'adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed,' [citation]. . . ." (*Mu'Min v. Virginia* (1991) 500 U.S. 415, 429; *People v. Prince* (2007) 40 Cal.4th 1179, 1216–1217.)

In *People v. Tidwell*, this Court wrote,

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.

(*People v. Tidwell* (1970) 3 Cal.3d 62, 73; see also *Irvin v. Dowd, supra*, 366 U.S. at p. 728.)

The United States Supreme Court has held that a rebuttable presumption of impartiality normally attaches if a juror could provide assurances that he or she could "'lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" (*Murphy v. Florida, supra*, 421 U.S. at p. 800.) A defendant can rebut this presumption by demonstrating that the juror actually held a biased opinion, or "where the general atmosphere in the community or courtroom is sufficiently

inflammatory," or when "most veniremen will admit to a disqualifying prejudice," such that it is probable that the community harbors "sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own." (*Id.* at pp. 802–803.)

The prosecutor argued that his interpretation of the responses to the questionnaire showed that no more than 50 of the 251 identified themselves as too biased to serve on the jury, for a figure of 20 percent, which was less than the 25 percent found to be acceptable by the United States Supreme Court in *Murphy v. Florida*. (27 RT 6492–6497.)[41] Earlier, the prosecutor recognized that the fact that 268 out of 430 jurors were dismissed because of prejudgement of the case, as happened in *Irvin v. Dowd, supra*, was "problematic." (27 RT 6480.)

Here, of the 450 people called to serve on this jury, 199 were dismissed for hardship reasons, sometimes because of their feelings about this case. Of the 251 prospective jurors remaining who filled out jury questionnaires, a substantial majority of venirepersons (166) were dismissed

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[41] These numbers in *Murphy* were reached after the jurors were questioned, while the prosecutor's numbers are limited to those he believed had self-identified as biased on the questionnaires. (*Murphy v. Florida*, *supra*, 421 U.S. at p. 803.)

for cause. This case is closer to *Irvin* than to *Murphy*, where only 20 of 78 potential jurors were dismissed for cause after being questioned.[42]

The prosecutor argued that the remaining 85 prospective jurors should be sufficient. (27 RT 6507.) But of these 85, more than 50 of these were challenged for cause by appellant—always with some reason, and often for very good reasons, i.e., intimate familiarity with and prejudgment of the facts of this case, belief that death should invariably be the punishment for deliberate murder, unqualified belief that appellant and his associates were "gangsters," etc. (See Arg. II.C, *post.*)

In *People v. Farley*, this Court rejected a challenge to the trial court's failure to change venue of the trial by noting, *inter alia*, that appellant had not challenged any of the seated jurors for cause, and had eight peremptory challenges remaining. (*People v. Farley* (2009) 46 Cal.4th 1053, 1085.) In addition, none of the sitting jurors or alternates had been challenged for cause. (*Ibid.*) Similarly, in *Skilling*, only one of the 12 seated jurors had been challenged for cause. (*Skilling v. United States*, *supra*, 130 S.Ct. at p. 2903.)

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[42] In *Murphy*, the high court noted, "In the entire voir dire transcript furnished to us, there is only one colloquy on which petitioner can base even a colorable claim of partiality by a juror." (*Murphy v. Florida, supra*, 421 U.S. at p. 801.)

In *Beck v. Washington* (1962) 369 U.S. 541, 557–558, the fact that the defendant did not challenge for cause any of the jurors selected "is strong evidence that he was convinced the jurors were not biased." See also *People v. Panah* (2005) 35 Cal.4th 395, 448, and *People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1127–1128, where this Court cited the circumstance that the defendant did not challenge any of the sitting jurors for cause or exhaust available peremptory challenges, in support of its conclusion that hindsight demonstrated that retention of the case did not "produce an unfair trial."

Here, there is no doubt that appellant believed the jury was biased against him. He used all his peremptory challenges, and unsuccessfully asked for more. Ten out of the 12 seated jurors had been challenged for cause. Appellant did everything in his power to object to this jury.

In *Patton v. Yount, supra,* the United States Supreme Court rejected defendant's presumption-of-prejudice claim despite a wave of negative publicity, because "[t]he jury selection for Yount's second trial, at issue here, did not occur until four years later, at a time when prejudicial publicity was greatly diminished and community sentiment had softened." (Accord, *Skilling v. United States, supra,* 130 S.Ct. at p. 2915, fn. 13.)

There was no evidence that the community's feelings had softened prior to appellant's trial. The community from which the venire was chosen had been saturated with negative publicity toward appellant, heartrending sympathy for the decedent and his family, and poisonous rumors about the desecration of the victim that were false.

In such a climate, the fact that jurors told the trial court, often only after lengthy and repeated instructions and questioning, that they could set aside their preconceptions and follow the law, does not insulate respondent from appellant's meritorious claim that the trial court erred in not directing this case to be tried outside Kern County.

I. Conclusion

No venue motion is ever granted because it is impossible to find 12 fair jurors. Even in the smallest county confronted with the worst possible crime, it would be possible to do so. "The underlying question has always been this: Do we have confidence that the jury's verdict was 'induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print'?" (*Skilling v. United States*, *supra*, 130 S.Ct. at p. 1848.) In an area where prejudicial publicity extended for years, with much empathy felt for the decedent and his family, and much hostility directed at the accused, at some point it becomes impossible to

have confidence that the persons chosen as jurors are truly impartial. This is such a case.

II. THE TRIAL COURT'S PERVASIVE ERRONEOUS RULINGS ON APPELLANT'S CHALLENGES FOR CAUSE RESULTED IN A BIASED JURY AND REQUIRE REVERSAL OF THE JUDGMENT.

> It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated.

(*Mattox v. United States* (1892) 146 U.S. 140, 149.)

A defendant has a constitutional right to a trial by an impartial, indifferent jury. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727; *In re Hamilton* (1999) 20 Cal.4th 273, 293.) An impartial jury is one in which no member has been improperly influenced and every member is capable and willing to decide the case *solely* on the evidence before it. (*Hamilton,* 20 Cal.4th at p. 294.)

The bias or prejudice of even a single juror violates the right to an impartial jury regardless of whether an unbiased jury would have reached the same result. (*In re Carpenter* (1995) 9 Cal.4th 634, 654; *Irvin v. Dowd, supra*, 366 U.S. at p. 722; *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1111.) Accordingly, "[t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973 fn. 2 (en banc), cert. den., 525 U.S. 1033.)

In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. (*In re Oliver* (1948) 333 U.S. 257.)

A. Juror Bias – Prejudgment of the Case, Partiality Toward the Victim or Prosecution Witnesses, Animosity Toward the Defendant or a Group to Which He Belongs

Actual bias is "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C); *People v. Hillhouse* (2002) 27 Cal.4th 469, 488; *People v. Wheeler* (1978) 22 Cal.3d 258, 273.)

> Such bias may consist of an opinion as to the guilt or innocence of the accused, based upon some knowledge or information of the facts embraced in the charge or of the evidence to be produced, or it may exist without such knowledge or information, and may consist of a preconceived opinion concerning the defendant or the prosecuting witness which would prevent a fair consideration by the juror of the evidence given or facts proven in the case.

(*People v. Riggins* (1910) 159 Cal. 113, 117.)

Juror bias can be shown by animosity toward the defendant personally, or to a class of people of which he or she is a member. It can also be shown by favoritism toward the victim and his family. Juror bias

exists if there is a substantial likelihood that a juror's verdict was affected by any improper outside influence, i.e., an ongoing work relationship with the victim's brother or with an important witness, rather than on the evidence and instructions presented at trial, and the nature of the influence was detrimental to the defendant. (*In re Hamilton*, *supra*, 20 Cal.4th at p. 294; *People v. Honeycutt* (1977) 20 Cal.3d 150, 157–158.) In *People v. Galloway* (1927) 202 Cal. 81, this Court wrote:

> Where a juror has prejudged defendant's guilt before hearing the sworn testimony, it cannot be said that defendant has had a fair trial before an impartial jury, and a new trial will be granted. Usually this ground is established by proof of prior statements of the juror concerning the case, bias being deemed to be established where the juror's declaration, on his voir dire, that he was not biased, is negatived by proof of prior statements of such a character as to show a fixed opinion on the part of the juror, and which, if unknown to defendant until after verdict, will call for a new trial. (16 Corpus Juris (Criminal Law) p. 1154.)

(*People v. Galloway, supra*, 202 Cal. at p. 91.)

A juror is likewise biased if he or she has an opinion on a material issue in the case. (Witkin, 5 Criminal Trial § 470.) In *People v. Sullivan* (1922) 59 Cal.App. 633, the defendant was charged with criminal syndicalism. Two jurors had testified that they had an opinion on the illegality of his organization (the I.W.W.). Sullivan's conviction was reversed because his challenge of the two jurors was denied. The jurors'

opinions were as prejudicial as a prejudgment of guilt; "[T]he difference would be one of degree only. It cannot be said that a juror is in a position to render an impartial and unbiased verdict, who at the beginning of the trial holds a settled opinion in relation to the truth of facts going to the very foundation of the case required to be made by the prosecution." (*Id.* at p. 635.)

Bias can also be based on a defendant's associations. (Witkin, 5 Criminal Trial, § 470 (4).) In *People v. Vitelle* (1923) 61 Cal.App. 695, the accused was a known member of the Ku Klux Klan and was charged with a felonious assault committed during a "Klan activity." The trial court's failure to grant defendant's challenge of a juror who admitted that he was prejudiced against the Klan and this prejudice would affect his state of mind was reversible error. "A juror cannot be said to be fair and impartial . . . when such juror admits that in weighing the evidence he will be prejudiced against the defendant solely by reason of the fact that the defendant is a member of an organization to which the juror feels that he is opposed." (*Id.* at p. 701.)

A modern form of "an organization to which to juror feels that he is opposed" is "juvenile street gangs." "The word 'gang' . . . connotes opprobrious implications. . . . [T]he word 'gang' takes on a sinister meaning

when it is associated with activities." (*People v. Perez*, *supra*, 114 Cal.App.3d at p. 479.) Given its highly inflammatory impact, this Court has condemned the introduction of gang evidence if it is only tangentially relevant to the charged offenses. (*People v. Cox* (1991) 53 Cal.3d 618, 660; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) Forty-six of 251 people who answered the juror questionnaires said they could not be fair or impartial if "street gangs" were involved in the case. (26 RT 6268; Def. Exh. E, analysis of juror questionnaires, p. 1, and frequency tables, p. 1.)

On appeal of a challenge for cause, the applicable standard is whether the trial court abused its discretion. This Court will uphold a trial court's ruling on a juror challenge for cause by either party if it is fairly supported by the record. (*People v. Bolden* (2002) 29 Cal.4th 515, 536–537.)

B. Juror Bias – "An Eye for an Eye"[43]

Errors in failing to excuse a juror for cause when the juror has stated that he or she would automatically vote to impose the death penalty are

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[43] Numerous prospective jurors expressed a belief in the doctrine of "an eye for an eye." (15 RT 3544–3545 [Jerry Flick]; 21 RT 4940 [Lenvil Hardy]; 21 RT 5022–5023 [Michael Smart]; and 25 RT 5416 [Brent Drummond].) Four more survived challenges for cause. (17 RT 4045 [Kyle Dock]; 20 RT 4697 [Sam Lozano]; 25 RT 5960–5961 [Charles West]; and 25 RT 6048–6049 [Josie Pinkston].)

harmless unless a defendant exhausts all peremptory challenges in selecting the jury, and a juror to whom the defendant objects remains on the panel. (*Ross v. Oklahoma* (1988) 487 U.S. 81, 89.) Such errors are subject to a harmless-error analysis as set out in *Chapman v. California* (1967) 386 U.S. 18, 23. (*People v. Coleman* (1988) 46 Cal.3d 749, 769–771.)

In *People v. Farley, supra*, this Court wrote,

> We also reject defendant's contention that the assertedly erroneous denial of the challenge for cause to Prospective Juror E.D. is "reversible error because it in effect deprived him of a peremptory challenge." "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." (*Ross v. Oklahoma* (1988) 487 U.S. 81, 88, 108 S.Ct. 2273, 101 L.Ed.2d 80; id. at pp. 89–91, 108 S.Ct. 2273 [the court also rejected a challenge under the 14th Amend.]); see *People v. Richardson* (2008) 43 Cal.4th 959, 987–988, 77 Cal.Rptr.3d 163, 183 P.3d 1146 ["where defendant did not exhaust all his peremptory challenges, he cannot even begin to demonstrate that his right to an impartial jury was impaired"]; *People v. Ashmus* (1991) 54 Cal.3d 932, 966, 2 Cal.Rptr.2d 112, 820 P.2d 214 ["That an allegedly biased juror might have sat had he or she not been removed by peremptory challenge does not implicate the right to a fair and impartial jury in any substantial way"], *abrogated on other grounds in People v. Yeoman* (2003) 31 Cal.4th 93, 117, 2 Cal.Rptr.3d 186, 72 P.3d 1166.

(*People v. Farley, supra*, 46 Cal.4th at pp. 1096–1097.)

"To preserve an objection to the trial court's failure to excuse a juror for cause, a defendant must (1) exercise a peremptory challenge against the juror in question, (2) exhaust all peremptories, and (3) express

dissatisfaction with the jury as finally empaneled. [Citations.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 339; see also *People v. Crittenden* (1994) 9 Cal.4th 83, 121 & fn. 4.) Here, appellant met all these requirements.

The standard of review of the court's ruling regarding the prospective juror's views on the death penalty is essentially the same as the standard regarding other claims of bias. "If, *after reasonable examination*, the prospective juror has given conflicting or equivocal answers, and the trial court has had the opportunity to observe the juror's demeanor, we accept the court's determination of the juror's state of mind." (*People v. DePriest* (2007) 42 Cal.4th 1, 20–22, emphasis added.)

Given the degree of deference owed to a trial court's rulings, it is thus rare indeed that an erroneous failure to excuse a juror challenged for case actually leads to a reversal. The cases that discuss such errors, however, have not had dozens of such errors, as does the present case. Ten of the challenged jurors actually sat on appellant's jury—many after examinations that cannot be called "reasonable."

The trial court dominated voir dire from start to finish, and would simply not let prosecution-favored jurors go, even when they repeatedly expressed views that amounted to a disqualifying bias. Early in the proceedings, the trial court threatened to "pursue" one of appellant's

lawyers for making a perfectly legitimate objection, on the basis of the trial court's inability to remember what it had just said. (See Arg. II.C.25, *post.*) Later, the trial court implied that a motion for mistrial due to errors in voir dire were not made in good faith, and raised the specter of inviting the State Bar to initiate proceedings against appellant's counsel. (See Args. III & XXIV, *post.*)

It is inevitable that jurors whose monosyllabic assent to the court's directions was often obtained only after repeated and suggestive instructions by the trial court, and reminders of what the law required of them, would make mistakes in self-assessment. If any one of appellant's challenges for cause was improperly denied, the error in this case is not harmless. (*People v. Coleman, supra.*) Appellant is entitled to a new trial by the 12 impartial jurors to which he is constitutionally entitled.

C. Numerous Meritorious Challenges for Cause by Appellant Were Wrongly Denied

Appellant here presents 48 challenges for cause that were improperly denied, in the same sequence as the prospective jurors were called. Three of the following jurors were challenged for cause by both the prosecutor and appellant, but their joint challenges were rejected by the trial court. (16 RT 3888; 17 RT 4172; 25 RT 6069.) The trial court also rejected challenges of

two other prospective jurors who were challenged for cause by appellant without opposition from the prosecutor. (17 RT 4231; 30 RT 7085.)

1. Dennis Herbert (Juror No. 200079847)[44]

Mr. Herbert's daughter's fiancé knew Chad Yarbrough or his family. (14 RT 3320.) He had read about the case and discussed it with other people, but did not think he had any "special knowledge" about the case due to his personal connections. (14 RT 3320–3321.) He said that it was his "strong opinion" that one who was convicted of murder should be sentenced to death, and that life without possibility of parole was reserved for people who plead guilty. (14 RT 3325–3326.)

On his questionnaire, Mr. Herbert indicated that he thought that the death penalty should be imposed for deliberate murder except in rare cases. When asked by counsel what such circumstances might be, he said, "the thing I thought about at the time was I believe a crime of passion."

> Q. And if those type of mitigating circumstance do not exist, then you feel the death penalty is the appropriate punishment?
>
> A. Yes.

(14 RT 3327.)

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[44] Mr. Herbert's questionnaire begins at 5 RT 1430—not at 5 JQ 1457, as the "Master Index of Jury Questionnaires" claims. The index is roughly accurate, but not precisely accurate.

The court then returned to Mr. Herbert with an approach that typified its voir dire throughout the process.

> [Q.] Mr. Herbert (200079487), you understand that we are asking you about different views or opinions you might hold. And then that's because we are entitled to find out what your relevant views or opinions are. And then the next question usually after that is can you set those views or opinions aside and be sure that they are not going to influence you or sway you as you follow the law based upon the evidence in this case. Do you understand that distinction?
>
> A. Correct.
>
> Q. So you may—I'll just use a hypothetical. You may hypothetically feel that the death penalty should be imposed in every case where someone is convicted of first degree murder. That may be your personal opinion. But then you may be honestly able to set that aside and follow the law if the law says, in every case where a person is convicted of first degree murder, it's the jury's duty to consider two possible penalties. One is life without parole. One is death penalty. And the jury has to consider all the circumstances, all the factors required by law, and decide which penalty is appropriate. Do you understand the distinction there that now you set aside your preconceived view and now you are just going to follow the evidence and the law?
>
> A. Yes.
>
> Q. You are satisfied you can do that?
>
> A. Yes.

(14 RT 3326–3329.)

Appellant filed a written challenge for cause (12 CT 3355.) That challenge was denied. (14 RT 3329.) After the juror left, counsel then objected to the court's leading questions, which supplied the juror with the desirable answer:

> [THE DEFENSE]: Also, we'd like—defense would like to object to the Court's use of leading questions, implying the answer to the juror. I feel the jurors are changing their response to questions the Court is giving them implying an answer.
>
> THE COURT: Do you want to be specific? Give me an example.
>
> MR. GARDINA: For example, Mr. Herbert (200079487), the way it was phrased, the juror answered, in response to No. 84, that he did not believe he was open-minded about what the penalty should be. The Court's inflection in phrasing the question indicated that was an improper answer, and this juror changed his answer.
>
> The juror also had stated earlier, in response to No. 77 and response to No. 72, that this juror indicated that the—if the defendant is convicted of first degree murder, the punishment is going to be death; that LWOP would only be appropriate if the defendant plead guilty and did not go to trial. And so by asking the juror in the manner the Court did, which really isn't reflected on the record, the inflection by the Court implied the

juror should change his answer, which he did.

Yet his other answers are consistent with his response to No. 84 that he, in fact, believes when this defendant is convicted of first degree murder the appropriate punishment is death. If the defendant plead at an early stage, then he would be entitled to LWOP.

Also, the fact that he said only rare circumstances, 71-B, favor not voting for death. And he is talking about crimes of heat of passion, but he's talking about manslaughter.

So this is a juror that's already made up his mind that if this defendant or when this defendant or if this defendant is convicted of first degree murder the appropriate punishment is death. And by asking him open-ended questions—or not asking open-ended questions but implying the answer, the juror's naturally going to change his answer in order to please the Court when he realizes he may have goofed at some point.

Also, 88 is consistent with all of his answers where he said he would not change his opinion after discussing the case with the jurors because he believed, if the defendant is convicted of first degree murder, the appropriate punishment is death. So why would he change his answer. So all of his answers are consistent. And he should have been disqualified. But I think the process in attempting to rehabilitate these jurors to

get them to change their answers to say what is socially acceptable and does not truly reflect what is going on with these individual jurors when we look at their answers in totality.

So there are objections with Mr. Herbert (200079487). We listed all his consistent answers in his questionnaire that indicated he has a preconceived idea what the punishment should be in this case and should be disqualified under the cases cited.

THE COURT: Anything else, Mr. Gardina?

MR. GARDINA: No, your Honor. Thank you.

THE COURT: I have reviewed the questions and answers that I asked the juror specifically about Question No. 88. And on Question No. 88, I read the question to the juror. I read the answer. And then I asked the juror—after I told him he marked the box no, I said so what did you mean by marking the box no to that question about, no, you couldn't vote for the penalty that you believed the proper one if other jurors agreed with you. And I allowed him to explain his answer. Referring to Question 44, I read the question to him. I told him that he marked the box no, and I said can you explain that. Then he said can you repeat that one again. And I read the question again and indicated that he marked the box no. And I asked do you think that you understood the question. His answer was, no, I don't think so. And I asked him what would your answer be. I don't

see how that was putting words in his mouth.

MR. GARDINA: No. It implies answers to the inflection, the question that is asked, the manner it is asked. Obviously, if he indicated he has a bias toward street gangs, I think it would be more beneficial to ask him what his—does he have a bias toward street gangs. See if he repeats the same answers, rather than telling him what his answer is and then implying that answer was improper and he should change it.

And I'm concerned that we can sit here all day and get these people to change their answers but it's not a true indication of how they feel in this court when they talk about the fact if the person is convicted of first degree murder they should get death; if it's a manslaughter situation, they should get life without parole. This juror has specific views on the death penalty, and he's expressed those in his questionnaire and in response to open-ended questions during the voir dire process.

THE COURT: I think we all recognize the reality is that, on a 27-page questionnaire, from time to time jurors are going to put down erroneous answers. And it's not my intention to assume that when I ask any juror about their answer. But to the extent that we are clarifying inconsistent positions, I intend to ask questions in the manner in which I did. I do not intend to try to lead jurors through that process. I intend to ask the questions in a neutral manner, without suggesting to the juror

that the Court has some preferred answer. And I will certainly keep your concerns in mind as I go through the process—

MR. GARDINA: Thank you.

THE COURT: —and invite you to make any further record you think is appropriate.

(14 RT 3331–3338.)

2. Patricia O'Neill (Juror No. 200336322)[45]

Patricia O'Neill was a special education teacher. (14 RT 3358.) She thought that serving on this jury, aside from the hardship her absence would cause her students, might be psychologically difficult for her, because she had a brother about the same age as the decedent at the time he was killed. (14 RT 3359.) She was a bit nervous about her ability to not let her feelings influence her verdict. (14 RT 3360.)

Ms. O'Neill had heard from someone at her prior job in mental health that "something had been cut off of the person as well and put in the mouth." She didn't know if the person who told her that heard it from someone else, or had seen a report as to what the punishment in this case should be. (14 RT 3363.)

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[45] Ms. O'Neill's questionnaire begins at 3 JQ 870.

Counsel for appellant asked her if she had formed an opinion as to what the punishment should be:

> [Juror]: If he was found guilty and I felt that he truly did that, then, you know, I don't like to say that someone should be put to death. But I guess at the same time if—as I said, I have a younger brother. If that was my brother that it happened to, yes.
>
> Question: And this relationship you have with your brother, I understand it's strong. Is that going to impair your judgment as to how you vote as to the punishment in this case?
>
> Answer: I don't want to say, no, it wouldn't at all, because I don't know, you know. I'm hoping that, you know, I would definitely just go by the evidence and what I believe has happened. And I really—you know, I've never been in this situation. I can't say.

(14 RT 3365–3367; see also 14 RT 3368–3370.)

She repeated that she did not know what role her relationship with her brother might play. (14 RT 3367.)

When asked by the court if she thought that the decedent's being about the same age as her brother would close her mind as to sentencing options, and direct her straight toward the death penalty, or whether she would be able to keep an open mind and consider all the circumstances and evidence at the penalty phase, she answered,

[Juror]: I feel that, yeah, I guess I would be able to keep an open mind. It would depend on the evidence on how I made my decision how I felt about this.

Question: When you say you guess you would be able, was that your honest feeling?

Answer: Yes. I would hope that I would be able to keep an open mind and make that kind of. . . .

Question: You understand it's your duty to let the court know if you could not?

Answer: Yes.

(14 RT 3372.)

Ms. O'Neill felt that the death penalty was appropriate punishment for murder, except in rare cases. When asked to describe an example of a rare case, she answered,

> I guess in circumstances in self defense or—I don't know. You hear about children being abused or something and then maybe they feel that's their only way out. I don't know if that is right or wrong, but I do think those are circumstances that could change my mind about something.

(14 RT 3373.)

Counsel for appellant challenged Ms. O'Neill for cause. (12 CT 3353; 14 RT 3373.) The prosecutor then asked the witness a supplemental question regarding her friends in the probation department: "Would your contact with them have any influence on you being fair and impartial?"

Answer: "No." (14 RT 3374.) The court denied the challenge. (14 RT 3374.)

3. George Haller (Juror No. 200074069)[46]

Prospective juror Haller was an appraiser with the Kern County Assessor's Office. He knew the Yarbrough family, because his son played football for Garza High School, but he didn't know them personally. (14 RT 3426.) He had a son-in-law who was a correctional officer, and a friend who was either an FBI agent or an INS agent. (14 RT 3432–3433.) He also knew "various judges." (14 RT 3432–3433.) He had heard rumors about the case, that it was a carjacking, but nothing specific about what happened after the carjacking. (14 RT 3427.)

Mr. Haller circled 71-B on the questionnaire.[47] (14 RT 3430.) Appellant's challenge for cause was denied. (14 RT 3433; 12 CT 3351.)

4. Juror No. 12 [Alt. 3] (200322141)[48]

This juror (previously an alternate, who replaced the original Juror No. 12) (14 RT 3435), followed the case on television and in the

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[46] This juror's questionnaire begins at 3 JQ 674.

[47] Item 71-B reads, "While I favor the death penalty, I do believe there are rare cases where the death penalty should not be imposed even if somebody has deliberately taken another's life."

[48] This juror's questionnaire begins at 24 JQ 6946.

newspapers. (14 RT 3436.) When asked what rumors she had heard, she said that "he was shot in an orchard execution-style, after his truck was stolen." She added that he was bound, and shot in the back of the head. (14 RT 3439.) She "hoped" that she could set aside those stories, and be impartial in this case. (14 RT 3440.)

This juror favored the death penalty but believed that there are rare cases where the death penalty should not be imposed, even if someone has deliberately taken another human being's life. (14 RT 3441.) Her ex-husband, Jess Azevedo, was a deputy for the Kern County Sheriff's Office. She knew quite a few witnesses in the case, but did not believe she would bring any preconceived notions about those witnesses to her assessment of whether they were telling the truth or not. (14 RT 3445–3446.) Appellant's challenge for cause was denied. (12 CT 3347; 14 RT 3446.)[49]

5. Silver Ordiway (Juror No. 200286463)[50]

Silver Ordiway, on his questionnaire, circled 71A, "which stated that the death penalty should be imposed in every case where someone deliberately takes another human being's life." (14 RT 3487.) After listening to detailed instructions from the court regarding his duty to keep

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[49] On January 22, 2001, Juror No. 12 became too sick to continue. Alternate Juror No. 3 was chosen by lot to replace her. (30 RT 7108–7114.)

[50] Mr. Ordiway's questionnaire begins at 3 JQ 898.

an open mind, Mr. Ordiway did not think that his strong support of the death penalty would sway him directly toward a death verdict. (14 RT 3490.) He then said,

> If I might add a scenario there. If a woman was accused of killing her husband and—that, yes, I would support death penalty on that, if it were for money or insurance.
>
> If they could prove there were spousal abuse in the case, then that would sway me back the other way, the way of life in prison or lesser.

(14 RT 3490–3491.)

After further instructions from the court, he asserted that he had no doubt of his ability to keep an open mind. (14 RT 3491–3492.) However, when questioned by counsel for appellant, Mr. Ordiway stated that if it were proved that the defendant intentionally caused the death of Chad Yarbrough, then he should be required to give up his life. (14 RT 3495.)

Mr. Ordiway then gave instances of

> [C]ertain areas I believe very strongly in the death penalty. That would be taking an officer's life when he was in—performing his duty. I also think that certain times when you have gangs that do drive-by shootings or shoot somebody for initiation purposes or something like that, those are the types of crimes that nobody can protect the innocent bystander from, and those cases or the professional bystander in the case of a police officer, and those types of circumstances, I strongly believe in the death penalty.

(14 RT 3496.)

Mr. Ordiway told the prosecutor that he could keep an open mind, follow the law, and consider all circumstances before he decided what penalty was appropriate. (14 RT 3502.) Counsel for appellant then asked, "If the circumstances of death indicated that the victim was killed with three bullets shot into the back of the head, would that eliminate a life without possibility of parole situation for you?" Answer: "Under those circumstances, it would be very difficult for me to consider life without parole." (14 RT 3503.) Counsel filed a written challenge for cause, and gave a copy to the court and prosecutor. (14 RT 3503; see 12 CT 3349.) The trial court then asked Mr. Ordiway,

> [Question:] If there was other evidence to consider, in regard to how that happened, if it did happen, then circumstances related to the defendant individually, circumstances in mitigation or aggravation, could you keep an open mind and consider all that, before you decide what penalty is appropriate?
>
> Or do you think just the fact that there were the three bullet holes, if it was established there were three bullet holes in the back of somebody's head, if that just means you go directly to death penalty? What are your thoughts on that?
>
> [Answer:] It would depend on the other circumstances. Like I said, when I was asked that question, I can visualize a person with their hands tied behind their back in an execution-style murder.
>
> And in that case, I would definitely agree with the death penalty.

> If there is something else to that, then, you know, as I said, I think I can be open-minded about it, and fair.

(14 RT 3504–3505.)

After extensive argument, the trial court expressed regret that it had allowed the particular question to be asked.[51] The court tentatively denied the challenge for cause but invited the prosecutor to provide the prospective juror with

> "[o]ther scenarios, in which it might be something other than somebody deliberately putting the gun to the back of a person's head. . . . With the possible defense theories that could arise, either mechanical failure of the gun, unintentional discharge of the gun, things like that, and see if the juror changes his views in any way. So that's my tentative."

(14 RT 3510–3511.)

Mr. Ordiway was then brought back in and was duly asked by the prosecutor if the fact that "a clip caused it to go off, it's an automatic

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[51] The Court: "Well, the problem we run into, though, is if we're going to give him just the scenario of three bullets to the back of the head, that's not a balanced scenario in terms of trying to describe to him all the different possibilities that the evidence might suggest that had occurred. I think we created an unnecessary problem by getting that specific, and that's why I'm bringing this up, because I don't want to have this happen with every juror that comes in, is to have us get into this area, unless I find that the law allows it, I'm allowing counsel to address this with this juror specifically and probably invite you to research it further." (14 RT 3509.)

weapon and it misfired, or something along those lines," would affect his thinking. The juror answered that it would "depend on the original intent."

> Question: What I am asking, is would you put on blinders, as soon as you decided somebody was shot three times in the back of the head, even if it was with their hands tied behind their back, would you at that point refuse to follow the law and keep an open mind in the penalty phase?
>
> Answer: No, I would never refuse to follow the law. And it would depend on what the instructions were, what was brought out in the courtroom.

Counsel for appellant then asked,

> [Question]: Would you have difficulty voting for LWOP if you found the defendant guilty of first degree murder during a kidnapping or carjacking?
>
> Answer: Yeah, because I do believe in the death penalty, for those types of crimes.

(14 RT 3516–3517.)

After Mr. Ordiway agreed with the prosecutor that it would be difficult, but not impossible, to impose LWOP, the trial court denied appellant's challenge for cause. (14 RT 3517.)

This court has held that a challenge for cause may be based on the prospective juror's response when informed of facts or circumstances likely to be present in the case being tried. (*People v. Coffman* (2004) 34 Cal.4th 1, 46–47; *People v. Cash* (2002) 28 Cal.4th 703, 720–721.) Mr. Ordiway

was a very strong and determined supporter of the death penalty who, after guidance from the trial court, said that he would follow the law, but never denied that it would be very difficult for him to not impose death on anyone proven guilty of deliberate murder.

6. Roger Dilbeck (Juror No. 200080030)[52]

This prospective juror knew Rick Yarbrough, the victim's father. Rick did plastering on Mr. Dilbeck's personal residence and does plastering work on construction jobs financed by his employer. Mr. Dilbeck was a construction loan officer for a local bank. He knew that Rick Yarbrough had other family members, to whom he may or may not have spoken on job sites, working for him. (14 RT 3608–3610.)

Mr. Dilbeck read about the case months earlier. His only recollection when questioned was that there was a confession involved. (14 RT 3612.) He also believed that the death penalty is the appropriate punishment for people convicted of first degree murder. (14 RT 3616, 3617.) When counsel asked Mr. Dilbeck if a person admits killing another person during a kidnapping or carjacking, did he feel that the death penalty was appropriate, the prosecutor objected. His objection was sustained—no grounds for the objection were provided. When Mr. Dilbeck was presented with the same

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[52] This juror's questionnaire begins at 2 JQ 562.

factual situation and asked if he felt that life without parole was not an appropriate sentence, Mr. Barton repeated "same objection," and the court repeated, "sustained." (14 RT 3618.) Counsel for appellant submitted a challenge for cause, which was promptly denied. (12 CT 3394; 14 RT 3619.)

7. Floyd Moore (Juror No. 200006880)[53]

This juror had initially circled both 71-B and 71-F on his questionnaire as reflecting his feelings about the death penalty. (14 RT 3767–3768.) When asked to re-read the options and pick one, he chose 71-B.[54] Counsel for appellant then asked him for an example of a killing that did not warrant the death penalty as punishment, and he answered, "in a case of self-defense or something like that." (15 RT 3768.)

The juror was told that self-defense was justifiable homicide, and not a crime. He was asked what the appropriate penalty would be for a killing during a carjacking, he answered that it would probably be the death

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[53] This juror's number was not given in the reporter's transcript, but can be found when appellant used his last peremptory challenge to excuse him. (28 RT 6697.) His questionnaire begins at 6 JQ 1626 et seq.

[54] Item 71 B reads, "While I am in favor of the death penalty, I believe that there are rare cases where the death penalty should not be imposed even if someone deliberately takes another human being's life."

penalty. (15 RT 3669.) After the prosecutor objected, the trial court asked counsel to clarify.

Q.	In a—where the defendant has been found guilty of first degree murder, no self-defense, committed in the act of carjacking and kidnapping, as between life in prison without the possibility of parole or the death penalty, do you believe the death penalty would be the appropriate—
A.	Yes, sir.
Q.	Sentence or verdict in all respects?
A.	Yes, sir.
MR. BRYAN:	Thank you.
THE COURT:	Any further questions, Mr. Bryan?
Q.	And you would not be open to life without the possibility of parole in that situation?
A.	No.
MR. BRYAN:	Thank you.

(14 RT 3769–3770.)

The prosecutor questioned this juror, and obtained a statement that he would follow the law during the penalty phase of this trial. (14 RT 3771–3773.)

The trial court then returned to further question this juror, and obtained an agreement from him that he could set aside his own personal views about the death penalty and the law, and consider with an open mind both penalty possibilities, death and life without parole. (14 RT 3775.)

Q.	All right. Any brief supplemental voir dire for defense?
MR. BRYAN:	Yes, your Honor. Brief.
THE COURT:	Very brief.
MR. BRYAN:	Thank you.
. . .	
Q.	If after the guilt phase, that both I and counsel talk to you about, as did the Court, the Judge, the defendant—a defendant were convicted of first degree murder, no self-defense, in the course of a kidnap, and carjacking, the only punishment that you would consider would be death penalty; is that correct?
A.	Not really.
Q.	What else would you—
A.	I'd take both sides, and then make up my mind, when I hear both sides.
Q.	Are you talking about things like self-defense?
A.	No.

Q. All right. What were you speaking of?

A. Just what you asked me.

Q. Well, what things would you consider in determining whether or not it was the death penalty?

THE COURT: I'm going to go ahead and interpose an objection, because the juror has to be offered the hypothetical as to what he can consider. He's not going to be presumed to know.

Q. Would you be considering things like the defendant's background, how he was treated as a child?

A. Not really.

THE COURT: I'm going to ask you to—ask the juror to assume what the law allows him to consider, and ask him if he can perform his duty in that regard. Otherwise, we're taking too much time to ask him to presume different things, that he may not know what the law provides, please.

Q. Well, you wouldn't consider what I asked you, correct?

MR. BARTON: Objection, your Honor.

THE COURT: Sustained.

MR. BRYAN: Sir—

THE COURT: Circumstances in aggravation and circumstances in mitigation, please.

(14 RT 3775–3777.)

Appellant challenged the juror for cause. (12 CT 3402; 14 RT 3777–3778.) The challenge was denied. (14 RT 3778.)

8. Juror No. 11 (200239389) (seated)[55]

This juror knew Kern County Sheriff's Officer Jill Johnson and her parents. Her son was a deputy sheriff, and partnered with Kern County Sheriff's Deputy Steve Urner. She remembered that the case was about teenagers out in Arvin, and that Chad Yarbrough was killed. (15 RT 3569–3570; 23 JQ 6853.)

Of the seven options on the jury questionnaire regarding prospective jurors' attitudes toward the death penalty (Question No. 71), this juror circled "A" as closest to her beliefs. Answer A provided that the death penalty "should be imposed in every case where someone deliberately takes another human being's life." (23 JQ 6855.) She affirmed during voir dire that she circled that because it was the way she felt. (15 RT 3572.)

In response to leading questions from the court, the juror answered affirmatively to the question, "Are you satisfied that you can set aside any

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[55] This juror's questionnaire begins at 23 JQ 6834.

personal views or opinions you have about the death penalty and follow the law and keep an open mind as to the two possible penalties that might be imposed here?" (14 RT 3578–3579.) However, when questioned by counsel for appellant, she indicated that it was still her feeling that death was the appropriate sentence for an intentional killing or a killing involving kidnapping or carjacking. (15 RT 3580.)

Counsel challenged the juror for cause (12 CT 3404; 14 RT 3580); the challenge was denied. (14 RT 3580–3581.) It was prejudicial error not to have granted this challenge for cause. This prospective juror became a seated juror, and was implicated in a subsequent motion for mistrial and renewal of the change of venue motion. (See Args V & VI., *post.*)

After this juror's voir dire, the court elaborated on its views about jury selection. It thought that "we are spending way too much time on personal views," when the focus needed to be on whether or not a prospective juror could follow the law and keep an open mind as to which penalty should be imposed. (14 RT 3582.)

9. Michelle Diaz (Juror No. 200233871)[56]

Michelle Diaz, on her questionnaire, in response to question 80, wrote, "If the defendant is found guilty he should get the death penalty."

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[56] This juror's questionnaire begins at 2 JQ 534.

(14 RT 3587.) The court told her that there would potentially be two phases to the trial: "if you found the defendant guilty on the charge of murder, then you have the potential to get into the penalty phase. And that's where you would have to consider, with an open mind, either life in prison without parole or the death penalty. Do you understand that?

A. Yes.

Q. Do you have any concerns about that?

A. No.

(15 RT 3588.)

When counsel for appellant asked, "What evidence would you have to hear in order to not vote for death?" she answered, "If everything showed that he didn't do it. If he did do it and how it was done." (14 RT 3590.) She added, "if it was just cold-blooded murder. I mean, if it was just, you know, a very bad brutal murder, he shouldn't be able to live if he committed this sort of crime." Appellant challenged Ms. Diaz for cause. (14 RT 3592; 12 CT 3406.) The challenge was denied. (14 RT 3593.)

On January 17, 2001, during juror selection, Ms. Diaz reported that she had just learned that her brother, supervisor at a Von's store, worked with Melissa Yarbrough, sister of the victim in this case. He mentioned having to change her work schedule to accommodate her testimony in this

trial. (28 RT 6707–6713.) It came up at a dinner with her brother and each of their spouses:

> [MR. GARDINA]: It's unusual for him to discuss with you employees, when he's rearranging employees' schedules, for any reason?
>
> A. No. He mentioned it because it was coming up and, and I guess everyone at work—
>
> Q. Figured it out?
>
> A. Were talking about it.
>
> Q. Everyone at his work was talking about it?
>
> A. They're knowing that she works there, so—
>
> Q. Okay. Thank you.

(28 RT 6713.)

Counsel for appellant renewed his challenge for cause against Ms. Diaz, and also moved for a mistrial, and renewed his motion for a change of venue, on grounds that it was proving to be impossible to choose a fair jury in a pool where virtually every juror had close connections with, or are one person away from, or are going to be affected for the rest of their lives, by their service on this jury:

> The brother will obviously be telling Melissa Yarbrough that his sister is on the panel, there's nothing we can do to stop

> that. We've already had one juror testify about the fact the Yarbrough father wants to seek retaliation against the defendant.[57] Now, I understand that. But we don't know how far this is going to go. This jury has the appearance of impropriety, and in order to insure a fair trial for this defendant, we can't have these close family connections, because just the appearance of impropriety makes it appear to the reasonable person looking at this objectively, that this defendant will not get always fair trial with these kinds of jurors in the jury pool.

(28 RT 6718.)

> The trial court denied these motions:
>
> The Court does not find that this juror has intentionally violated any court rule. In fact, this was obviously an innocent conversation with her brother, in which he brought up the fact that he was rescheduling somebody in connection with the Yarbrough case. As soon as the juror realized that the brother was referring to the case, she told him to not say anything further. She's brought it to the Court's attention.

(28 RT 6719.)

The trial court denied the motion for mistrial, and also denied the challenge for cause.

10. Raymond Benson (Juror No. 200266117)[58]

The woman Mr. Benson lived with had a nephew who worked as a prison guard in Tehachapi. The nephew said that one of the people involved in this case is in prison up at Tehachapi "right now." (16 RT 3832.)

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[57] See Argument III.C.2, Kyle Dock, *post*.

[58] This juror's questionnaire begins at 4 JQ 1122.

Mr. Benson believed that if people knew the difference between right and wrong, whatever happened to them as children should have nothing to do with the appropriate penalty for their crimes. (16 RT 3842.)[59] When counsel for appellant followed up on his assertion that if the defendant had no mental problems and knew what he was doing, that he could not find life without possibility of parole, the court interrupted and made a lengthy presentation of the law regarding the types of evidence that the parties might present at a penalty phase, and the duty of jurors to have an open mind to consider all of that evidence. The court concluded,

> [THE COURT]: So to follow up on what Mr. Bryan has said, do you think that you have an open mind to consider personal things about the defendant and his childhood, or do you think you would have just a closed mind that you won't even consider that for any purpose?

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[59] ATTORNEY BRYAN: "There are mitigation or mitigators, mitigation evidence that the jury can use in order to make a finding of life without the possibility of parole. One of these mitigators might be childhood events. Would you be willing to consider those, if you found they existed, for mitigation to produce a life-without-the-possibility-of-parole verdict?"

A. "No, sir."

Q. "Why not?"

A. "Because I feel like unless—what is the word I want top use. If they are mentally incompetent, yes. But if they are not, they know the difference between right and wrong. And childhood events has nothing to do with it, as far as I'm concerned." (16 RT 3842.)

[PROSPECT. JUROR]: I can consider it.

(16 RT 3843–3844.)

When reminded by defense counsel that he had earlier said he would not consider childhood events in assessing penalty, the witness answered, "I don't think I said I feel like childhood events wouldn't—maybe I am saying that, maybe not. I'm just saying childhood events, to me, shouldn't make a person decide what he's going to do later on in life." (16 RT 3844.)

Counsel for appellant filed a written challenge for cause, and argued that the prospective juror would not follow the court's instructions and would fail to consider mitigators. (12 CT 3421; 16 RT 3846.) The court had a followup question directed at whether Mr. Benson would have an open mind, or whether he would already have made up his mind and have a closed mind before the penalty phase, and obtained from the prospective juror an answer that he would consider the evidence. (16 RT 3846–3847.) The court denied the challenge for cause.

11. Juror No. 8 (200061224) (seated)[60]

This juror was a correctional officer. (16 RT 3849.) He read articles about this case when the case happened in 1997, but had only read one article since, about a week prior to his appearance in court. (16 RT

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[60] This juror's questionnaire begins at 23 JQ 6750.

3851–3852.) The juror answered question 72-A ("Do you feel that life without the possibility of parole is enforced?") by writing "No," and then wrote that "our appeals system has opened many doors." He could not say it would be possible for him to assume that any sentence selected by the jury would ultimately be carried out, because of his 15 years' experience in the Department of Corrections. (16 RT 3855–3856.)

After further questioning, the juror ultimately said he could make the assumption that whatever penalty was returned by the jury would in fact be ultimately carried out. (16 RT 3857.) The juror answered the question about whether or not he already had an opinion as to the guilt or innocence of appellant by saying that he did—but when questioned, he could not recall what he was thinking about when he wrote that. (16 RT 3859.) His memory of what he read about the case was reading "a couple of articles about it" when the crime happened, "and then again when Ramirez was captured coming across the border." (16 RT 3860.) He reiterated his feeling that people sentenced to life without possibility of parole are let out of prison at some point. (16 RT 3860.) Counsel then asked,

> Question: If, during the penalty phase, the court instructs you that you are allowed to consider circumstances of mitigation including the childhood of the defendant, would you consider the childhood

circumstances of the defendant in determining punishment?

Answer: I don't think I understand what you are saying.

Question: Okay. If evidence is presented at the penalty phase, for example, that the defendant had some type of abused childhood or some problems in childhood—

THE COURT: Counsel, I will go ahead and interpose an objection. Let's stay with the general natures of the juror's duties to consider circumstances in aggravation or mitigation and address it more generally, please.

MR. GARDINA: Okay.

(16 RT 3862.)

Counsel then asked,

Question: You indicated—well, two answers—on question number 71, that the death penalty should be imposed in every case where somebody deliberately takes a life. And then you also indicated that while you were in favor of the death penalty you do believe that there are rare cases where the death penalty should not be imposed even if someone deliberately takes another human being's life.

Answer: I think what I meant on that is that first degree murder, if someone is lying in wait to commit a murder, that is intent and first degree and should be dealt with, with the death penalty.

> If you are driving an automobile and you kill somebody, I don't think that deserves the death penalty.
>
> Those are the things that I would consider. It's still murder, but it's not a death penalty.

(16 RT 3863–3864.)

Counsel filed a written challenge for cause. (12 CT 3419; 16 RT 3865.) The court followed up with instructions on the duty of jurors to set aside whatever their personal feelings are about the death penalty before having heard all the circumstances in aggravation and mitigation. The juror understood that that would be improper and was satisfied that he could be fair. The court denied the challenge for cause. (16 RT 3867.)

12. Juror No. 10 (200343496) (seated)[61]

This juror was a county employee. (16 RT 3881.) She knew members of the Bakersfield Police Department, and recognized several names of prospective witnesses, including members of the sheriff's office and one of the interpreters, as well as doctors at Kern Medical Center, and had heard people talking about the case. (16 RT 3882; 23 JQ 6816.) The juror was a member of the Catholic Church, and was aware of the Church's position

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[61] This juror's questionnaire begins at 23 JQ 6806.

against the death penalty, but that was not her individual opinion. (16 RT 3887; 23 JQ 6829.)

The defense filed a written challenge for cause, which was joined in by the prosecution. (12 CT 3417.) Despite the joint challenge by both parties, the court denied the challenge for cause. (16 RT 3888.)

13. Charles Julian (Juror No. 200206127)[62]

Mr. Julian (called at 17 RT 4153) had heard about the case in the local news media and remembered the place where they found the victim, and that fact that the victim was from Arvin. (17 RT 4155.) When questioned about what he meant when he indicated he favored the death penalty except in rare cases where the death penalty should not be imposed even if someone had deliberately taken another human being's life, he said he was referring to self-defense: "I feel that self-defense is self-defense, maybe they should have gotten life." (17 RT 4161.) He believed that the death penalty would be appropriate for a deliberate murder convicted in the case of kidnapping (17 RT 4163), but also thought that there might be a lesser sentence, depending upon the case. (17 RT 4165–4166.)

When questioned by the prosecutor about the fact that Mr. Julian's son had been arrested for a drug violation while on parole for a previous

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[62] This juror's questionnaire begins at 9 JQ 2522.

drug violation, he indicated he thought that his son needed help because he had a problem, and held no quarrel at all with the district attorney's office—"In fact, I'm the one that turned him in the last time." (17 RT 4169.)

Counsel for appellant filed a written challenge for cause. (12 CT 3447.) His challenge was joined by the People. (17 RT 4171.) After argument, the court rejected the joint challenge. (17 RT 4172.)

14. Juror No. 7 (200199345) (seated)[63]

The juror knew about the case from both newspaper and television. She couldn't recall people talking to her about the case, but it might have happened, because "there was a lot of attention to it." (17 RT 4194.) She knew that the case happened in Arvin, that it was a young man who was killed in an orchard, and that a family member found him, and that he had a girlfriend and he had a brother—and that the perpetrators went to the East Hills Mall to paint the truck. She remembered that there was another carjacking on that same day or just shortly before. (17 RT 4195.) She remembered he was dropping his girlfriend off in Arvin, and that it was in the early evening. (17 RT 4196.) She remembered that he was shot (17 RT 4196), and she remembered that his girlfriend was from Arvin, and that he

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[63] This juror's questionnaire begins at 23 JQ 6722.

was a football player for Arvin—and she remembered as well that the brother took over as homecoming king and that the girlfriend was homecoming queen. (17 RT 4197.)

The witness became upset when she talked about Chad Yarbrough's brother taking over as homecoming king. Counsel asked her if she thought it would be difficult or impossible to set aside the things she had read or heard when seated on the jury. The juror answered no. (17 RT 4200.) Counsel asked,

> [MR. GARDINA]: If the jury came to the conclusion that it was a first degree accidental murder during a kidnapping or carjacking, do you have any predeterminations as to what the sentence should be?
>
> ANSWER: No.
>
> MR. BARTON: Objection, Your Honor.
>
> THE COURT: Sustain the objection.
> We need to ask her to assume the general facts, and if the jury returned a verdict of guilty.
>
> MR. GARDINA: I—
>
> THE COURT: It would be a verdict of guilty as to first degree murder. That would be the general facts that would then cause the jury to go the penalty phase, counsel.

MR. GARDINA: I object to that. We need to have a discussion outside the presence of the juror.

MR. BARTON: I don't mind having a discussion—

THE COURT: In order to intelligently voir dire the jurors, I'm going to make my ruling. I'll let you make a ruling later.
I've made my ruling, Mr. Gardina. I appreciate you making a record later.

(17 RT 4203.)

Appellant challenged the juror for cause (12 CT 3442; 17 RT 4204), which the court denied without explanation. (17 RT 4204.)

15. Jane McKee (Juror No. 200222276)[64]

The prospective juror was a kindergarten teacher. (17 RT 4211.) The court lectured and questioned the witness extensively (17 RT 4211–4225.) Counsel challenged her for cause. (12 CT 3445; 17 RT 4230.) The prosecutor did not oppose the challenge, but it was denied by the trial court. (17 RT 4231.)

16. Donna Wilson (Juror No. 200190765)

Ms. Wilson said on her questionnaire that she could not be fair and impartial if evidence showed the involvement of a "street gang." (17 RT 4263.) After the court explained to her a juror's duty to set aside their

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[64] This juror's questionnaire can be found at 9 JQ 2690.

personal feelings about street gangs and not let those feelings sway the verdict, she said, "I feel very strongly, but I would listen to the facts." (17 RT 4264.) After further instruction and explanation by the court, she said that she believed she could avoid letting a bias about street gangs influence her verdict. (17 RT 4266.)

On her questionnaire, Ms. Wilson indicated that she would give greater weight to the testimony of a police officer. The court then questioned her about his answer:

> Q. Ma'am, do you understand it will be your duty as a juror to consider all witness' testimony, using the same types of factors? Do you understand that?
>
> A. Yes.
>
> Q. And that's true, regardless of whether the witness is a police officer or any other person. You have to keep an open mind and decide how much weight to give to their testimony, how credible they are. You might have respect for police officers, for example, but that doesn't mean that you just believe everything they say or give their testimony greater weight than other people.
>
> You have to look at each witness individually, and decide how much weight to give to it.
>
> Do you think you can do that?
>
> A: Yes, I can.
>
> Q: Any doubt?

A: No.

(17 RT 4276–4277.)

Counsel for appellant then asked,

Q. You answered that you would give greater weight to the testimony of a police officer simply because he was a police officer. Is that not true?

A. Yes, it's true, but I would be able to listen to both.

Q. Okay. If a gang member got on the—a suspected gang member got on the stand and a police officer got on the stand and each testified as to a fact, who would you be inclined to believe?

A. It would be up to them to make me believe. I would have to watch them.

Q. Okay. So you would keep an open mind and consider their demeanor?

A. Yes, I would.

(17 RT 4277.)

Appellant challenged Ms. Wilson for cause. (12 CT 3439; 17 RT 4278.) The challenge was denied. (17 RT 4278.)

Ms. Wilson was clear that although she would listen to the testimony of all witnesses with an open mind, she would give greater weight to the testimony of a police officer. Her bias against persons labeled as gang members and in favor of law enforcement officers was clear. Her

assurances that she could keep an open mind were guided by the trial court's leading questions.

17. Felix Rodriguez (Juror No. 200161953)[65]

This prospective juror had heard about the case, remembered what he heard, and recalled seeing photographs of either appellant or Chad Yarbrough. (10 JQ 2924–2925.) Appellant challenged Mr. Rodriguez for cause (12 CT 3470; 19 RT 4452.) The trial court denied the challenge. (19 RT 4452.)

18. Betty Hallum (Juror No. 200158112)[66]

Ms. Hallum heard about the case through news media and from her husband's brother. Her husband was raised in Arvin, graduated from Arvin High School, and had a brother who still lived in Arvin. (19 RT 4510.) Her husband's brother knew the Yarbrough family and told her "a few details of what had happened." (19 RT 4511.)

"All I can remember" was that the young man was taken from his car, taken somewhere and shot. (19 RT 4512.) She remembered that he was shot like execution-style. She heard that he was tied to something, and shot in the head. She remembered that the victim was taken away in his own car,

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[65] This juror's questionnaire begins at 10 JQ 2914.

[66] This juror's questionnaire begins at 8 JQ 2298.

that his brother was there, that his girlfriend was there at the scene where the car was taken, and later on the car had been altered to some degree. She also heard that there were two people involved in the abduction, and they had abducted somebody else the day before or sometime before. On further reflection she seemed to remember the following:

> Chad Yarbrough was taking his girlfriend home, and he—they were parked out front, and then somebody came along and told his brother to get out of the car, and they drove away with him, and then he was taken out and he was killed. And then it seems like I remember that the car was taken to Bakersfield, and somebody took it, and I guess they were going to alter it so it wouldn't be known. Then I thought I remembered reading—as I said, that the people that had apprehended him has also done this to someone else.

(19 RT 4512–4514.)

Her husband's brother has lived in Arvin for 45 years or so. He knows the Yarbroughs personally and visits with them. (19 RT 4515.) She would probably call him a good friend of the Yarbroughs; she remembers his wife saying that her mother was married to a man who was related to the Yarbroughs. Ms. Hallum herself had no knowledge of the Yarbroughs and had never met them, and did not feel any bond or allegiance that would affect her deliberations. (19 RT 4517–4518.)

When asked by counsel for appellant if she would expect her brother-in-law to be upset or concerned about her feelings as a juror in this

case, she answered that he might be, but said that it would not bother her or keep her from doing what she thinks is appropriate. (19 RT 4523–4524.) Counsel for appellant challenged her for cause. (19 RT 4527; 12 CT 3457.) The court denied the challenge. (19 RT 4528.)

19. Wayne Epperson (Juror No. 200184436)[67]

Mr. Epperson had heard "very little" about the case other than the victim was murdered after somebody tried to take his vehicle. (19 RT 4532–4533.) Mr. Epperson responded to question number 72, asking what he thought about the sentence of life without parole for the crime of murder, he indicated that he paid a lot of money in taxes: "If you are in there, and they give you the death penalty, we pay a lot of money on people sitting there for years and not going on with it." (19 RT 4536.) Appellant's challenge for cause was wrongly denied. (12 CT 3485; 19 RT 4541.)

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[67] This is the number assigned to Mr. Epperson in the reporter's transcript, but his juror questionnaire, at 12 CT 3588, lists him as No. 200207952. That number was used by counsel in his written challenge for cause, and it seems to be correct, because the questions of counsel relate to Mr. Epperson's answers on his questionnaire, at 12 JQ 3558 et seq. (See 19 RT 4536.)

20. Jess Reeder (Juror No. 200191213)

Mr. Reeder heard about the case from the news media, and from his children. He had heard that somebody was killed in a carjacking, and that the person was a high school athlete. (19 RT 4548.)

> Q: Was there anything significant about your children mentioning this, other than that they had heard about it?
>
> A: I believe it would—they were impressed because it was somebody their age. That's what I believe.

(19 RT 4547–4548.)

However, it did not become a significant item of family discussion. (19 RT 4549.) He wrote on his questionnaire that the death penalty should be invoked when special circumstances are involved, and that the punishment should fit the crime but when questioned about this, he indicated that he would "have to consider everything that was proposed." (19 RT 4556, 4558.) Appellant's challenge for cause was denied. (12 CT 3476; 19 RT 4559–4560.)

21. Jean Stevens (Juror No. 200116134)

Ms. Stevens was 65 years old, and a retired teacher. (19 RT 4593.) Her ex-husband was shot around October of 1972, while playing with guns with his best friend. His best friend immediately stopped drinking and tried

to commit suicide in all manner of different ways; when they put him on a work detail, he died of heart failure. (19 RT 4594.)

Ms. Stevens cautioned the parties that one of her prejudices is against people charged with child abuse. (19 RT 4599.) She did not consider Chad Yarbrough or Brent Yarbrough, who were 17 and 14 respectively, to be in the age range that caused her emotional feelings. (19 RT 4600.) She said she had heard nothing about the case, but then added that she heard the victim was very popular. (19 RT 4603.) She couldn't recall anything else, or where she had heard about his popularity.

Ms. Stevens reported that some of the other prospective jurors asked her for her opinion on how to answer questions. (19 RT 4609.) She referred them back to the bailiff in the courtroom. (19 RT 4610.) She had also left page 23 on the questionnaire completely blank—she overlooked it. (19 RT 4614.) Ms. Stevens subscribed to the Bakersfield *Californian* and read it every day; she had done so for many, many years. (19 RT 4615.) She was surprised she could not recall anything about the case, given how often the case had appeared in the paper. (19 RT 4615.)

When asked about what crimes should be punished by death, she answered "Well, certainly I feel where they've proven that a child has been molested, messed around with at all, I mean, I would just take them out and

shoot them." (19 RT 4617.) Other than her feelings about young children though, she felt she could judge each individual case and determine the appropriate punishment on the basis of the evidence presented. (19 RT 4617–4618.)

Appellant's challenge for cause was denied. (19 RT 4619–4620; 12 CT 3482.) Counsel also filed a motion for mistrial on the basis of a poisoned panel, in that the witness reported several jurors talking among themselves about the case, and there was other evidence of discussions about the case among prospective jurors. (See, e.g., 17 RT 4127.) The motion was denied. (19 RT 4624.)

22. Sherry Williams (Juror No. 200106487)[68]

Ms. Williams was very good friends with a daughter of Sgt. Glen Johnson, the officer who took appellant's confession. Her friend's husband was Ms. Williams's gardener and she had "friendships with them." (20 RT 4735.) When they opened the Shafter Community Correctional Facility in 1990, she met Julia Rivas, Sgt. Johnson's daughter. Ms. Williams told the court that she understood her duty not to be influenced by friendships, and that she could be fair in evaluating all witnesses. (20 RT 4737.) Ms. Williams had been a correctional officer for 10 years at the time she was

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[68] This juror's questionnaire begins at 15 JQ 4314.

questioned. (20 RT 4738.) Her sister was in prison; Ms. Williams had cut off all ties with her. (20 RT 4749.)

She had friends in the Bakersfield Police Department, but she did not believe those friendships would affect her judgment in the case. Ms. Williams's father had served time in prison. She assured the prosecutor that neither her father's prison term nor her sister's would affect her judgment and that she did not feel that either of them were treated unfairly by the system. (20 RT 4751–4752.) Appellant's challenge for cause was wrongly denied. (12 CT 3509; 20 RT 4752–4753.)

Ms. Williams's voir dire took place on January 3, 2001. When she was called to serve on the jury on January 17, 2001, she informed the court and other jurors that she had heard correctional officers talking about the case since her last appearance in court. (28 RT 6625.) The jury was dismissed, and she was questioned by the parties as to what she had heard.

While on the job in prison she heard fellow correctional officers say that the appellant had kidnapped Chad Yarbrough, stolen the vehicle, taken him to an orchard, and killed him "execution-style." (28 RT 6627.) They also said that the case is old and mentioned that appellant's health was not very good. (28 RT 6628.) She heard them saying it while walking through the locker room, going to change clothes. (28 RT 6629.)

This had happened more than once, probably three times. (28 RT 6630.) She also heard that appellant fled to Texas and had to be brought back to California. (28 RT 6630.)

The trial court asked her if she felt influenced by any such talk; she denied having been affected by it. (28 RT 6632.) Appellant moved for dismissal of the panel, asked to dismiss all correctional officers for cause, because they all worked in an environment where this case was a staple topic of discussion, and could not get away from hearing about it. (28 RT 6640.) He also renewed his challenge for cause against this juror, and pointed out that on her questionnaire she had indicated she would give more credit to the testimony of a police officer than to civilians. (28 RT 6644.)

Counsel also argued that her reference to an execution-style slaying that she heard from her fellow correctional officers is a conclusion the prosecutor would draw from the evidence, but there would also be substantial evidence that the shooting was accidental; reference outside the courtroom to execution-style slayings in the community and particularly from the places where many prospective jurors work, gave the prosecution an unfair advantage, and lessened their burden. All motions were denied. (28 RT 6645–6646.) (See also Arg. VI, *post*.)

23. Betty Emms (Juror No. 200213509)[69]

Ms. Emms was familiar with the case from the news, and from people she knew:

> [Juror]: Just like when it happened. It was just—everybody thought it was terrible that this child had been shot—I mean killed.
>
> Q: Who do you describe as everybody?
>
> A: Just people by my house and that sort of thing.

(20 RT 4762.)

She remembered that the boy who was shot was taken in a pickup out into the woods and was killed. (20 RT 4763.) She remembered that there were two young men believed to have been responsible. (20 RT 4764.) In response to question 71, she indicated that the death penalty was appropriate except for rare cases, such as "if a child had been molested or beaten all her life by her parents." (20 RT 4768–4769.)

Ms. Emms indicated that even in an intentional killing in a carjacking case, she would want to know all the circumstances of the case. But she also believed that if it was proven beyond a reasonable doubt that a person is guilty of a first degree murder, that person should also die. (20 RT 4770–4771.) Ms. Emms assured the prosecutor that she would have an open

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[69] This juror's questionnaire begins at 12 JQ 3530.

mind toward either penalty, and would not prejudge the case. (20 RT 4773.) Counsel for appellant filed a written challenge for cause (12 CT 3497), which was promptly denied. (20 RT 4774.)

24. Ernest Shaw (Juror No. 200167435)[70]

Mr. Shaw took care of his handicapped wife, who was wheelchair-bound. He worked full-time for the Santa Fe Railway. (20 RT 4778.) Mr. Shaw assured the court that he would keep an open mind about the penalty phase and the appropriate sentence if defendant should be found guilty of an intentional murder. (20 RT 4778.)

However, on his questionnaire, Mr. Shaw indicated that he felt the death penalty should be imposed in every case where somebody deliberately takes another human being's life. (20 RT 4780–4781.) Mr. Shaw then told counsel that he did not want to be on the jury.

> [Question]: You feel that your attention is better served taking care of your wife rather than being on this jury, correct?
>
> Answer: No, just—I mean, yes. She's my life, she's my wife, yes.

(20 RT 4782.)

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[70] This juror's questionnaire begins at 14 JQ 4146.

Mr. Shaw thought that the fact that his father had been shot and killed in 1975 would not affect his deliberations, but he wasn't entirely sure:

> [Answer]: That's a long time ago. And if it comes back up, you know, right now I would say no.
>
> Question: Okay.
>
> Answer: I mean, I still have feelings about it, yes, if that's what you mean.

(20 RT 4784.)

Appellant's challenge for cause was denied. (12 CT 3500; 20 RT 4787.)

25. Glen Kellerhals (Juror No. 200133204)[71]

Mr. Kellerhals had trouble with street gangs. When the trial court asked him if he could set aside any opinions he may have about gangs and decide the issues in the case on the evidence presented, he answered, "I think we—you know, we say set aside, but we really can't take away 55 years of background, where I come from, where we all come from. I think so, yes. I would do the best I could. But you can't take away where you come from, what you've been through. Life's experiences, I guess is good." (20 RT 4829–4830.)

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[71] This juror's questionnaire begins at 13 JQ 3810.

The trial court then made a lengthy philosophical appeal to Mr. Kellerhals, together with analogies to the choice of a wife or a career regarding the need to be thoughtful, and concluded by asking him if he would be guided by emotions or by the facts as a juror. Mr. Kellerhals acknowledged that such a course would be the right one, and thought he would be guided more by the facts. (20 RT 4829–4832.)

After a discussion about firearms, the trial court brought up the subject of being open-minded about the witnesses, concluding with this:

Q. Doesn't matter what their background or occupation is. It's your duty to evaluate all of their testimony using the same standards. Do you understand that?

A. I understand, yes.

Q. I'm not trying to put words in your mouth. I'm going to then ask you do you have any doubt as to whether you could evaluate all witnesses, using the same standards, or do you think you might tend to give some witnesses greater weight than others, just because of their occupation?

A. *I think there is a question on that questionnaire referring to police officers, and I guess my gut feeling is I would tend to give more credence to testimony from a police officer.*

Q. Okay.

A. Than just anybody off the street, so to speak.

Q. Okay.

A. Yeah, I would just throw that to you.

Q. And again, the way I usually address jurors about this, it's not uncommon for people to grow up being taught to respect law enforcement officers. Is that your situation?

A. Oh, yes, yes.

Q. Okay. And there's nothing wrong with that. Other people may have had some life's experiences where they have reasons to distrust police officers, because of something that happened to them, maybe, or some influence they've had. There's nothing right or wrong about this.

The question is: Recognizing you have a tendency to give more weight to a police officer because of your respect for them, the way you were brought up, do you understand now it's going to be your duty as a juror to guard against that happening?

In other words, you have to look at each witness now as an individual and remind yourself, okay, regardless of how I feel about law enforcement officers in general, I'm looking now at a human being sitting on the witness stand, and I have to decide with an open mind how credible that person is, how well they perceive things, how well they recall things, to test their memory, things like that, and to not prejudge that witness one way or the other.

Do you understand?

A. I understand that, yes.

Q. So that means, for example, that a person that is an alleged gang member, might be more credible than a police officer, in any particular case. Do you understand that?

A. Yes.

Q. And there may be reasons why a person that is a plumber or a—or a blue collar worker might have a better memory or be able to perceive things better than a doctor or a police officer or somebody else.

Do you understand that?

A. Yes, I understand. I agree, yes.

Q. So do you see yourself having any difficulty in performing your duty, to consider the testimony of a police officer using the same standards as you would any other witness?

A. I have no problems. I think I—I could do that, yes.

Q. Okay. So it wouldn't matter whether it's an alleged gang member, custodian, anyone else, you can keep an open mind to consider their testimony using the same factors as you would a police officer?

A. Yes. I could do that.

Q. Is there any doubt about that?

A. *I think it would be tough. I think you—I mean, for me, it would be tough to do that, to be honest.*

Q. We want you to be honest.

A. As far as—I mean, once we're told to do that, I think if I were on the jury, that's what you have to try to do, of course. But it's tough not to do exactly what you're saying. No opinion about this or this, in the whole—

Q. I understand we ask jurors to do some tough things, to do some difficult things.

I want to emphasize there's no right or wrong answer here.

Any time you have a doubt about something, you let me know.

Okay?

A. Okay.

Q. So if you have any doubt about your ability to evaluate the testimony of a police officer in the same manner as you would other witnesses, you need to express that to me.

I want you to be honest about that, and tell me if you don't think you can perform your duty, as I described it.

A. *I would have—I think I would have some problems.*

I mean, I'm not there, but I think I would have some problems, given the same level of I guess belief, whatever, credibility to certain people as other people, I guess.

(20 RT 4834–4838, emphasis added.)

The trial court was not finished. After another extensive presentation to Mr. Kellerhals, it asked,

Q. Can you conceive that a police officer might be incorrect in what they perceive, that they saw something incorrectly, even if they honestly believe they saw it, that they saw it incorrectly?

A. Oh, I think so. Yes. Yes.

Q. So the question is can you think of—keep an open mind to look at each witness individually, without

generalizing about the occupation or group they fall into?

A. I guess the answer is yes.

Q. Well, if you have a doubt about it, sir, please tell me.

A. *I think it would be tough, like I said. I'm kind of back to that. Tough to do. But I think you would—*

Q. If it's so tough that it's creating a question in your mind as to whether you can perform your duty, then you need to let me know.

If it's tough, but you can do it, I need to know that too.

A. I guess I could do it. I know I can do it.

(20 RT 4837–4839, emphasis added.)

Counsel for appellant challenged Mr. Kellerhals for cause. (20 RT 4840–4841.)

THE COURT: Well, I'm still on voir dire. Thank you. I'll reserve on that.

THE COURT: We ask jurors to do difficult things. You need to tell me if you have a reasonable doubt as to whether you can perform your duties in evaluating witnesses.

If you have some reasonable doubt about your ability to perform your duty, please tell me one way or the other.

(20 RT 4840.)

The trial court then asked Mr. Kellerhals what he had heard about the case. He said that he had read about the case in the newspaper, and heard that the were selecting jurors for "the Yarbrough case" while in the courthouse a couple of weeks earlier. (20 RT 4842.) After a lengthy depiction of the two possible phases of the trial, to which the prospective juror gave widely spaced monosyllabic answers (20 RT 4844–4846), the court allowed the defense to question him.

Mr. Kellerhals was a military policeman in the army for two years when drafted, and his daughter was a police officer in Tulsa, Oklahoma. (20 RT 4847.)

Counsel questioned him about his feelings regarding the credibility of police officers, and what percentage of them were likely to not tell the truth. He answered by saying,

> Tend to favor—I guess I would tend to favor police testimony over nonpolice testimony. I mean, until—unless somebody gives you the feeling that there's something that's not coming out in this police testimony, that's not quite right, is the way I look at it.

(20 RT 4850–4851.)

Mr. Kellerhals believed that the death penalty was appropriate for deliberate murder, except in rare cases. Counsel was not allowed to ask him for a situation in which he would not impose death penalty on a murderer.

(20 RT 4854.) Voir dire concluded shortly thereafter, and appellant filed a written challenge for cause. (20 RT 4859.)

Counsel argued that the trial court had repeated its instructions and questions over and over in order to drill into the juror the message that he should say he could be fair, even when he repeatedly said that it was be difficult for him to do. (20 RT 4860.) The court said that the record would reflect what had happened, and asked counsel if there was anything else. Counsel added that the believed the witness was intimidated by the court into saying that what the court wanted to hear by an increase in voice volume. (20 RT 4860–4861.)

The court replied,

> [THE COURT]: Now, Mr. Bryan, if you're going to make that kind of an allegation, again, I want you to be very careful, because I don't take that as an allegation to make lightly.
>
> This court has a lot of experience picking juries, I appreciate we all have our good days and bad days.
>
> But I think I'm having a pretty good day in terms of being fairly neutral and not overly loud with jurors today, Mr. Bryan.
>
> And I specifically don't recall having any sharpness to my voice or raising my voice unduly with Mr. Kellerhals (200133204). So do you want to give me a specific example of when you think I

was intimidating to the juror, and be very careful when you—I've your response, because if you're making an *allegation without some good faith basis, I may have to pursue that.* Go ahead.

MR. BRYAN: Yes, your Honor.

And I appreciate the fact that this court probably will pursue that.

And I regard that as intimidation of counsel. And I believe this court kept asking essentially the same question over and over again.

It kept getting the same answer, which the witness was saying it would be tough, and finally, the Court was able to turn this witness to say that he could, and then he gave the—you know, the words, I believe the Court was trying to get from him.

I don't think there's anything improper. I have to make a record.

I will be soundly criticized by Appellate Districts and appellate counsel and habeas counsel if I don't make a record.

I think it is clear that that line of questioning, in my opinion, was not proper voir dire.

THE COURT: The record reflects the words I used. Do you specifically—*you specifically were stating your belief that the Court was intimidating in the range and the rank of voice volume that the Court used. So now*

you've changed the basis for your concern to the words that were used. So I want you to clarify in what manner was this court intimidating in the voice volume? Are you withdrawing that allegation?

MR. BRYAN: Your Honor—your Honor, I am very frankly, I don't want to be—I believe now the Court is more interested in attacking me.

I am not going—I have said what I've said. I'm not going to say any more.

I believe that this court—and I agree with the Court, by the way, the Court's tone of voice has been very low all day today.

I agree with that.

But I believe with this last juror, and I have not made that objection regarding tone of voice for a long time in this case.

I believe it's my opinion that in—and I might add, it is also the opinion of co-counsel, that with this last juror, there was improper voir dire, that this juror was, in both in terms of the Court's attitude—you know, volume, and mannerism, that this court I believe just kept after this juror until it got the answer that it wanted.

And it appeared that this court did very much want to seat this particular juror, even though he told us that he would find

it very tough to regard witnesses with impartiality.

He said it over and over again.

Then he said it again under—and I would also—but there is one thing I would add.

I believe that this witness's body language, he, in my opinion, he was very reticent to finally say that he could be fair.

It was hard for him. He paused. He hemmed, he hawed.

That probably will not be in the record. But that's what I saw and heard.

And that is all, your Honor.

I'll submit it.

THE COURT: *Well, I'll note, Mr. Bryan, that your initial concern was that the Court was intimidating to the juror in the voice and the range of voice volume. That was specifically what you alleged.*

When I asked you to be careful in making an allegation which really could be. construed as improper conduct by the Judge, which I would be very concerned if there is a finding that I'm engaging in behavior that's intimidating to jurors, in some improper manner, I asked you to clarify that and give me an example.

And then you focused more on the words the Court used or the repetitive nature of

my questioning. The record is going to reflect that.

So that is the reason for my asking to explain it, Mr. Bryan.

MR. BRYAN: Your Honor, *I believe when I first addressed this issue, I certainly believe I mentioned that the Court asked him over and over again the same question and got the same answer.*

I believe I put that in my first statement. If I didn't, I was remiss.

THE COURT: *It was not.*

MR. BRYAN: Because my main objection is I do believe the Court was very—was somewhat intimidating to that juror.

However, what I first said was that he said, in answer to the Court's questions, that it would be tough. And he kept saying that.

And then the Court would basically repeat the question, over and over again, until finally he was able—in the Court's view, to say that he could be impartial.

THE COURT: That's a sufficient record. Thank you, Mr. Bryan.

MR. BRYAN: Thank you.

(20 RT 4861–4865, emphasis added.)

Repeated questioning is a classic method of eliciting statements from the one being questioned that the interrogator/interviewer wants to hear. It sends the message that the answers initially given are not desirable. (See Poole & White, *Effects of Question Repetition on the Eyewitness Testimony of Children and Adults* (1991) 27 Dev. Psychol. 975.) It was the heart of counsel's objection to the trial court's voir dire, even though it was apparently smothered in the court's mind by the allegation that it had again improperly raised its voice.

Although the court's vocal tone cannot be determined from this record, the sequence of words is clear. As this excerpt shows, counsel's primary concern was, contrary to the court's recollection, the repetitive nature of the court's questions, and the court's refusal to accept the juror's honest and genuine difficulties with not granting police officers more authority as witnesses than laypersons. The court was not only wrong—it threatened to "pursue" Mr. Bryan for objecting to the court's repetitious and leading voir dire.

Mr. Kellerhals repeatedly told the court that he would give more credit to the testimony of a police officer, due to his upbringing and life circumstances. The trial court persisted. After repeated statements (four) that it would be "tough" for him not to give special credit to the testimony

of a police officer, appellant challenged him for cause. The trial court said that it was not yet done, and returned to the same question. Eventually, it extracted widely spaced monosyllabic answers from Mr. Kellerhals that could be interpreted as a willingness to consider all witness testimony equally. Then, Mr. Kellerhals reiterated to defense counsel that he would tend to favor police testimony over nonpolice testimony until something gave him the feeling that the police testimony was not quite right.

When counsel filed a written challenge for cause and argued that the trial court had drilled Mr. Kellerhals over and over to change his statement, and further intimidated him by raising his voice, the court threatened to "pursue" counsel unless counsel had a good faith basis for his complaint —and furthermore mistakenly believed that counsel initially complained about the volume of his voice rather than the repetitious nature of his questions and instructions to Mr. Kellerhals. (20 RT 4857–4868.) The trial court's denial of appellant's challenge for cause was based on an incorrect recall of what had transpired during voir dire, and its having improperly guided the prospective juror's responses.

26. Juror No. 3 (200316337) (seated)[72]

The court pointed out that the prospective juror did not disclose any prior knowledge about the case on his questionnaire, and asked if that was correct.

[Answer]: Yes. Just I mean from what was on TV and—but I don't watch too much TV because my—where I'm employed, I have shifts change work every week. So there's time I don't even see TV.

Question: Okay. Now, I don't think that you disclosed in your questionnaire that you had ever heard anything about the case in television or radio. In fact, you said no, you had not.

Do you recall saying no?

Answer: Yes.

Question: If you can recall anything about the case, we need to know about it. In other words, if you think you might have heard something about it on TV, even if it was very brief, we need to know what you heard.

Answer: There was a few brief things that I seen, that were just on the news.

Just about like when they recovered the truck and, just the—

Question: Okay. I want you to tell me everything that you can recall about this case, other than what has

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[72] This juror's questionnaire begins at 23 JQ 6310.

been stated here in court or the questionnaire. You mentioned that they recovered the truck. What else can you recall?

Answer: Something about—my wife is the one that had mentioned most of it to me. She had said something about it.

I guess it started with a carjacking and then I don't know from where it went from there.

Question: Well, do you recall anything about the death of Chad Yarbrough?

Answer: Well, yeah.

I mean, it was publicized, so big, so, you know—

Question: So what do you recall specifically about the death of Chad Yarbrough in terms of how he died, who might have been responsible, how it was handled, etc.?

(21 RT 5041–5042.)

He answered that he learned from the news that some young guy was killed, and after that, he learned from his wife that Chad Yarbrough had been shot. (21 RT 5042.) His wife told him that there were a couple of people who were supposed to be investigated as having done it. (21 RT 5043.) Then, he "kind of remembered" that a defendant was picked up out of town, or out of state. (21 RT 5044.)

Counsel for appellant questioned him about whether his wife followed the case closely, and about the photograph of the pickup on the back of a tow truck that he saw in the newspaper. (21 RT 5053–5054.) The prospective juror has a court date coming up because he's being sued for child support by his ex-girlfriend. (21 RT 5060–5061.) He was certain that he would not want to help out the prosecutor in this case in order to get favorable treatment from the prosecutor in his own case. The trial court denied appellant's challenge for cause. (12 CT 3737; 21 RT 5062.)

27. Richard Holmes (Juror No. 2300318135)[73]

Mr. Holmes was in financial difficulties; he had just closed down his business and was selling assets and looking for work. (21 RT 5066.) Nonetheless, he thought he would be able to serve on the jury, even though it would be "very tight." (21 RT 5067.)

When asked what he knew about the case, he said that he recalled from the TV and the papers that Chad Yarbrough "was abducted, taken out to some field, beaten, and shot." (21 RT 5069.) He also recalled something about the girl the victim was dating. When asked about other details, he said,

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[73] This juror's questionnaire begins at 16 JQ 4790.

A. A gang member comes up to my mind, but I'm not so sure I heard that.

Q. Possibly that there was some gang involvement?

A. Yes.

(21 RT 5072.)

He also remembered that the Yarbrough vehicle was involved—a pickup truck. (21 RT 5077–5078.) He remembered that the victim was shot while tied up, and that he was in a kneeling position, and "like I told the judge, I—it seems I heard something about a beating." (21 RT 5078.)

Mr. Holmes was challenged for cause. (21 RT 5081.) The challenge was denied. (21 RT 5083.)

28. Juror No. Alt. 5 (200362275) (seated)[74]

This juror thought that when he filled out the questionnaire that his employer would pay him for the entire trial, but since then he found out that his company [ASFA Data Corporation] would only pay him for three weeks. He was nonetheless prepared to make that sacrifice. (21 RT 5088.)

When asked what he remembered about the death of Chad Yarbrough, he answered that he remembered a carjacking, with a little brother being in the truck. (21 RT 5090.) He remembered seeing in the

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[74] This juror's questionnaire begins at 24 JQ 7003.

media that they did find the truck, which was burned or painted, and he remembered pictures on television of where they found it in an alley. He also remembered that the victim was shot. (21 RT 5089–5090.) Then, he remembered that there were two suspects that the authorities were searching for. (21 RT 5091.)

When questioned by counsel for appellant, the juror remembered that the two suspects were Hispanics, and he believed that one of them had been arrested in Texas. He also indicated in response to question number 71 that he circled B ("While I favor the death penalty, I do believe there are rare cases should not be imposed, even if somebody has deliberately taken another human being's life."). (21 RT 5101.) When asked for an example of such a case, he mentioned a case where a father had killed another man who had raped his boys while they were in Cub Scouts. (21 RT 5102.)

The trial court refused to allow counsel to ask questions of the juror about what circumstances may lead him to vote for a sentence of less than death, assuming that the defendant was convicted of an intentional killing in the course of a carjacking. (21 RT 5102–5105.) Counsel for appellant filed a written challenge for cause (12 CT 3529), which the court denied. (21 RT 5108.)

29. Kimberly Lindgren (Juror No. 200351872)[75]

Ms. Lindgren said she did not know anything about the case other than the fact that it was a murder. She thought she learned that from the juror questionnaire. (21 RT 5130.) However, she later acknowledged hearing things on the news about the case. (21 RT 5130–5131.) She couldn't remember particulars. (21 RT 5151–5132.)[76] Appellant's challenge for cause was denied. (12 CT 3526; 21 RT 5145.)

30. Juror No. 1 (No. 200151234) (seated)[77]

This juror indicated that she had heard about the case through the local media, and had also heard other people talk about the case at work. She remembered hearing on the news that Chad Yarbrough was shot, and that they caught the person who shot him, and that they caught him in another state. (22 RT 5163.) She had heard that "Chad was in high school; he was a football player; and he went to Arvin High. And that's all I can remember about that." Counsel for appellant filed a written challenge for cause (12 CT 3552), which was denied. (22 RT 5174–5175.)

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[75] This juror's questionnaire begins at 17 JQ 4902.

[76] On her questionnaire, Ms. Lindgren wrote that she remembered seeing stories about the case; she recalled their contents, and had seen photographs of the victim and/or the accused. (17 JQ 4911–4913.)

[77] This juror's questionnaire begins at 22 JQ 6554.

31. Robert Murphy (Juror No. 200250180)[78]

Mr. Murphy worked as a maintenance mechanic for the Department of Corrections at the North Kern State Prison. (22 RT 5237.) He said that he would tend to give greater weight to the testimony of a police officer, but that feeling would not interfere with his duties as a juror. (22 RT 5239.) He had heard nothing about this case for a long time, but he was part of many discussions about it right after it happened. He remembered that it was a carjacking, and that the victim was a "stand-out football player at Arvin High." He thought the victim was found in a field in his truck. (22 RT 5241–5242.)

He thought the death penalty should be more swiftly imposed, that in practice it was like life without possibility of parole because people sit on death row for 25 years. (22 RT 5247–5248.) He felt the death penalty was not used enough, in the sense that people who were given the death penalty did not seem to ever be actually executed. (22 RT 5248–5249.)

Mr. Murphy's wife worked for the Kern County Sheriff's Office. (22 RT 5254.) He remembered that discussions about this case happened for three weeks to a month after the crime took place, on a daily basis. (22 RT

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[78] This juror's questionnaire begins at 17 JQ 5014.

5254.) He remembered discussing this case with his wife, and with prison guards. (22 RT 5255.)

When asked if it was impossible for him to assume that if he and the jury voted for a death penalty that the penalty would actually be carried out, he answered "Yes." (22 RT 5258–5259.) He assumed from what he knew about the case that Chad Yarbrough had been murdered, and he would keep that assumption unless the defense put on evidence to convince him otherwise. (22 RT 5259–5260.)

The prosecutor then asked,

> Q. [C]an you set those feelings aside for purposes of this trial and place the burden on me to prove I guess the truthfulness of my witnesses and the strength of my case?
>
> A. Yes, sir.
>
> Q. So will you require the defense to prove anything to you?
>
> A. That he's innocent.
>
> Q. Okay. Well, do you understand he's presumed innocent as he sits here today?
>
> A. Until proven guilty.

(22 RT 5262.)

Mr. Murphy's duties as a juror were then described by the court, who questioned him closely about his views and whether he could set them aside

to perform his duties as a juror. (22 RT 5263–5266.) The prosecutor questioned him again:

[MR. BARTON]:	Okay. So even though you disagree with the rate at which it's carried out, you won't let that enter into your decision on whether or not to give someone the death penalty or life without parole?
A.	No, sir.
MR. BRYAN:	Objection. Counsel is putting words in the juror's mouth.
THE COURT:	Overruled.
	Your answer, sir?
MR. BARTON:	His answer was no.
THE COURT:	Your answer was no?
[JUROR]:	I can vote for the death penalty or whatever. Do I actually think that he is going to die? No. Bottom line, that's what I think.
	I don't know what you guys are trying to do here besides confuse me. I mean—
[MR. BARTON]:	The question is: Can you set that aside, sir, that feeling?
A.	Yeah. Three or four times, yes.

(22 RT 5268–5269.)

Appellant challenged Mr. Murphy for cause; the challenge was denied. (22 RT 5269.)

Mr. Murphy, despite pages of repeated and directive statements from the prosecutor and particularly from the trial court, insisted that if he voted for a death penalty, it would never be carried out. A juror should not conduct his or her deliberations under the impression that these deliberations do not matter, and that someone else would make the ultimate decision. (*Caldwell v. Mississippi* (1985) 472 U.S. 320.)

32. Juror No. Alt. 1 (200263191) (seated)[79]

This seated juror was a postal employee. (23 RT 5284.) He answered question No. 33 about credibility by saying he intended to give greater weight to the testimony of a police officer than to other witnesses. After being questioned closely about this by the trial court, the juror concluded by saying that he was satisfied that he could perform his duty of individually evaluating each witness. (22 RT 5289.)

The juror had heard about the case through the media and through a couple of people expressing their opinions. After stating that he couldn't remember anything specific about the case (22 RT 5290–5291), he said, "The only thing I can recall is that he was a quarterback for a high school

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[79] This juror's questionnaire begins at 23 JQ 6890.

team, that he was murdered and his car was taken, and they had caught two suspects. ¶ That's all I remember." (22 RT 5291.) Regarding the state of the body, all he could recall was that the condition of his body when it was found was "pretty brutal." (22 RT 5291.)

This juror wrote that "if the person is convicted beyond a reasonable doubt and is proven to be a menace to society (i.e., more than likely crime would happen again) I feel the death penalty should be used." (24 JQ 6912.) Counsel for appellant filed a written challenge for cause. (22 RT 5307; 12 CT 3555.) The challenge was denied. (22 RT 5308.)

33. Gary Moreno (Juror No. 200325950)[80]

Mr. Moreno worked at the fire department. He first told the court that he did not remember anything about the case "other than that young man was, I believe, kidnapped and killed. That's pretty much it." (23 RT 5335–5336.) He also remembered a pickup truck being involved, and that the individual was kidnapped for the pickup truck. He knew there were possibly two people involved, and that Chad Yarbrough was bound and then killed, with a firearm. (23 RT 5336.)

Mr. Moreno knew Glen Johnson (the officer who took appellant's confession) because of responding to medical calls on Johnson's parents,

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[80] This juror's questionnaire begins at 10 JQ 2718.

and while being employed at the county jail at Lerdo. He also responded several times to calls where Dep. Steve Urner was present. His father and the father of John Fidler, one of the case's investigating officers, both worked for the Kern County Sheriff's Office. (23 RT 5339–5340.)

The court then instructed Mr. Moreno on the duties of a juror, and obtained his assent to questions about whether he could maintain open mind and consider both death and life without possibility of parole as possible penalties should appellant be found guilty. (23 RT 5342–5343.)

In response to questions from counsel for appellant, Mr. Moreno stated that he thought the death penalty would be the appropriate punishment if appellant were found guilty of a premeditated murder, and that was his very strong opinion. (23 RT 5347–5348.)

In response to the court's second round of instruction and questioning, he confirmed that he would always vote for the death penalty no matter what other evidence was presented if it were a premeditated murder:

> Q. Do you have feelings in favor of the death penalty which are so strong that you would always vote for the death penalty no matter what evidence was presented?
>
> You marked the box yes, and then you explain premeditation of a murder is grounds for the death penalty.

Do you recall that answer?

A. Yes. And I agree with that. I mean, there again, the facts would tell me whether it was premeditated or not. So, yes, I would agree with premeditation in killing somebody is pretty bad.

Q. Okay. Now, you have in mind what both the attorneys were talking to you about in terms of what your duty to follow the law would be?

A. Yes.

Q. And I'm going to tell you that if there is a penalty phase that means the jury has already found the defendant guilty of an intentional murder in connection with a kidnapping or carjacking.

Do you understand?

A. So you are saying it's premeditated.

Q. It will be found to be willful, deliberate, or premeditated.

A. Then I would have to agree with what I wrote there.

Q. What's that?

A. I would agree with what I wrote.

(23 RT 5351–5352.)

The court then instructed Mr. Moreno at length on the necessity of keeping an open mind in the penalty phase when determining what the appropriate penalty for premeditated murder should be. Mr. Moreno thought that death was always the penalty for premeditated murder. When informed

otherwise by the court, he agreed that he would go either way, and be guided by the facts and the law. (23 RT 5352–5355.)

Counsel for appellant asked Mr. Moreno about the type of facts that might lead him to a penalty of less than death after the defendant was found guilty of a premeditated murder. (23 RT 5357–5358.) When he asked, "would you consider that the childhood of the defendant was relevant to determine the punishment?" Mr. Moreno answered, "No." (23 RT 5358.) The court then instructed Mr. Moreno on the responses it hoped to hear from him about the duty to follow the law and to set aside personal convictions. (23 RT 5358–5360.) When it became clear that Mr. Moreno's willingness to be open-minded centered on the proof or lack thereof of appellant's guilt for first-degree murder, the prosecutor pointed out that the penalty phase was not to lessen the degree of murder:

> Q. At any rate, what we are trying to determine now is whether you will go into that penalty phase and consider any mitigating factors, including perhaps evidence about the childhood of the defendant. Now, you will decide, as a jury, how much weight to give that, but you have to be open to considering it. Can you do that?
>
> A. Yes, I believe I can be open-minded.

(23 RT 5361–5362.)

Appellant's challenge for cause was denied. (23 RT 5363.)

34. Dianne Krotter (Juror No. 200266599)[81]

Ms. Krotter lived in Ridgecrest, in the mountains on the eastern edge of Kern County. She had left question No. 7 blank on her questionnaire, the question seeking her opinion about the sentence of life without possibility of parole. The trial court asked her, "What do you think about the sentence of life in prison without the possibility of parole for the crime of murder in the first degree?" She answered, "I don't agree with it."

Q. Why not?

A. I just don't.

Q. Okay. Any other explanation?

A. Just I feel like if somebody takes somebody's life and they are proven guilty that they should die too.

(23 RT 5373–5374.)

The trial court then instructed her in detail on her duties as a juror. (23 RT 5374–5377.) She answered his questions by saying she did not know, and wouldn't know until she saw the evidence. (23 RT 5374, 5378.) She finally agreed with the court that she had no doubt that she could set aside her personal views and follow the law. (23 RT 5378.)

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[81] This juror's questionnaire begins at 17 JQ 4874.

When asked by counsel for appellant if an unpleasant childhood might impact her determination that first-degree murders should received the death penalty, she answered, "I had a bad childhood, but I don't think anybody would rule in my favor." (23 RT 5379.)

When asked what the penalty should be for first-degree murder, she answered, "death." Appellant challenged her for cause. (23 RT 5381; see also 23 RT 5387.)

The prosecutor then questioned her. When the prosecutor asked if she could give consideration to new evidence in the penalty phase of a trial, and consider the alternative penalty of life without possibility of parole, she thought she could, but resisted unequivocal answers:

> Q. And can you go into that penalty phase, then, with a willingness to consider life without parole as the appropriate punishment for first degree murder?
>
> A. I think I could do that too.
>
> Q. Okay. Well, do you have any doubt that you could do that? In other words, are you so against life without parole for first degree murder that you couldn't give someone that sentence?
>
> A. No. What I'm trying to say is it would depend on the circumstances.
>
> Q. Okay. What we have to find out is if that's indeed the truth that you could consider that punishment, that is life without parole, equally with the death penalty.

A. You will have to take me on my word.

Q. That is your word. You could do that?

A. I think I could, yes.

Q. Okay. Well, do you have any doubt? You say I think I could, and the problem is that's ambiguous language. It's hard for us to know what you are thinking.

A. Well, it would be very hard to determine someone's life too.

Q. So you would consider it a very serious decision to make?

A. Very serious.

Q. And you would want to give equal consideration to life without parole?

A. Of course. Of course.

(23 RT 5390–5391.)

After further questioning by the court and counsel, Ms. Krotter indicated that she would be open to a vote for life without parole in a penalty phase, depending on the evidence. Because Ms. Krotter never wavered on her belief that death should be the penalty for first-degree murder, counsel sought to determine what kind of evidence might lead her to vote for a sentence of less than death. The prosecutor's objections to such questions were sustained. Appellant's challenge for cause was denied. (23 RT 5390–5391.)

35. Lee Woolfolk (Juror No. 200247847)[82]

Mr. Woolfolk knew about this case from local media, and remembered seeing photographs in the converage. (19 JQ 5415–5417.) He heard that they found the victim's body in an orchard, and that he had been shot. Mr. Woolfolk remembered that the victim and his brother were involved, and that two people were involved in causing the crime, and that they stole the victim's vehicle. (23 RT 5398–5399.) He remembered that they had let the brother out, and then took him to a field and shot him. One of them fled the state. He didn't know who the killers were, but he remembered that one of them, probably the one who fled, had a Spanish name. He remembered too that the person arrested for the crime might have killed Chad Yarbrough. (23 RT 5406.)

Mr. Woolfolk's wife was a probation officer. (19 JQ 5411.) He believed that death was the appropriate punishment for most murders, depending on the crime, i.e., "motive, number of victims, etc." (19 JQ 5428.) He agreed with the assertion that "persons convicted of murder should be executed," but not if the circumstances of the crime indicated self-defense. (19 JQ 5429.) Appellant's challenge for cause was denied. (23 RT 5408.)

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[82] This juror's questionnaire begins at 19 JQ 5406.

36. Teresa Gonzales (Juror No. 200245105)[83]

Ms. Gonzales's daughter was being operated on the next day for cancer. (23 RT 5428.) Even though it could be a long-term, possibly terminal illness, it was in an early stage, and she did not think it would interfere with her ability to serve as a juror. (23 RT 5429.)

She did have prior knowledge about the case from local news media. She remembered the crime, and then a funeral, all on television. Her husband commented that he felt like there was too much publicity and "basically he felt that it was being over-covered." (23 RT 5431.) Her husband's comment was made during Chad's funeral, "probably because it was in the news for quite a few days there." (23 RT 5432.)

She thought her husband meant that such coverage would probably impact public opinion about the case. Her own views were that she was in general just really disgusted that it happened. (23 RT 5432.) She felt that way because she has her own children. She recalled something about a truck but not much more about how he died or the manner of his death. (23 RT 5433–5434.) Then, she remembered that one individual was out of state and then was captured, and that there were two people allegedly involved. (23 RT 5434.)

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[83] This juror's questionnaire begins at 16 JQ 4678.

Ms. Gonzales was a correctional officer, and had been for about five years. (23 RT 5435.)

Question: So, in your mind, if the defendant looks familiar to you, you are thinking it's possible you have seen him at the North Kern State Prison?

Answer: Well, there's a possibility.

(23 RT 5436.)

After a discussion, the court represented to Ms. Gonzales that appellant had never been an inmate in a state prison, at North Kern State Prison or any other state prison. (23 RT 5438.)

Counsel for appellant then questioned Ms. Gonzales closely about the condition of her daughter. The court followed up and learned that her daughter was initially examined and was told they could not tell if the tumor were cancerous; then, she went back in, and they told her it was cancerous and would need to be treated. (23 RT 5445–5446.) However, she was not asking to be excused. Appellant challenged her for cause (13 CT 3639); the challenge was promptly denied. (23 RT 5451.)

37. Jeffrey Hart (Juror No. 200290059)[84]

Mr. Hart had knowledge about the case from the local media, but he could not recall talking about it with anybody other than his wife. (23 RT

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[84] This juror's questionnaire begins at 20 JQ 5994.

5453.) He remembered "the basics." Mr. Yarbrough was taken in his truck with his brother; they let his brother go, and then they found him in an orchard later on, tied up to a tree and shot in the head. (23 RT 5454.) He remembered the person being accused saying something about it having been an accident, and that one or the other went to Mexico. (23 RT 5455.)

Mr. Hart believed that the appropriate punishment for murder was death, except in rare cases. He thought that the question of whether persons convicted of murder should be executed should be answered by the circumstances of the crime, that is, whether it was premeditated or accidental. (21 JQ 6105, 6107.) Appellant's challenge for cause was denied. (13 CT 3645; 23 RT 5464–5465.)

38. Juror No. 2 (200336734) (seated)[85]

This juror's brother worked in the sheriff's office, and her daughter worked for the county in Child Protective Services. She knew something about the case; "Just the television and probably a page on the newspaper of some sort." (23 RT 5547.) When asked if she could recall anyone expressing an opinion or making a comment about the case, she replied,

A. Just sympathetically.

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[85] This juror's questionnaire begins at 22 JQ 6582.

Q. Tell me specifically what you can recall in that regard. Where you were, what type of comments might have been expressed?

A. Honestly, I don't know the particular details. It was a woman—a conversation between women, and the sympathy they had as a mother—for the mother of him.

Q. For the mother of Chad Yarbrough?

A. Yes.

Q. Do you recall whether this was in someone's home or some other setting?

A. It may have been at church.

Q. You're not sure?

A. No, I'm not really sure.

Q. How did you know they were talking about Chad Yarbrough?

A. Just the case itself was mentioned, you know.

Q. And how many people were talking about it, approximately?

A. A couple, I think. I don't even really know exactly how it was mentioned. Just maybe a sports mom or something like that. It was so brief, I can't even imagine it being anything.

Q. I understand it may have been some time ago, and you may not have a good recollection. But I want you to give me the best recollection, even if you're not sure about it?

A. I would venture to guess it was a sports mother sharing, because her child played football.

And I'm thinking it was probably a prior request or something that her son may have played football and knew of the situation or something.

Q. And would be requesting a prior for Chad Yarbrough or his family?

A. Just the situation, for all parties.

(23 RT 5547–5549.)

When asked what she had heard about the case, she said,

A. Just the news, just the news that—you know, I sound pretty basic, but it—or innocent, I should say, because—I just know he was a football player, and he was found murdered and there was a truck involved. But that's about all as far as details. I never really took interests in learning more.

Q. Now, in terms of being found murdered, what specific allegations can you recall about the nature of his death and what caused you to think of his murder?

A. What caused me to think?

Q. Correct. What allegations do you recall about that?

A. Well, the news media said he was killed.

Q. Okay. And what other details? I know it's difficult to think back?

A. Yeah.

Q. Just do the best you can. Can you recall—

A. Just that his—I'm thinking his body was found and it was near a truck, that's—

Q. All right. And do you recall any allegations as to who did this, who committed this?

A. I think probably on the news I heard of some sort of possible gang influence or something. But that's all I can recall.

. . .

Q. Did you ever hear from any source that you have mentioned about this case, and—any discussions with these women you mentioned or anything from publicity, did you ever hear about what the race of the culprits were—was?

A. I believe I heard that they were Hispanic.

Q. And you used the word murder, so I assume that whatever you heard or read lead you to conclude that it was a murder; is that correct?

A. Yes, I mean, the newspaper lead me to believe that.

(23 RT 5557.)

Appellant challenged this juror for cause. (23 RT 5561; 13 CT 3648.) The challenge was denied. (23 RT 5562.)

39. Jerry Franklin (Juror No. 200352346)[86]

Mr. Franklin remembered news articles about the case and a little bit on the radio about it, and that when the incident took place, "it was the talk

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[86] This juror's questionnaire begins at 20 JQ 5882.

of coffee rooms." (23 RT 5573.) Most of the conversations were within a couple or three months after the murder happened. His supervisor had a son playing football in high school at the time, and he remembered everyone, including himself, talking about the crime. (23 RT 5575.)

Mr. Franklin couldn't recall "much," but remembered that Chad Yarbrough was shot with a gun, and found in a field (23 RT 5576) and that his car was hijacked, and that he was missing for a day or so. He also remembered from the paper that the people who were involved in carjacking him were two Hispanics. (23 RT 5577.)

The name "Juan Ramirez" sounded familiar, as if he had read it in the paper—that name was maybe the guy who was alleged to have committed the murder. (23 RT 5578.) As he looked at appellant in the courtroom, he had not seen him before, but "the name sounded familiar. The face meshed with the name." (23 RT 5579.)

Mr. Franklin circled option 71-B on his questionnaire, indicating that while he favored the death penalty, he thought there were rare cases where is should not be imposed even if someone has committed a deliberate murder. (23 RT 5587.) The prospective juror had friends or relatives in law enforcement, and one close relative, who had retired—his brother-in-law. (23 RT 5591–5593.) He knew that Chad Yarbrough was a football player

for Arvin High—he talked about it with his wife. Appellant's challenge for cause was denied. (13 CT 3627; 23 RT 5592–5593.)

40. Edward Caudill (Juror No. 200252753)[87]

When asked by the trial court about what he had heard about the case, Mr. Caudill initially answered that he "didn't hear too much at all through the newspapers because I'm on the road most of the time." (23 RT 5595.) He remembered reading about the case and hearing about it from his wife in October of 1997. What he could remember was that Chad Yarbrough played football for Arvin High School and that he was carjacked. (23 RT 5595–5596.)

Mr. Caudill had been a deputy sheriff for four years, 1981–1984, and then went back to driving trucks. (23 RT 5607.) He worked at Wayside Honor Rancho, a minimum security jail. (23 RT 5607–5608.)

He believed that the death penalty should be imposed if someone has deliberately taken another's life, with rare exceptions. He thought the death penalty was used randomly; if the jury felt it should be imposed, "then that should be the case." (19 JQ 5680.) Appellant filed a written challenge for cause (13 CT 3651) which was denied. (23 RT 5609.)

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[87] This juror's questionnaire begins at 19 JQ 5658.

41. Michael Cera (Juror No. 200318903)[88]

Mr. Cera, an accountant, had moved to Kern County in 1996. He had read about the case in the newspapers and watched it on television news; he remembered seeing photographs in the paper. (19 JQ 5698–5699.) He recalled that it involved a popular football player, and there was a lag between the crime and catching the suspects, but had no opinions about the case. (24 RT 5631–5632.)

Mr. Cera believed that the death penalty was appropriate, except in rare cases. (24 RT 5639.) The appropriate punishment depended on the circumstances of the crime, or facts of the case. (20 JQ 5708–5709.) He thought that death was appropriate if there was premeditation, i.e., if someone had bought the murder weapon two weeks before the crime. (23 RT 5640.) Appellant's challenge for cause was denied. (23 RT 5642.)

42. Juror No. 4 (200118551) (seated)[89]

This juror worked as an administrator for the Kern County High School District, with Highland High School. She heard about this crime on the news; she listened to Channel 17 in the morning while dressing for work. The other source of information about the case was when "they were

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[88] This juror's questionnaire begins at 19 JQ 5686.

[89] This juror's questionnaire begins at 23 RT 6638.

dealing with what they would do at Arvin High as far as memorials and the problems the administration was having with whether to do memorials or not do memorials." (19 RT 4409–4410.)

She recalled that in her administration at Highland High, she heard that the school was having a tough time keeping memorials to a minimum, because "it can get out of hand and disrupt school activity. . . . If you have a lot going on at the school over a death of a student, it keeps the students in turmoil." (19 RT 4411.)

The juror was questioned about any information she may have heard about the condition of Chad Yarbrough at the time he was found or any other specific facts. (19 RT 4413.) She answered, "I didn't hear very much other than I knew it was two people, they were looking for two people they were dealing with and it was around his truck." (19 RT 4413.) If the crime were severe enough, like an intentional killing during a carjacking, she thought that death was the appropriate punishment. (19 RT 4416–4418.) Appellant challenged her for cause (12 CT 3473; 19 RT 4418); his challenge was denied. (19 RT 4419.)

43. Juror No. 6 (200301163) (seated)[90]

This juror worked for the Department of Corrections. She was a counselor at Wasco State Prison, "which means—it's kind of a misnomer. I don't do any counseling." (24 RT 5705–5706.) On her questionnaire, she answered that evidence showing involvement of a street gang would prevent her from being fair and impartial, because "street gangs are generally crime-oriented." (23 JQ 6701.) The court obtained assurances that the juror would not try to impose any expertise about street gangs onto other jurors. (24 RT 5705–5712.) When asked by counsel for appellant if there was anything about street gangs that would cause her to treat a witness differently if he was an alleged gang member, she answered, "I don't think so." (24 RT 5730.)

She had prior knowledge of the case from local news media—specifically, from television. (24 RT 5718.) She remembered that Chad Yarbrough was kidnapped and killed, and that his body was found in a field, and that there were fundraisers in the town of Arvin where he came from. (24 RT 5719.)

Appellant's challenge for cause was denied. (24 RT 5734–5735; 13 CT 3664.)

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[90] This juror's questionnaire begins at 23 JQ 6694.

44. David Bohanon (Juror No. 200297577)[91]

Mr. Bohanon worked for Frito-Lay. (24 RT 5763.) He lived close to Los Angeles, and was in the process of looking for a place into live there, but he would make every effort to be on time, and did not think that his work or his personal life would make it impossible for him to be a juror. (24 RT 5765–5766.)

Mr. Bohanon indicated that he would give greater weight to the testimony of a police officer than other witnesses. (24 RT 5769.) After being instructed by the court as to the duty of treating each witness individually, he assured the court that he could set aside those predilections, and perform his duties as instructed. (24 RT 5772.)

He had not heard about this case, because he lives "at the other end of the valley" and get Los Angeles County papers and television. (24 RT 5778.) Mr. Bohanon favored the death penalty but believed there were rare cases where it should not be imposed even if someone had deliberately taken another human being's life. The example of such a rare case would be a father or mother seeing their child hurt or murdered in front of them. (24 RT 5782.) He was uncertain whether he thought it relevant to consider a defendant's childhood and background in determining the punishment,

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[91] This juror's questionnaire begins at 19 JQ 5518.

because he had friends with bad backgrounds who came out well, and friends with good backgrounds who ended up in jail. (24 RT 5784.) In fact, he would not consider that background as relevant in a penalty phase. (24 RT 5786.)

Counsel for appellant filed a written challenge for cause. (24 RT 5796; 13 CT 3661.) In argument, counsel for appellant pointed out that the juror gave inconsistent answers according to whoever was asking the questions, but that he would not give serious consideration to circumstances in mitigation. (24 RT 5799.) The court denied the challenge. (24 RT 5802.)

45. Charles West (Juror No. 200221567)[92]

The prosecutor knew Mr. West as a police officer from Bakersfield College, and had contact with him in the past. (25 RT 5866.) (Both of Mr. West's sons have had court cases and one son was then incarcerated. (25 RT 5536.) That son had been in and out of trouble for almost 20 years, primarily due to drugs. (25 RT 5937.) The other of his sons was a deputy sheriff who was caught with drugs. His son denied the charges, and was never convicted, but he eventually lost his job as a deputy. (25 RT 5940.) Mr. West did not have any bad feelings about how the authorities had handled either of his sons' cases. (25 RT 5947–5948.)

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[92] This juror's questionnaire begins at 11 JQ 3194.

When asked about what he thought the proper punishment for murder was, Mr. West answered that it should be "an eye for an eye." (25 RT 5960–5961.) Mr. West worked for "security" at Bakersfield College. Appellant's challenge for cause was denied. (13 CT 3691; 25 RT 5967.)

46. Lorraine Kilby (Juror No. 2000013345)[93]

Ms. Kilby worked for the Kern County Superintendent of Schools. (25 RT 5997–5998.) She had prior knowledge of the case from local news media, and remembers talking about it with friends or when it came up in conversations. (25 RT 6010.)

What she could remember was that Chad Yarbrough was a football player who was killed. She can't remember anything else other than a search for people who might have committed the crime. (25 RT 6012.) She heard much about the case on television back when it happened, because she listens to the news in the morning before getting ready for work, about five days a week. (25 RT 6016–6017.) She hadn't heard much about it after "the big story kind of died down." What she recalled was that it was an intentional killing. (25 RT 6017–6018.)

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[93] This juror's questionnaire begins at 5 JQ 1458.

Ms. Kilby believed that the death penalty was appropriate in the case of deliberate murder, except for rare cases, if it really weren't premeditated. (25 RT 6020–6021.) Appellant's challenge for cause was denied. (25 RT 6023–6024; 13 CT 3694.)

47. Josie Pinkston (Juror No. 200366521)[94]

Ms. Pinkston had prior knowledge of the case, both from local media and from two friends of hers who were teachers at Arvin. (25 RT 6042–6043.) One of them "knew personally somebody real close to the family." (25 RT 6043.)

When asked what she could remember about the details of the crime, she answered, "I have very few details in my mind at all, other than that I remember it seemed like it was gang related, and that you know it seemed like it was some football hero in high school or something." (25 RT 6044.) Another "very vague recollection" she had was that a gun was involved. (25 RT 6045.)

Her thinking regarding punishment was pretty much "an eye for an eye and a tooth for a tooth type of idea that was back in my thinking." (25 RT 6048–6049.) After extensive instruction by the trial court, she

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[94] This juror's questionnaire begins at 22 JQ 6386.

agreed that she could be open minded and fair in listening to all the evidence. (25 RT 6051–6056.)

Ms. Pinkston marked on her questionnaire that she would give greater weight to the testimony of a police officer, but her experience at a preliminary hearing made her feel that that was not completely true. (25 RT 6059.) Counsel for appellant challenged Ms. Pinkston for cause. The prosecutor joined him. (13 CT 3697; 25 RT 6068–6069.) The trial court denied the challenge. (25 RT 6069.)

48. Steven Turner (Juror No. 200282539)[95]

Mr. Turner had heard very little about the case: "Actually I believe the only thing that I really heard was that a football player from Arvin had gotten killed." (25 RT 6072.) All he could remember was the victim's name. (25 RT 6079.)

Mr. Turner believed that the death penalty was appropriate in the case of deliberate murder, except for rare cases. He thought that maybe it would not be appropriate if the killing really wasn't premeditated. He could not provide an example of what such a case might be, but said that in his judgement, he might "go that particular way." (25 RT 6083.) Counsel for

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[95] This juror's questionnaire begins at 18 JQ 5294.

appellant submitted a challenge for cause (13 CT 3700; 25 RT 6084), which was promptly denied. (25 RT 6084.)

49. Conclusion

This Court is frequently confronted with cases where a defendant complains on appeal about the failure of a trial court to grant his or her meritorious challenges for cause. Recent cases include *People v. Souza* (May 31, 2012) 2012 WL 1948527, p. 27; *People v. Jones* (May 7, 2012) 54 Cal.4th 1, 140 Cal.Rptr.3d 383, 422. It is rare, however, for such claims to be reached on their merits, because even if appellant's contentions about a particular juror are correct, it would rarely make a difference.

> As a general rule, a party may not complain on appeal of an allegedly erroneous denial of a challenge for cause because the party need not tolerate having the prospective juror serve on the jury; a litigant retains the power to remove the juror by exercising a peremptory challenge. Thus, to preserve this claim for appeal we require, first, that a litigant actually exercise a peremptory challenge and remove the prospective juror in question. Next, the litigant must exhaust all of the peremptory challenges allotted by statute and hold none in reserve. Finally, counsel (or defendant, if proceeding pro se) must express to the trial court dissatisfaction with the jury as presently constituted.

(*People v. Mills* (2010) 48 Cal.4th 158, 186.)

Here, appellant exhausted his peremptory challenges, and asked the trial court for more. He pointed to plainly biased jurors who had survived

challenges for cause but later come forward to say they could not be impartial, and said,

> There are other examples here of jurors who said they could not be fair and impartial, after the voir dire process, and we feel they're just the tip of the iceberg.[96] That there are jurors in this panel who have prejudged guilt, who have prejudged the penalty phase and cannot be fair and impartial to this defendant, and are afraid to come forward. And I think we are put into this position now, because of rulings during the course of voir dire by the court denying our challenges.

(28 RT 6693–6694.)

Counsel's final requests for more peremptory challenges were denied. (28 RT 6694, 6698.) Appellant expressed his dissatisfaction with this jury every way he could, and with good reason. Many seated jurors had indeed effectively prejudged the case, or appellant, and/or had inflexible views on the death penalty. If *any* of the jurors in this section had been properly dismissed for cause, than appellant would have been able to have another juror more receptive to his penalty phase arguments sit in judgment on him. The trial court's failure to grant the meritorious challenges for cause presented in this section requires that his penalty be set aside.

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[96] The voir dire of five such persons is presented in Argument IV, *post*.

III. THE TRIAL COURT'S *WITHERSPOON-WITT* ERROR IN THE REMOVAL OF PROSPECTIVE JUROR KATY GONZALEZ NECESSITATES AUTOMATIC REVERSAL OF THE DEATH PENALTY JUDGMENT.

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the United States Supreme Court held that capital-case prospective jurors may not be excused for cause on the basis of moral or ethical opposition to the death penalty unless those jurors' views would prevent them from judging guilt or innocence, or would cause them to reject the death penalty regardless of the evidence. Excusal is permissible only if such a prospective juror makes this position "unmistakably clear." (391 U.S. at p. 522, fn. 21.)

That standard was amplified in *Wainwright v. Witt* (1985) 469 U.S. 412 (*Witt*), where the court, adopting the standard previously enunciated in *Adams v. Texas* (1980) 448 U.S. 38, 45, held that a prospective juror may be excused if the juror's voir dire responses convey a "definite impression" (469 U.S. at p. 426) that the juror's views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Id.* at p. 424.) The *Witt* standard has long been applied in California. (*People v. Butler* (2009) 46 Cal.4th 847, 859–860; *People v. Avena* (1996) 13 Cal.4th 394, 412.)[97]

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[97] "In a state such as California that in capital cases provides for a sentencing verdict by a jury, the due process clause of the Fourteenth

Prospective juror Katy Gonzalez (No. 200282149) was called on December 19, 2000. (15 RT 3683.) On her questionnaire, she selected 71-E as the statement that best corresponded to her position on the death penalty ("While I am somewhat opposed to the death penalty, I do believe there are rare cases where a death sentence should be imposed for a deliberate murder."). (5 JQ 1367.)

When questioned by the trial court, Ms. Gonzales indicated that if the accused expressed remorse, she would have a hard time sentencing him to death. (15 RT 3690.)

> Q. So, given the nature of this case, the allegation of murder in connection with a kidnapping or carjacking, if the law required you to consider the evidence, consider all the circumstances relating to the defendant, and then fairly reach a verdict of either death penalty or life without parole, if the evidence and the circumstances supported a death penalty, could you or could you not return a verdict for a death penalty?
>
> A. Well, if the evidence was there, I believe I could.
>
> Q. Okay. So are we clarifying what you told me before? In other words, you do feel you have an open mind then about that potential?

Amendment of the federal Constitution requires the sentencing jury to be impartial to the same extent that the Sixth Amendment requires jury impartiality at the guilt phase of the trial. . . . California's Constitution provides an identical guarantee." (*People v. Earp* (1999) 20 Cal.4th 826, 852-853, internal quotation marks omitted, cert. den. sub nom. *Earp v. California* (2000) 529 U.S. 1005.)

A. Well, I guess, given if I had all the evidence, I would have an open mind about it.

Q. Is there anything about your moral, religious or personal views or beliefs about the death penalty that would prevents you from performing your duty here?

A. No.

Q. Are you satisfied, then, that you do have an open mind to consider the two possible penalties at a penalty phase, either death or life without parole?

A. Yes.

(15 RT 3692–3693.)

The prosecutor then addressed Ms. Gonzales:

Q. I'm a little bit confused. You told the Judge that you could have no part in sentencing somebody to death; is that correct?

A. Yes, I did say that.

Q. Is that how you—

THE COURT: Keep your voice up.

THE JUROR: Yes, I did say that.

BY MR. BARTON:

Q. Is that how you feel? You wouldn't want to be responsible for sentencing somebody to death?

A. I think it would weigh heavy on me, knowing that I had a part in it. But if the

law required me to have an open mind about it, I mean—

Q. Okay. Well, there is no right or wrong answer, and you said in your response that it would have to be the rare he is (*sic*) of circumstances that you could ever vote for death?

A. Correct.

Q. Like what are you thinking about? What type of circumstance would, in your mind warrant going for death?

A. Well, again, about the remorse. If they were—if they showed no remorse for what they did and they were like, you know, they just really didn't care about it, then I think they should be sentenced to death.

Q. Okay?

THE COURT: Keep your voice up, please, ma'am.

THE JUROR: For taking somebody's life

BY MR. BARTON:

Q. I've noticed a few times you've glanced over at the defendant, it's okay, *and you would have to sit here during the trial, looking directly at this defendant*, and having done that for a couple weeks, it's one thing to sit here and intellectually say I would follow the law, if the Judge told me to keep an open mind?

A. (Affirmative nod.)

Q. It's another thing to search your sole (*sic*) and say am I really capable of doing that. What we want, both sides are entitled to a fair trial, honest jurors, there's no right or wrong answer, nobody is going to be mad at you for telling us what you believe to be the truth. Can you do that for me, can you look inside yourself and say okay, I wouldn't be leaning towards life without parole going into that penalty phase? Can you say that honestly?

A. No.

Q. Okay. And can you say honestly that even if you felt somebody didn't have remorse, and—you sit in this courtroom, you'd be looking at the defendant every day, you actually have the ability to say I vote for the death penalty. You can't do that, can you?

A. No.

MR. BARTON: Challenge for cause, your Honor.

THE COURT: Submit it.

BY MR. GARDINA:

Q. Ma'am, you would follow the law in this case and do what the Judge instructed you, wouldn't you?

A. Yes.

Q. Now, if you felt, after listening to all the evidence in the case, that this was a cold-blooded calculated murder and the man deserved to die, you could vote for the death penalty, couldn't you?

A. Yes.

(15 RT 3595–3596, emphasis added.)

The prosecutor then asked for argument; but the trial court turned to the prospective juror, and said,

[THE COURT]: Ma'am, I appreciate that you're expressing some concern about what you're personally capable of doing. And just—and we've used the word sentence. I want to clarify that. That the jury doesn't actually sentence the defendant.

The jury would return a verdict on a penalty phase, where—where they had—where they would return a verdict of either death or life without parole. Then the Court pronounces any sentence. We want you to be honest, just as both the attorneys have expressed. What is your honest feeling about your ability to keep an open mind and come out here and sit down and look at all of us, and either say yes, I voted for the death penalty or yes, I voted for life without parole, could you do that and look at every one and say yes, I voted for the death penalty?

A. No.

Q. So when you answered Mr. Gardina last question, can you explain your answer to him?

MR. GARDINA: I object to the last question. That's not a jurors responsibility.

THE COURT: Overruled.

[THE COURT]: Mr. Gardina asked are you a question that related to a situation where somebody committed, and the exact words I can't recall, but something like a cold-blooded murder or something to that effect, and you said yes, you could vote for the death penalty. Could you explain that?

A. Well, I don't—gosh I don't think I could.

Q. Could what?

A. Explain it. I just know that I wouldn't be able to come out here and—I don't think I could have any part in somebody going to—sentenced to death.

THE COURT: I have no further questions. I'm prepared to rule on a challenge, after I hear argument.

(15 RT 3697–3698.)

In argument, appellant contrasted the treatment of this juror with the treatment of an obviously pro-death juror, Mack Torres, who had just been questioned (15 RT 3664–3679), and accepted as a prospective juror by the trial court, and pointed out that no pro-death juror had ever been told they had to look the defendant in the eye when voting for death.

[MR. GARDINA]: We have to have some kind of level playing field here, where a pro-life juror is not being put into an uncomfortable situation, to make a judgment call on

evidence she hasn't seen, a situation she will never have to possibly face, and then make a determination, as to how she will react when she has to look at somebody in the eye and say she returned a death verdict. I submit that even with a pro-life juror—pro-death juror, they're going to feel uncomfortable looking somebody in the eye and saying we just voted to execute you.

THE COURT: My language was, come out here and look at every one and be present and say that in front of everyone.

MR. GARDINA: A juror doesn't have to do that; they don't have to make eye contact with a defendant or an attorney or anything. The law doesn't require that. Most jurors that come in on a homicide verdict, don't make eye contact with either the defendant or the defense attorneys.

(15 RT 3700–3701.)

The trial court explained its approach to the juror, and added,

I resent any implication by either side, unless you have good cause, that I'm somehow trying to sway these jurors toward one side or the other. That is not my point. I think the record is very clear that I'm not doing that. I've been a judge for almost 13 years. I have a long history of jury selection, that I don't think supports any allegation that I'm somehow trying to guide this jury one way or the other. And if any counsel is going to make any specific allegation that I am somehow biased, then let's get it on the table, and let's make a record on that, and resolve it. Because otherwise, I don't want to hear loose allegations about me badgering jurors or being biased in some way, unless there's a good faith, specific record to make about that.

(15 RT 3702–3703.)

The prosecutor then asked for sanctions to be imposed on defense counsel, for using terms such as "cajoled," "manipulated," and "hounded" to characterized how he questioned jurors:

> [MR. BARTON]: [A]ttacks were made. I was accused of punishing that juror, hounding her, cajoling her and manipulating her, all of which—and we've had this discussion before—are in violation of the court's repeated admonitions to counsel. And yet he did it four times in the same argument.
>
> THE COURT: Okay.
>
> MR. BARTON: And I do take offense at that, your Honor.

(15 RT 3704.)

The trial court replied that it would not tolerate "throwing around a lot of inflammatory language. And I'm going to put an end to that." (15 RT 3705.)

Counsel then objected to the challenge for cause. After further argument, the court granted the challenge for cause:

> I find under all the circumstances, including the demeanor of the juror, that she was clearly equivocal in her responses, and that she would be unable to carry out the duties that she would be required to, that her views on capital

> punishment would prevent or substantially impair her ability to be neutral and follow the Court's instructions.

(15 RT 3705–3706.)

Ms. Gonzalez had made it clear that she was reluctant to impose the death penalty, but there were circumstances under which she could do so—if the crime was cold-blooded, and there were no signs of remorse. That was how she answered her questionnaire, and that was how she responded to voir dire questions, until she was asked to confront what it would be like to look squarely at all the parties, including the defendant, whom she would be looking at for weeks, as she imposed death.

Whether or not such questions are a fair way of ferreting out a prospective juror's true attitude toward his or her task, it is certain that Ms. Gonzales, one of the rare prospective jurors in this case who was not a strong supporter of the death penalty, was the only juror subjected to that question.

Exclusion for cause of a prospective juror from serving on a capital jury when that juror is in fact qualified to serve is per se reversible error—even when the prosecutor has unused peremptory challenges. (*People v. Heard* (2003) 31 Cal.4th. 946, 950; *Gray v. Mississippi* (1987) 481 U.S. 648.) In this case, the prosecution did use all its peremptory challenges (28 RT 6701–6702.)

The trial court's erroneous disqualification of Ms. Gonzalez violated appellant's state and federal constitutional rights to a reliable penalty verdict, due process of law, and a fair and impartial jury. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.) Established law requires that the death judgment be automatically reversed.

IV. THE TRIAL COURT'S BIASED, OVERBEARING, AND RELENTLESSLY DIRECTIVE VOIR DIRE CONSTITUTED JUDICIAL MISCONDUCT; REVERSAL IS REQUIRED.

A. Applicable Law

This Court has recognized that a failure of the trial court to conduct the voir dire proceedings in an evenhanded manner can be a form of judicial misconduct. (*People v. Mills*, *supra*, 48 Cal.4th at p. 189; *People v. Champion* (1995) 9 Cal.4th 879, 908–909.) The "occasional use of leading questions when attempting to rehabilitate 'death-leaning' jurors" does not suggest a lack of impartiality. (*Mills*, *supra*, at p. 188.) Here, there was a sustained, systematic use of leaning and directive questions by the trial court to accomplish that end. The result is a jury whose impartiality is in grave doubt.

A motion for mistrial should only be granted where an error causes prejudice which is incurable by admonition or instruction. (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) The trial court has discretion in determining whether an incident is incurably prejudicial. Thus, its ruling is reviewed under the deferential abuse of discretion standard. (*People v. Hines* (1997) 15 Cal.4th 997, 1038.) An abuse of discretion occurs when the trial court makes a ruling that is arbitrary, capricious, or exceeds the bounds of reason. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

Code of Civil Procedure section 223 provides that in a criminal case, the trial court shall conduct an initial examination of prospective jurors. The voir dire shall be conducted to assist the parties in making challenges for cause against prospective jurors.

> [T]he examination of prospective jurors should not be used "to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law." [Citations.]

(*People v. Abilez* (2007) 41 Cal.4th 472, 492–493.)

Challenges to a trial court's voir dire are subject to review by this Court for abuse of discretion. (*People v. Butler*, *supra*, 46 Cal.4th at p. 859.) The trial court's exercise of discretion will be upheld unless exercise of that discretion results in a miscarriage of justice as specified in article VI, section 13 of the California Constitution, or renders the trial fundamentally unfair under the United States Constitution's guarantee of due process of law. (Code Civ. Proc., § 223.)

B. The Trial Court's Voir Dire Was Improperly Coercive in an Effort to "Rehabilitate" Biased Jurors

Throughout the process, the trial court repeatedly instructed potential jurors on the law and on their obligations should they be chosen as jurors, in an effort to salvage plainly biased people by making them feel like law-

breakers, or at least feel ashamed, if they admitted being incapable of doing their legal duty. These errors prevented the selection of a jury in whose fairness one can have confidence.

The trial court indicated that it was not interested in the prospective jurors' own views as much as whether or not they could set aside those views and follow the court's directions. (14 RT 3278–3279.) Accordingly, the court began each meeting with 75 members of the jury pool with an extended and detailed presentation of the law's requirement that the juror not be guided by any prior publicity or attitudes about the death penalty, but rather should set aside personal views and follow the law as given them.

The court allotted three minutes to defense counsel for each prospective juror.[98] This rule was not rigidly enforced, but the trial court

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[98] MR. BRYAN: Is the Court going to ask questions first and counsel supplement?

THE COURT: That's correct. And I intend to offer counsel, you know, brief supplemental voir dire with each juror. I'm going to suggest, given the amount of time we have available, something in the two- to three-minute range is going to be the norm. Obviously, use as little time as possible. If you start going beyond the three-minute range, I'll probably cut you off. Let's say three minutes is your limit, absent some showing of good cause. Counsel ready?

(14 RT 3279–3280.)

repeatedly asked counsel to finish up, to be brief, and turned voir dire over to defense counsel with an admonition to be brief.[99]

Counsel was obliged in this case not only to unearth the prospective jurors' attitudes about the death penalty, but also about what he or she had heard or read about the case at bench, and what attitudes they may have formed. About 65 percent, or 166 of the 251 jurors remaining in the pool after hardship excusals, were excused for cause, overwhelmingly for one form or another of bias. Many others answered their questionnaires in such a manner that they had to be questioned about their responses. More than 50 of the remaining jurors were challenged for cause, often for very good reason. (See Arg. II.C, *ante*.) A common impression conveyed to the jury had to have been that the trial court and the judicial process were being strained and undermined by defense counsel's efforts to do what they were required to do on appellant's behalf.

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[99] Admonitions to be brief were aimed occasionally at the prosecutor (14 RT 3373; 16 RT 3865, 3995; 17 RT 4118, 4149; 21 RT 5024; 22 RT 5268) and regularly at defense counsel (see 14 RT 3368, 3371–3372, 3413, 3502, 3515; 15 RT 3579, 3676, 3695, 3766, 3773, 3776; 16 RT 3798, 3849, 3902, 3918, 3996, 4020, 4027, 4092 ["We need to move along, Mr. Gardina, we have other jurors to talk to."]; 17 RT 4056, 4069, 4161, 4166, 4170, 4225, 4251, 4271, 4275, 4277; 20 RT 4859, 4866, 4702; 21 RT 4938, 4946, 4953, 4997, 5063, 5113, 5115; 22 RT 5176, 5258–5259; 24 RT 5695, 5798, 5815, 5818; 25 RT 5868, 5930).

During voir dire the trial court proved to be hypersensitive, quick to threaten defense counsel, and unwilling to acknowledge error. The following example from the second day of voir dire, on December 19, 2000, shows all these tendencies. It took place at the conclusion of the voir dire of prospective juror Terri Burton (No. 200117768).[100]

THE COURT:	*If the evidence and law required it, could you return a verdict for the death penalty?*
A.	(Affirmative nod.)
Q.	Yes or no?
A.	Yes.
Q.	If the evidence and law required it, could you return a verdict for life without parole?
A.	Yes.
THE COURT:	Thank you.
MR. BRYAN:	Your Honor, I object to the last form of questioning, because the law never requires death.
THE COURT:	What is your objection, Mr. Bryan?
MR. BRYAN:	Irrelevant. It does not go to cause.
THE COURT:	Overruled.

[100] Ms. Burton's questionnaire begins at 7 JQ 2074.

(17 RT 4312–4313, emphasis added.)

. . .

MR. BRYAN: Pass for cause, your Honor.

THE COURT: Very good.

MR. BRYAN: I do want to be heard, though, before this juror is excused, briefly, very briefly.

THE COURT: You've just passed for cause.

MR. BRYAN: Your Honor, that's correct, but this juror has been misinformed about the law, and it's on a very important issue.

THE COURT: Let's confirm there's no jurors in the courtroom. Mr. Bryan, do you have some objection?

MR. BRYAN: Yes, your Honor. You know, Mr. Barton just asked this juror if upon deliberations if he thought the—if he as the juror thought the appropriate sentence was the death penalty, could he vote for it. He said yes. And I must say, that is the right way to put it. The Court, however, asked this juror if he could find the death penalty, if the law required it. And that is the most important—

THE COURT: *Mr. Bryan, be very careful when you state things to state them accurately. And that's not the way I phrased it.*

MR. BRYAN: Your Honor, I—

THE COURT: Go ahead.

MR. BRYAN: That is certainly what I heard. I heard this court tell this juror that if the law required the death penalty, could he impose it, and that is a complete misstatement of the law.

THE COURT: *Mr. Bryan, you are misquoting the Court right now.*

MR. BRYAN: Your Honor, I'm—I can only—I can only argue from what I remember. And that's what I remember.

THE COURT: Then you're remembering incorrectly. I'll tell you specifically what I told the juror. Let me find it in the transcript.

(17 RT 4318, emphasis added.)

When the court reviewed the transcript, it discovered that counsel was indeed correct. It did not, however, acknowledge any factual—or legal—error.

THE COURT: My question to Mr. Burton (200117768), if the evidence and law required it, could you return a verdict for the death penalty, his answer was yes. If the evidence and law required it, could you return a verdict for life without parole, his answer was yes. What is your objection, Mr. Bryan?

MR. BRYAN: That is a misstatement of the law.

THE COURT: Explain your argument.

MR. BRYAN: The law never requires the death penalty. It never requires the death penalty. That's what you asked him. And that is

improper. And he should be informed that the law—it can be an appropriate sentence based on aggravators, but it can—the jury can never be told that the law requires the death penalty—

THE COURT: Mr. Bryan, listen to the words that I used. I said if the evidence and law required it, the evidence and the law, we use that terminology with jurors all the time, Mr. Bryan. What is your point?

MR. BRYAN: The law never requires it.

THE COURT: The point is the evidence and the law. The Court instructs the jury on the law. They must follow the law in returning their verdict on the death penalty, Mr. Bryan.

MR. BRYAN: Yes, but the law never requires the death penalty, and that's what—

THE COURT: Mr. Bryan, do you understand what the Court told the juror. I said if the evidence and the law require it. That's standard language in asking jurors if they can follow the evidence, follow the law, return a fair verdict. What is your point, Mr. Bryan?

MR. BRYAN: I've made it, your Honor. The law never requires it, and I believe that is the upshot of what you said. I've made my record.

THE COURT: Well, I think—I don't understand your objection, Mr. Bryan, because I informed the juror if the evidence and law requires

something, could they return a verdict and that's appropriate.

MR. BRYAN: The law never requires the death penalty, that's my point.

MR. BARTON: Your Honor, the law states that they have to consider both equally. And I think I hear both court and counsel, seems like what counsel is saying is because you asked that in the singular as opposed to putting it together, it sounds like this juror might be thinking that the law would require one or the other, given a set of circumstances. But the law will never require one or the other, it will always require him to be open to either. I think it's a semantic difference of opinion. That's my understanding of death penalty law.

THE COURT: And my point in asking the juror both sides is to make sure he understood he would have to consider either verdict, and return the verdict that was proper under the evidence and the law. That was the point I was making.

MR. BARTON: And I'm sure—

THE COURT: I don't think it misled the juror in any way.

(17 RT 4317–4321.)

As both the prosecutor and counsel for appellant well knew, and tried to explain to the trial court, the death penalty is never required by any combination of facts and law. The United States Supreme Court has long

recognized that any "process that . . . excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind" is intolerably inhumane. (*Woodson v. North Carolina* (1976) 428 U.S. 289, 304.) So has this Court. (See *People v. Brown* (1985) 40 Cal.3d 512, 541.) This principle is contained in the jury instruction guiding jurors during their penalty phase deliberations. (See CALJIC No. 8.88.)[101] The trial court was apparently blinded by its displeasure in being contradicted—especially because counsel was right, not only about what the trial court had actually said, but also about the relevant law.

The trial court's demeanor was formidable, as the voir dire of Nicollete Costa (200286508)[102] illustrates. Miss Costa was 19 years old, attending school, and working at Albertson's. Other employees with whom she worked had attended school with Chad Yarbrough. Trial court began

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[101] CALJIC No. 8.88 provides in part: "The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." Appellant's jury was so instructed. (62 RT 13733–13734.)

[102] Ms. Costa's questionnaire begins at 4 JQ 1150.

questioning her (16 RT 3931), and then Miss Costa became very uncomfortable (16 RT 3950).

The court offered to take a break, but she expressed a willingness to continue. Later, the court asked if there were something it was doing that caused her to become upset and cry in court. She agreed that it made her embarrassed to be asked a lot of questions to which she wasn't sure what answers to give. (6 RT 3953.) Defendant's challenge for cause was ultimately granted by the court. (16 RT 3966.)

After the court explained why it granted the motion, the prosecutor expressed concern about two aspects of the court's ruling. The first was whether it was consistent with previous rulings, and the second was the court's manner of questioning:

> I will say that with as much respect to the Court as I can, I don't think the Court realizes its brusk (*sic*) turn when the Court tells a juror, when your answer is such-and-such, explain. That's the way it comes across to myself, defense counsel, and I think to the jurors. . . . I can't even tell the court how it would change. Maybe perhaps by saying—well, you have said it to some jurors, you'll repeat a question, do you have a way to explain that, and I use the word sharp, but it comes across louder in tone, Your Honor, and sometimes it's just because you're making a point.

(16 RT 3968–3969.)

The court indicated that it appreciated constructive criticism and that if it was becoming brusque, it was not aware of it, and that the court was

aware that he had a loud voice. However, the court thought that if it was a common problem, that if he were upsetting jurors, then he would have become aware of it sooner. (16 RT 3971.)

The trial court's method of conducting voir dire is further illustrated by the voir dire of James Davis (200291149).[103] The court asked Mr. Davis if he could think of any reason why he should not be on the jury. Mr. Davis answered,

> [MR. DAVIS]: There's no exterior reasons, *but inside I don't know how fair I could be.*
>
> [THE COURT]: Well, explain that.
>
> [MR. DAVIS]: I work in a setting where I deal with convicted felons on a daily basis. And I have done that for 16 years. And it's hard to be in that environment and not become a little bit callused in the way I view certain things.

(16 RT 3789, emphasis added.)

The court then asked if there was any specific feeling that he had about the case at bench that made him feel that he could not be fair. Mr. Davis answered that it was nothing about this case; "it's just my overall outlook of certain things." (16 RT 3789.)

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[103] Mr. Davis's questionnaire begins at 5 JQ 1206.

The court asked him again if his feelings were related to any criminal trial, or something about this particular case. He answered,

> Again, I don't know anything about this case. I think it would be in any case. I would probably tend to look more on a negative way of looking at it. To be honest, it would probably be harder for me to believe in innocence than guilt. I have been trained in my job they are guilty, and that's kind of hard not to look at after 16 years. And I could try to be fair, and I really would. But I have thought about it since I was here last, and, honestly, inside, have become a little bit cynical in my job. And I think that would affect me.

(16 RT 3789–3790.)

The court then instructed Mr. Davis on his duties, and told him that many jurors might have biases for one side or another, but it was his duty to set those biases aside. (16 RT 3790–3791.) The court concluded with,

> [Q.] You kind of have to look over your life's experience, how you have dealt with similar issues, your ability to set aside emotions or biases and make decisions in a way that isn't influenced by those. So that's what I'm asking you to think about and tell me what your thoughts are in terms of the second area, whether you can set aside these biases or feelings that you have expressed and perform your duty to be completely fair to both sides.
>
> A. In my 16-year career in corrections, on a daily basis, I have to set my biases and my prejudices aside. Because I have to be fair at all times. It's something that I have been trained to do for a long time. I think I can do it, and I would sure give it a try. I would do the best I could.

Q. Just so you understand the way the process works, if you tell me that you have a bias, that obviously creates concern in the Court's mind as to whether you can be fair. But that doesn't end the questioning. My next area of questioning, then, now that you have disclosed this bias and explained what it is so we all understand what it is, do you honestly feel that you can set that bias aside and be careful throughout the trial and throughout the deliberations not to let that bias influence you and to be sure that you follow the law, decide the case based solely upon the evidence and the law, and reach a fair verdict that hasn't been influenced or guided by your bias?

A. I would definitely try my hardest. Honestly, I would have a hard time. But I would be willing to make the effort to put it aside.

Q. I'm not trying to put you in an impossible situation here, where you really, you know, have a serious doubt as to whether you can perform your duties. I guess one way that I have described this to jurors is, if you have a reasonable doubt as to whether you can perform your duties, then tell me about it. It's just hypothetical if you say, well, I'm a human being, I don't know what the future might bring, I'm pretty sure I can do it, but, you know, I might get hit by a lightening bolt. That kind of unlikely thing that can happen in the future, none of us can anticipate. But if you think there's a reasonable doubt as to whether you can perform your duties, then I need to know about that.

A. I believe I can do it, because I'm sitting here, being as honest as I can with you, and that's putting it aside in itself.

Q. So given your ability to predict your future state of mind, your future ability to listen to the evidence, follow the law, set aside your biases and prejudices, are you satisfied that you can perform your duties?

Because if you have some doubt about it, I want you to tell me.

A. I do have a doubt about it. It would be a daily thing that I have to deal with.

Q. Do you think it's putting you in a very difficult position to try to set that aside?

A. I would have to work at it. It's just something that I would have to keep in my mind all the time.

Q. Well, you need to tell me if you think that it's something you can reasonably do or if you think it's really putting you in an unreasonable position where you are going to have a very difficult or impossible task ahead of you.

A. I don't think it would be difficult or impossible. I think it would be reasonable. I would expect every juror to be able to do it to an extent, and I believe I could do it to that extent that you are asking.

Q. Are you feeling pressured in any way to give me the right answer here?

A. No. No, I'm not.

Q. Because you understand I want your honest response. If you have any doubt as to whether you can perform your duty, now is the time for us to know about it. Because both parties are entitled to a fair jury, and it's not fair to the prosecution or the defense to have jurors that do have some real doubts about their abilities to perform their duties but they don't disclose those because they think, well, gee, I don't want to embarrass myself or get the Judge mad at me for some reason.

A. No. I can perform my duties.

Q. Okay. Do you understand that's going to require an ongoing effort by you to set aside any biases or prejudices that you have?

A. Daily.

Q. And is there any doubt as to your ability to do that?

A. There's a little doubt.

Q. Now, is that doubt—what's that doubt based on? Explain it.

A. My knee-jerk reaction is to be on the negative side of the way to look at things. It would be towards the negative side. And it's just daily situations I have had to face every day. My whole attitude has gone to the cynical side of life. It's kind of sad to say, but, in being fair here, I would make the effort to keep it centered best I can.

Q. Well—

A. But I do have doubts.

Q. If you have doubts, then that again raises a concern in the Court's mind as to whether those doubts rise to the level that they become a reasonable doubt, meaning that it's not likely that you are going to be able to perform your duties here.

A. I don't feel that it would be unreasonable for me to do it or too difficult. I could do this.

Q. Well, if you have doubts about whether you can do it—

A. They are not so strong that I don't believe I couldn't. I don't think they would override my reasoning.

Q. So you are satisfied that you can perform your duties as a juror?

A. I can do it.

Q. And set aside your biases?

A. I can do that.

Q. If at some point during the trial you became aware that you were not going to be able to perform your duty and set aside those biases, it's going to be your duty to disclose that to the Court. Do you understand?

A. I understand that.

Q. And I don't want to set us up for that. In other words, we certainly want to find out now the likelihood of your being able to perform your duties. Because you understand if we excuse jurors in the middle of a trial that creates other problems.

A. I was sitting as you were just speaking and was just thinking of a situation I was placed in two days ago. A little traumatic at work. Really kind of set me back a little bit. Should I disclose the situation?

Q. If you think it's relevant to this subject, go ahead.

A. I ended up having to shoot three inmates a couple of days ago. And it was not what I had to do but it was the situation that was put in front of me. And it's staying with me. It's like I'm kind of angry about having to be placed in that situation. So when I'm sitting here and I see things that I have dealt with or attitudes that I have dealt with, it's those angers. It's a way of looking at things that I have had to deal with for so long. That's what I have to put aside. And I believe it's not unreasonable to ask me to do that. I can do that. I don't have a problem doing that. But there may be situations

that come up through work, like, three days ago. I deal with that quite often. I would hate to be sitting here and having gone through something of that nature and be affected by it.

Q. If you are on this jury, are you going to be also going back to work during the trial?

A. I don't know. If there's gaps in time, yes, I will.

Q. Well, do you have some concerns, then, about being on this jury with that potential?

MR. BARTON: People would stipulate, your Honor.

(16 RT 3791–3797.)

After Mr. Davis was excused, defense counsel then said that he objected strenuously to the trial court's voir dire of Mr. Davis. The trial court chastised him at length for using the word "strenuously," saying that it was inflammatory and disrespectful. (16 RT 3898–3899.)

Counsel then explained his concern. He thought the trial court was going beyond the question of whether or not a prospective juror could set aside his or her bias, and pressing them by repeating over and over what a juror's duties are, "so that he was eventually put in the position of violating the law if they cannot set aside their biases and prejudices." (16 RT 3801.)

With Mr. Davis, counsel contended that

[A]fter he had given a heartfelt description that his performance as a juror would be affected by his job and things related to his job, the Court then did what it has done in

> the past which we have objected to, and that is to confront jurors with clear biases with their duties and with the governing law, and repeating it with slight variations, putting the prospective juror in a position that if he answers that he still has or would be affected by his biases that he is somehow violating the law or not being fair or not being a good person. That is not what voir dire is for. It is to find out these prospective jurors' feelings and attitudes.

(16 RT 3801.)

The court replied,

> if a juror expresses a bias, I am always going to have to try to have them bring up honestly what that bias is and then go to the next step and explain what their duties are. And it's necessary to explain what their duties are in order for them to answer the questions. It's the jurors' duty to set aside bias if they are able to, and they have to tell the court honestly if they can or can't set that aside.

(16 RT 3802.)

The actual practice of the trial court with jurors it favored, invariably strong supporters of the death penalty and/or people with detailed knowledge about or connections to this case, was to repeat with slight variations a depiction of the juror's duties, and to view each successive expression of doubt as something it needed to "clarify." (See, e.g., the voir dire of prospective juror Glen Kellerhals discussed at Arg. II.C.25, *ante*.)

The effect of such repetitions in general is to teach the person answering the questions that they have not yet made the right answer. In this context, the prospective jurors were effectively made to feel that they were

not law-abiding citizens who could do their duty if they indicated doubts about their ability to be fair. As noted above, repeated questioning is a classic method of eliciting statements from the one being questioned that the interrogator/interviewer wants to hear. (See Arg. II.C.25, *ante*.) Counsel for appellant was correct when he objected to this misuse of the voir dire process.

C. Biased Jurors Who Survived Challenges for Cause but Later Admitted Their Bias

Five obviously biased jurors survived meritorious challenges for cause. They came to recognize their biases, and when they were called, they told the court they were too biased to serve on appellant's jury. They were dismissed by stipulation. Their voir dire is illustrative of how the trial court proceeded, and shows the similarities between how they were questioned, and how they answered, to several other biased prospective jurors unsuccessfully challenged for cause.

1. Mark Torres (Juror No. 200151661)[104]

Mr. Torres was a teacher in the California State Prison at Lancaster. (14 RT 3666–3667.) He wrote on his questionnaire that he found law enforcement witnesses to be more credible, because he worked with law

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[104] This juror's questionnaire begins at 7 JQ 1906

enforcement people "every day." His primary duty as a prison employee was to protect the security of the institution. (14 RT 3669.) On his questionnaire he wrote that if a person is found guilty, without a reasonable doubt, the death penalty should be imposed and enforced. (14 RT 3670.)

He answered question number 71 on his questionnaire ("Please tell us the answer or answers that best correspond to your views on the death penalty.") with "A" ("The death penalty should be imposed in every case where somebody deliberately takes another person's life."). Mr. Torres felt the death penalty should be used if a person is found guilty of a homicide beyond a reasonable doubt during a kidnapping or carjacking, and thought the death penalty should be used more often. (14 RT 3673.)

Mr. Torres assured the prosecutor that he could keep an open mind during a penalty phase. The court then stepped in to "clarify" Mr. Torres's position, and repeatedly instructed Mr. Torres on the basic duties of being a juror. (14 RT 3675–3676.) Mr. Torres then answered that he would have no problem keeping an open mind, and that he would not "just kind of skip over the law and return a verdict of death penalty in the second phase, no matter what the law or evidence requires." (14 RT 3676.) Counsel challenged Mr. Torres for cause; his challenge was denied. (12 CT 3400; 14 RT 3678–3679.)

Mr. Torres was called to serve on the jury on January 17, 2001. He informed the court that there was a reason why he could not be fair. The reason:

[THE PROSPECTIVE JUROR]:	[m]y place of employment.
THE COURT:	And explain that.
THE PROSPECTIVE JUROR:	I work for the Department of Corrections. I don't feel I could be fair.

(28 RT 6616.) Both sides stipulated to his excusal, and the stipulation was accepted.

2. Kyle Dock (Juror No. 200221141)[105]

Mr. Dock (called at 17 RT 4035) was the father of teenaged boys who played football in Kern County. That's how he knew about the case. (17 RT 4040.)

Question:	Based on any conversations that you have had or any newspaper articles that you have read, have you formed any opinions on this case?
Answer:	No, not necessarily. I'm keeping an open mind. Since I've been selected for this, I basically have to keep an open mind now.
Question:	Okay. What rumors have you heard about the death itself?

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[105] This juror's questionnaire begins at 2 JQ 590.

Answer: Just what led up to it, how his life was taken, and what occurred prior to that—things what people have told me but they were also stated in the newspaper also.

(17 RT 4045.)

When Mr. Dock was asked about opinions he might have as to the appropriate punishment should defendant be found guilty, he answered,

[Mr. Dock]: The way I was raised, it's life for life, eye for an eye.

Question: You believe in an eye for an eye?

Answer: Yes.

(17 RT 4045.)

When told that if chosen as a juror he would be required to listen to both mitigation and aggravation in the penalty phase, including possible testimony about the defendant's childhood, he replied, "I feel that the way the person or way the individual was raised has no bearing on that [choice of punishment]." (17 RT 4047.) Mr. Dock later stated he would have no problem with being totally fair and impartial in the case, and would listen to both sides. (17 RT 4049–4050.) Defendant filed a written challenge for cause. (12 CT 3457.) After argument, the challenge was denied. (17 RT 4052.)

Mr. Dock was questioned on December 21, 2000. When he was called to serve as a juror on January 17, 2001, and he was asked if there was any reason why he should not be on the jury, he answered "yes." (28 RT 6665.)

He told the court that he worked on the railroad in a gang truck with some people from Arvin, and they were talking about having heard Chad's father being really upset about what had happened to his son, and how he wanted to hurt the person who did it. Mr. Dock also told the court that there was no practical way for him not to overhear such talk in close quarters, and that he had to work in evenings and on weekends to stay financially afloat.

The trial court questioned him closely.

THE COURT: Mr. Dock (200241121), can you think of any reason why you should not be on this jury?

A. Yes.

THE COURT: All right. We're going to have to talk to you about that. Let me just ask you this, yes or no, is it based upon a hardship reason or some other reason?

A. Some other reason.

THE COURT: The record reflects that we have juror number 2, Kyle Dock (200241121), in the courtroom. None of the other jurors are present. Mr. Dock (200241121), please express your concern.

THE JUROR: I work with a group of individuals that are from Arvin, California. And on one day, they were speaking about the case. And I—

Q. Is this on a day since you and I were in court together?

A. Yes.

Q. And let me just see where that was at. Where was that?

A. Where was it—

Q. Where did it take place?

A. At work in Tehachapi.

Q. Is this within the Department of Corrections?

A. No, it isn't.

Q. Where is it at?

A. I work with the railroad.

Q. Okay. And so tell me what happened.

A. The individuals know of the father of the—of Chad Yarbrough. And stated a few things about what he had done since then.

Q. Well, be specific. What did you hear?

A. That he was real upset about the incident, and that he had—

Q. Who is he? Who is he?

A. The father of Chad Yarbrough.

Q. Okay. Go ahead. Chad's father was very upset and—

A. Yeah. And he—that he was upset with the individual, and that he was making statements that he was wanting to hurt this individual, the one that killed his son.

Q. Okay.

A. This is secondhand. This is coming from one of my coworkers, who knows the father.

Q. Okay. What else did you hear?

A. Basically that's about it.

Q. And where were you when this person was making these statements? Were you in a break room or out on the job or what?

A. We have a gang truck, and six guys sit in this truck. So there was no way of getting away from it. We were moving at the moment.

Q. Okay. Now, was it just one other worker that made these statements?

A. No. There was two conversing.

Q. Were you part of the conversation?

A. No, I wasn't.

Q. Were either of these people directing their comments or statements to you, that you could observe? That they were looking at you and trying to include you?

A. I was sitting in between them, so they had to look over me.

Q. Did either of these people know that you're on this jury panel on this case?

A. They know I'm in jury duty, that's all they know. So they probably made some assumption that yes, I'm on this one. I don't know for a fact.

Q. Did you ask them to not discuss this case further?

A. No, I didn't.

Q. Did you say anything at all?

A. No.

Q. And did they say anything else other than what you've told me, in terms of what happened, who did what, any other details?

A. Just that, you know, just going through a hard time. That's about it. Basically that's it.

Q. Referring to Chad Yarbrough's father going through a hard time?

A. Yes.

Q. Is that a hard time, meaning the emotional hard time over the loss of his son?

A. Yes.

Q. Now, how has that impacted you in terms of your ability to be fair in this case?

A. I still have to work around these individuals, and I'm going to be around it, and I can't get away from it, because we're in this truck, and there's no stopping the truck and pulling it over and letting these guys talk. So there's no getting around it.

Q. If we're in trial Monday through Friday from approximately 9:00 to 4:30, are you still going to be working evenings or weekends?

A. I'll be subject to call on weekends, yes.

Q. You intend to do that?

A. Oh, yeah.

Q. Is that part of what you're relying on in terms of making up financial loss?

A. That's correct, yes.

Q. So you don't feel it would be reasonable to avoid the weekend call, while you're on this jury?

A. No.

Q. Because of financial reasons?

A. Yes, that's correct. This is our busy season, the summer—in the summers, it gets slow.

Q. So is there anything about what was said to you up to this point, that has caused you to have a doubt as to whether you could be fair?

A. Yes.

Q. Do we have a stipulation?

MR. BARTON: I'll submit it, your Honor.

(28 RT 6665--6670.)

The court then excused Mr. Dock. (28 RT 6670.)

3. Edward Wright (Juror No. 200109830)[106]

Mr. Wright's son's girlfriend was friendly with the Yarbrough family. His son went with her to the Yarbrough house after Chad Yarbrough's death. (17 RT 4100.) She had dated Chad, and her parents were friends with Chad's parents. (17 RT 4101.) When his son returned from the visit, he said that Chad Yarbrough's bedroom "was like a shrine." (17 RT 4101.) Mr. Wright could not recall if his source was his son's friend or the newspaper, but he understood that Chad was partially clothed when killed, and that his hands were duct-taped behind him. (17 RT 4102.)

He had followed the case in the newspaper. He remembered that one of the defendants was caught coming back across the border from Mexico into Texas, and that one was found guilty and was then (December 2000) imprisoned. Because of his son's girlfriend, he followed the case more closely than he normally would have. (17 RT 4103.)

However, Mr. Wright understood that it was his duty to not let any personal feelings sway him, and that it was his duty to follow the law as given to him by the court, and was satisfied that he could be fair to both sides if selected as a juror. (17 RT 4106.)

The court questioned him as follows:

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[106] This juror's questionnaire begins at 12 JQ 3306.

Q. Now, sir, in your questionnaire response after you answered the question about your son going to the Yarbrough house with his girlfriend, you answered the next question would it affect your ability to be fair and impartial in any way. You answered that no. Is that still your response?

A. Yes.

Q. Do you understand, as a juror, it's going to be your duty to set aside any knowledge you have about either the case from what you have heard, from what you have read, set aside any feelings you have about the case whether it is because of what you have heard or read or because your son's girlfriend knew Chad Yarbrough, knew the family—it's your duty to set that aside, if you honestly can, or tell me if you think you can and make sure you don't let that influence you in any way in deciding this case. Do you understand that?

A. Yes.

Q. *And we are not concerned about appearances. We are concerned about reality.* So just from the appearance it would appear that you have some closer connection to the Yarbrough family than many other people just because your son is dating a girl who knew Chad Yarbrough. It creates an appearance that maybe you are likely to have some feeling of a connection to the Yarbrough family. Do you understand that, just from appearance only?

A. Yes.

Q. My question is: What is your state of mind? Do you feel that you have some kind of a bond with the Yarbrough family because of those relationships that would in any way interfere with your ability to be completely fair to both the prosecution and the defendant?

A. I think whoever killed Chad Yarbrough should be punished, whether it's this guy or somebody else. Yes, I'd listen to the evidence and decide from that.

Q. So my question, though, is: Do you feel that you have some type of a bond or a connection with the Yarbrough family because of your son's—

A. No.

Q. —girlfriend that causes you to come into this case with a possible tendency to lean toward one side or the other?

A. No.

Q. Do you have any thought about that?

A. No.

Q. Any explanation?

A. On this part of the questionnaire?

Q. Well, in other words, is there anything about your son dating a girl that had dated Chad Yarbrough that you think even creates a question in your mind that you might tend to be biased or have a tendency to lean toward one side or the other?

A. No.

Q. You understand that it is your duty to not let any such feelings or emotions sway you in any way; correct?

A. Yes.

Q. That wouldn't be fair to the defendant or the prosecution if jurors did that.

A. Right.

Q. So you are satisfied that you are completely fair and impartial to both sides, sir?

A. Yes.

Q. Sir, you expressed an opinion about street gangs. You stated they are not good; correct?

A. Yes.

Q. Explain that.

A. I'm a firefighter, and I used to run out of the station for several years at Virginia Avenue and Mount Vernon. And I went to several stabbings and shootings in that area.

Q. Did you believe they were street gang-related?

A. Yes, some of them were.

Q. And do you have any other reason to think the street gangs are not good?

A. I've never heard of them doing any charity work. I mean, everything I have heard has been negative.

Q. Now, I understand that jurors are going to have a variety of views about subjects like that. Again, we are not trying to change anybody's views. We need to know what your personal views are. Do you understand that it's your duty as a juror to tell me honestly if you can set that side, those views, and not let it influence you in deciding the issues in this case? Do you understand?

A. Yes, I understand.

Q. I'll give you an example. The defendant in this case is charged with certain crimes, and the People have the burden of proving those charges beyond a reasonable doubt. Do you understand?

A. Yes.

Q. Do you understand that it would be improper for a juror to let their feeling about street gangs influence how they view the evidence or how they decide the case against this defendant?

A. Yes.

Q. In other words, if the People were trying to prove a charge of kidnapping or carjacking or murder, it would be improper for a juror to think to themselves, well, the People haven't really proved it but this person may have some involvement with a street gang so let's convict him anyway because of that. Do you understand that would be an example of improper use of that feeling or opinion?

A. Yes.

Q. Is that a problem?

A. No.

Q. You understand your duty not to let that influence you?

A. Yes.

Q. Sir, you expressed some opinions or views about the subject of death penalty and life without parole. And that was in the questionnaire because it addresses the possibility of a penalty phase. Would all of your answers still be the same—

A. Yes.

Q. —on those subjects?

A. Yes.

Q. Do you feel that you are going to have an open mind, if the case does get to a penalty phase, to consider all of the evidence, all of the circumstances that might be presented to the jury, which may include circumstances in mitigation that might cause the jury to lean toward a life without parole sentence, circumstances in aggravation which might cause the jury to lean toward a death penalty sentence—consider all of that and keep an open mind to decide what weight to give to all of it before deciding which is the appropriate penalty?

A. Yes.

Q. Any doubt?

A. No.

THE COURT: Thank you.

(17 RT 4104–4109, emphasis added.)

After the court concluded with its voir dire, the juror volunteered,

[JUROR]: May I say something? There was one—bring up one point. There was one [question] about would I believe, would I believe a peace officer over somebody else. I answered yes to that. And I work with law enforcement all the time. I do want to bring that up.

[THE COURT]: Let's ask you about that.

Answer: Basically, I work with them. And I would take their word over somebody from the general public.

(17 RT 4109.)

The court then instructed him that jurors need to keep an open mind and look at each individual witness, and to not apply general prejudices to any class of witnesses. The court concluded,

[THE COURT]: So if you have a feeling, for example, that a law enforcement officer can't lie, you know, that they always state the truth and no law enforcement officer could ever lie, that it's going to obviously interfere with your ability to be fair in evaluating the witnesses.

Do you understand?

Answer: Yes. And I can evaluate their testimony. But because where I'm coming from as I'm not—I don't believe they have a reason to lie. Now, somebody else could have a motivation.

(17 RT 4111.)

The court then asked Mr. Wright to remember that law enforcement officers are individual human beings. (17 RT 4112–4113.)

When asked by counsel for appellant whether, given his respect for law enforcement, it would be difficult for him to believe that a police officer could ever lie on the witness stand, the witness affirmed that it

would be difficult for him to believe that could happen. He affirmed that he would automatically be inclined to give their testimony greater weight than that of any civilian witness.

The witness had strong feelings in favor of the death penalty as punishment for deliberate murder, or an intentional murder during a kidnapping or carjacking. (17 RT 4114.) He affirmed that if he found that the killing was an intentional one committed during a carjacking, the proper punishment should be "murder or death." (17 RT 4118.)

However, when questioned by the prosecution, the prospective juror indicated that he could go into a penalty phase with an open mind as to either life without parole or death penalty, depending on the circumstances and evidence that emerged in the penalty phase. (17 RT 4118–4119.)

Counsel for appellant challenged Mr. Wright for cause. (12 CT 3451; 17 RT 4119.) The challenge was denied. (17 RT 4120.)

Mr. Wright was called back to serve on the jury on January 17, 2001. When asked if there was any reason why he should not serve on the jury, he answered, "No," but when asked if there was any reason why he could not be fair to both sides, he answered, "yes." (28 RT 6650.) His honest belief was that he was "leaning way too far towards guilty." Mr. Wright was then excused. (28 RT 6651.)

4. Charlene Hicks (Juror No. 200216085)[107]

This juror was a first-grade school teacher at Di Giorgio Elementary School. When asked if there was something about her working in Arvin as a teacher that caused her to think she should not be on the jury, she answered that "a couple of my coworkers know the parents of the boy, and know the whole family." But the prospective juror had no doubt that she could be completely fair and impartial to both sides. She knew several teachers and former Arvin High School graduates from the Arvin High School community, including two people who attended the funeral—one a teacher, and the other a secretary. (17 RT 4234–4235.)

When asked by the court if her relationships with people at Arvin might cause her any concern about being completely independent in reaching a verdict, not influenced by possibilities of talking with people later, the witness answered, "That's a tough one. It probably would." After further probing by the court, the prospective juror ultimately said that she would not take into account the potential for criticism or support in her deliberations as a juror. (17 RT 4238.)

She had heard about the case through the media. She had also heard from a secretary with whom she worked about the emotional state of Chad's

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[107] This juror's questionnaire begins at 8 JQ 2326.

mother. She heard that his mother was "taking it very hard, and that it was very hard for her to deal with it." The secretary told her that his mother had to take some sleeping pills to help her sleep at night. (17 RT 4241.) When asked by the trial court about what she had heard regarding the manner in which Chad died, she answered,

[Juror]: I heard the brother and he were in a car or a pickup truck or something, and I heard they were ordered out, and that they made the brother go sit on the curb, and they tied him up or something, and put sunglasses on him, and shot him in the head.

Question: What else can you recall specifically about Chad Yarbrough's death?

Answer: Well, just that I guess the manner in which it was done, they were kind of mocking him or something or making some crude remarks.

Question: Well, be specific, if you can.

Answer: Well, I don't know what those remarks were. This is just what I had heard.

Question: Well, tell me what you heard.

Answer: They just said that they made some—you know, they didn't specifically say what it was, that they just said that these things were said, and that was—

Question: Well—

Answer: And then I heard that he had his cap on at the—that he was laid out in an open casket.

Question: At the funeral?

Answer: Yes.

(17 RT 4242–4243.)

She didn't form any opinions about who might be responsible, but said, "I just thought that whoever was responsible, that it was just a horrible—I mean, the most horrible, terrible—I don't know what word I'm looking for. ¶ Just a horrible crime." (17 RT 4244.)

When questioned by counsel for appellant, the prospective juror stated that she had formed the opinion that Chad's death was not an accident. (17 RT 4251.)

Q: Have you formed a strong opinion, based on what you've heard?

A: Yes.

Q: You refer to Chad Yarbrough's death as being horrible, correct?

A: Yes.

Q: So you assume, without hearing any evidence at all in this trial, that Chad Yarbrough's death was an intentional first degree murder?

A: Yes.

Q: And there's nothing that you can do at this point to change that opinion, is there?

A: There's nothing. No.

(17 RT 4251–4252.)

The prosecutor then asked her,

[MR. BARTON]:	All you've heard up to this time you've told the court are media accounts you said you could set aside.
A:	Mm-hmm.
THE COURT:	Say yes or no.
A:	Yes.
[MR. BARTON]:	If you set those aside, you're working on a clean slate, right?
A:	Except for what was covered in the newspapers and the TV, what I've heard already, right, but other than that, working on a clean slate.

(17 RT 4252–4253.)

After further questioning by the prosecutor, the prospective juror stated, "Yes, I could be fair and open-minded as to whether or not a murder has been committed." (17 RT 4256.) She asserted that she really could put out of her mind her opinion that Chad was murdered, and keep an open mind to listening to evidence presented in the courtroom. (17 RT 4256–4257.)

When questioned again by counsel for appellant, the prospective juror affirmed that she believed that Chad was intentionally killed. (17 RT

4259.) The witness stated that she could, as a citizen, "Come in here with a clean slate." (17 RT 4260.) Counsel for appellant submitted a challenge for cause, which was denied. (17 RT 4261.)

Ms. Hicks was called to serve as an alternate juror on January 17, 2001. She informed the court and counsel that she had developed concerns about her ability to perform her duties as a juror—concerns not related to hardship. Both parties stipulated that she be excused, and the court accepted their stipulation. (28 RT 6721–6722.)

5. Sam Lozano (Juror No. 200222973)[108]

Mr. Lozano was an institutional gang investigator for the Department of Corrections:

> [Lozano]: So I do have a little more knowledge than just the average.
>
> Q: All right.
>
> A: It's not a bias.

(20 RT 4676.)

His job was like being a police officer within the walls. He investigated anyone who was involved in street gangs or prison gangs. (20 RT 4678.) He had discovered that the EME, or Mexican Mafia, a prison

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[108] This juror's questionnaire begins at 13 JQ 3866.

gang, was "setting up" in the Arvin area. (20 RT 4679.) He also knew about the Barrio Colonia Lamont in the Lamont area.

Mr. Lozano told the court that he could separate his expertise from his ability to bring life's experience and common sense into the case and perform his duty just as any other juror would. He promised he would not, as the trial court put it, "go back in the jury room and become kind of a surprise expert on gangs when none of us would know, in fact, what expertise you are providing." (20 RT 4684.) After the court explained to him by the necessity of treating all witnesses as individuals, he promised the court he could do that for both police officers and alleged gang members. (20 RT 4686.)

Mr. Lozano had indeed heard previous opinions expressed about this case. It was "through general discussion" at his work site. He explained:

> [Lozano]: People generally talking and saying, you know, did you hear about this case. And there were some—I can't remember exactly who it was. But somebody brought up that there was some stuff that wasn't released through the press, such as about Yarbrough's body parts.
>
> Question: Okay. Tell us about that.
>
> Answer: I mean, I don't know for a fact but—
>
> Question: I understand there may be rumors.

Answer: Is it okay to say it in here? I don't want to offend her.

Question: You tell me what you heard.

Answer: I heard that his penis was cut off and put in his mouth. I mean, like I said, I don't know how true it is.

Question: What else did you hear?

Answer: I heard it was over a disrespect issue, something to do with the mother of his girlfriend.

(20 RT 4686–4688.)

The person who said that had a relative who with the Kern County Sheriff's Office, and he said he had heard it from his relative. That was all he could remember that had not appeared in the media and in the papers. The personal conversations he had at home and elsewhere were "not outside of the normal. I mean, with the family like, oh, that was terrible or that's too bad, another young life." (20 RT 4688.)

Mr. Lozano related what he could remember about the case, that it was an alleged carjacking, the victim was executed at close range and that the velocity of the bullet actually had to be that he was kneeling or at a lower position than the shooter, and that it took them a while to catch who they thought did it. (20 RT 4689.)

The trial court then cautioned Mr. Lozano that there would not be evidence that Chad Yarbrough had his penis cut off and put in his mouth and told him how important it was for jurors to be able to set aside what they had previously heard about the case, and to base their decisions only on evidence presented in the courtroom. Mr. Lozano said that he was the type of person who generally doesn't believe something until he knows it for a fact, and he would be able to set aside what he had previously heard about the case were he selected as a juror. (20 RT 4692.)

Regarding the appropriate penalty, Mr. Lozano indicated that "I kind of believe in the eye-for-an-eye theory." (20 RT 4697.) He thought that if you were convicted of the crime of murder you should be sentenced to death. The trial court then made a lengthy explanation of the capital punishment process, including the guilt phase and the penalty phase, and what sort of evidence might be presented at the penalty phase. Mr. Lozano assured the court that he could be fair to both sides. (20 RT 4696–4701.)

In response to a question from counsel for appellant, Mr. Lozano said he had formed a belief that the killing of Chad Yarbrough was intentional. (20 RT 4704.) Mr. Lozano felt that he was in an adversarial position regarding gang members if they were to ever come to the Department of Corrections. (20 RT 4706–4706.) He gave as an example of

one of those rare murders that would not, in his opinion, require a death penalty, a killing that was done in self defense, or perhaps retaliation for a crime against one of your own children.

Counsel for appellant filed a written challenge for cause against Mr. Lozano and also advised the court that it might call him as a witness in their case. After the juror was dismissed from the courtroom, counsel elaborated: the prosecution listed Deputy Robert Contreras as an expert who would testify about the Arvin-Lamont gangs. Counsel believed that Contreras's funding had been cut off around 1991 or 1992, and that Mr. Lozano would have more current information on Arvin gangs. (20 RT 4713.)

The prosecutor believed this was "outrageous" and "specious" and said that Deputy Contreras would not testify about Arvin gangs, but rather about Lamont gangs, and specifically about the gang that he believed appellant belonged to, which is the LFS (Lamont Familia Sureño), which was tied to Lamont. (20 RT 4714–4716.)

Counsel replied that contrary to the prosecutor's present assertions, Contreras had testified that there were indeed Arvin gangs in the trial for Efrain Garza, in response to direct questions by the prosecutor. After an in camera hearing, the trial court informed the parties that Mr. Lozano was

not a potential witness, and that he would be precluded from being designated as a witness by the defense. (20 RT 4726.)

Arguing in support of the written challenge for cause (12 CT 3494), counsel said that Mr. Lozano would potentially substitute his expertise for the evidence in the case. (20 RT 4726.) In light of the horrendous rumors which keep surfacing,

> We are now going to have to disprove and possibly show autopsy pictures we have agreed to stipulate to keep out, now I have to show the fact that this victim's genitals are intact. The juror himself is in an adversarial position with gangs automatically because of his job.

(20 RT 4729.)

After noting that correctional officers in general were indeed permitted to be on criminal juries, the trial court denied the challenge for cause. (20 RT 4729.) Mr. Lozano ultimately came to court and told the parties that he did not think he could be fair, and was dismissed for cause. (25 RT 6116–6120.)

D. The Purposes of Voir Dire Were Stymied in This Case by the Trial Court's Method of Proceeding

> Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. [Citation.] Similarly, lack of adequate voir dire impairs the defendant's

> right to exercise peremptory challenges where provided by statute or rule. . . .

(*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188; see also *United States v. Steele* (9th Cir. 2002) 298 F.3d 906, 912 ["The fundamental purpose of voir dire is to ferret out prejudices in the venire and to remove partial jurors."].)

"While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable." (*Swain v. Alabama* (1965) 380 U.S. 202, 220.)

Voir dire thus provides the court and counsel the opportunity to learn about a prospective juror's background, experiences, and philosophy as it relates to the matter to be heard. (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 741–742; see also *Mu'Min v. Virginia*, *supra*, 500 U.S. at pp. 431–493.)

Here, the trial court's voir dire of plainly biased jurors was often relentless. It refused to accept prospective jurors' plain indications of bias or prejudgment, and acted as if that voir dire was designed to impart knowledge of the prospective juror's one's duty, and to press until a juror said that he or she would do their duty.

The court directed counsel on what questions to ask, refused to allow questions probing prospective jurors' views on what circumstances might support a verdict of less than death,[109] and threatened to "pursue" counsel and with reporting them to the State Bar for pointing out legitimate factual and legal errors. By the time of the mistrial motion, the trial court's errors could not be repaired. Appellant's motion for a mistrial based on the trial court's mishandling of voir dire should have been granted. His convictions and sentence must be set aside.

E. Appellant's Mistrial Motion Should Have Been Granted

On January 8, 2001, counsel for appellant moved for a mistrial on the basis of the court's mishandling of the voir dire in general, and that of prospective jurors Moreno and Krotter in particular. Regarding Gary Moreno, counsel complained that the court had spoon-fed him answers that would insulate him from a challenge for cause. When the juror's pro-death bias reappeared when questioned by the defense, the court then repeated the process. The court spent around 40 minutes seeking to rehabilitate a biased juror. Meanwhile, defense counsel were not only severely limited in their

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[109] The trial court precluded counsel from asking such questions of three seated jurors who strongly favored the death penalty, despite indications that their willingness to impose a sentence of less than death depending entirely on the circumstances of the crime: Jurors No. 200061224, 200006880, 200362275. (See Args. II.C.7, 11 & 28, *ante*.)

ability to ask questions, but their questions were made to seem intrusive. (23 RT 5474–5475.)

These same factors were also present in the voir dire of Diane Krotter, who was opposed to life without possibility of parole, and believed that intentional murder should be punished with death. Mrs. Krotter would not listen to evidence about a bad childhood because she had one, too, and would not expect anyone to rule in her favor for that reason. (23 RT 5475–5477.)

With both of these jurors, the trial court made a sustained and lengthy effort to extract from them a statement that they could set aside their own feelings and follow the law. Counsel felt that the jurors, and the trial court, had pre-judged appellant's guilt as well as the change of venue motion; that a miscarriage of justice was taking place; and that a mistrial should be declared. (23 RT 5377–5378.)

The court answered by saying that while, like everyone, it had some days that were better than others, it had been as even-handed as possible in its questioning and explorations of each prospective juror's feelings, and confirmed that it was making its best effort to pick a fair and even-handed jury. (23 RT 5479–5480.)

Regardless of the trial court's defensive response, its directive questioning of prospective jurors violated fundamental principles of voir dire. Appellant's motion for a mistrial should have been granted.

V. JUROR NO. 11 COMMITTED PREJUDICIAL MISCONDUCT, REQUIRING REVERSAL OF THE JUDGMENT.

A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd, supra*, 366 U.S. at p. 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) "'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.'" (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110, citing *People v. Galloway* (1927) 202 Cal. 81, 92 [259 P. 332].)

A defendant is "entitled to be tried by 12, not 11, impartial and unprejudiced jurors. 'Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' [Citations.]" (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

"For a juror to prejudge the case is serious misconduct." (*Clemens v. Regents of University of California* (1971) 20 Cal.App.3d 356, 361; accord, *People v. Brown* (1976) 61 Cal.App.3d 476, 480.) The Penal Code provides

that jurors must not "converse among themselves or with anyone else on any subject connected with the trial, or . . . form or express any opinion thereon until the cause is finally submitted to them." ([Former] § 1122 [now § 1122, subd. (b)].) . . . Violation of this duty is serious misconduct. [Citation.]' [Citation.]" (*People v. Majors* (1998) 18 Cal.4th 385, 422–423.)

> The law does not demand that the jury sit with the muteness of the Sphinx, and when jurors are observed to be talking among themselves it will not be presumed that the act involves impropriety, but *in order to predicate misconduct of the fact it must be made to appear that the conversation had improper reference to the evidence, or the merits of the case.*

(*People v. Kramer* (1897) 117 Cal. 647, 649, emphasis added; accord, *United States v. Klee* (9th Cir. 1974) 494 F.2d 384.)

As a general rule, juror misconduct "raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted. [Citations.]" (*In re Hitchings*, *supra*, 6 Cal.4th at p. 118.) In determining whether misconduct occurred, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 582 (lead opn. of George, C. J.); accord, *People v. Majors*, *supra*, 18 Cal.4th at p. 417.)

As discussed in *People v. Holloway*, the presumption of prejudice merely excuses the defendant from affirmatively proving prejudice when that cannot be done. (*People v. Holloway*, *supra*, 50 Cal.3d at pp. 1108–1109.) The presumption prevails "'unless the contrary appears.'" (*Id.* at p. 1108.)

> The presumption of prejudice is an evidentiary aid to those parties who are able to establish serious misconduct of a type likely to have had an effect on the verdict or which deprived the complaining party of thorough consideration of his case, yet who are unable to establish by a preponderance of the evidence that actual prejudice occurred. The law thus recognizes the substantial barrier to proof of prejudice which Evidence Code section 1150[110] erects, and it seeks to lower that barrier somewhat.

(*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 416.)

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[110] Evidence Code section 1150 reads as follows:

> (a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.
>
> (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict.

Any presumption of prejudice arising from juror misconduct is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant. (*People v. Stewart* (2004) 33 Cal.4th 425, 511.)

As delineated above at Argument I.F.1, Juror No. 11 had lunch with her father in a crowded restaurant near the court house mid-trial. At some point in the conversation, he said, in a loud voice overheard by several people in the restaurant, "what's taking them so long; they know he did it." (39 RT 8979.) She had not told her father that she wasn't supposed to discuss the case outside the courtroom. (39 RT 8994.) She appeared hostile and prejudiced to counsel for appellant when he questioned her. (39 RT 8986.) When the trial court directed her to not discuss the incident with other jurors, she said that she had already told other jurors that her father had said something. (39 RT 8995.)

The trial court's questioning of other jurors indicated that Juror No. 11 had talked with the jurors about the incident after being told by the trial court not to do so, and that she was upset about the comments made by

her father, and at being called in and questioned about the incident. One of the jurors heard her talk about her father saying the name "Yarbrough" out loud. (39 RT 9011–9012.)

Thus, she failed to follow court orders by discussing the case with her father and fellow jurors despite repeated warnings by the court since trial began. She was not candid in her disclosure to the court of what she had done. She was unlikely to follow the court's order in the future that she disclose these types of events to the court. She was subject to improper influence by her father who expressed a forceful opinion, in public, about the guilt of the defendant. Allowing her to continue to sit on appellant's jury prejudicially violated his right to an impartial jury and a fair trial.

VI. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S UNOPPOSED MOTION TO HAVE JUROR NO. 1 DISCHARGED FROM HIS JURY, AND HIS MOTION TO REMOVE JUROR NO. 11 FROM HIS JURY.

A. The Relevant Law

The law regarding discharge of jurors who have been sworn in is straightforward. Section 1089 provides, inter alia: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty . . . the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box. . . ." (§ 1089, final par.)

Before this Court will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a "demonstrable reality." (*People v. Holt* (1997) 15 Cal.4th 619, 659.) This Court will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence. (*People v. Beeler* (1995) 9 Cal.4th 953, 975, 989.)

B. Juror No. 1 Was Biased Against Appellant

On January 19, 2001, after jury selection and opening statements but before evidence was presented, Juror No. 1 tried very hard to talk to the

court alone. The trial court refused. (30 RT 7063.) In open court, she then expressed deep fear of continuing on the jury.

She owned rental properties in Lamont, went there once a month to collect, maybe more often if repairs were necessary, and feared that she might be "putting myself in some sort of situation," because the case was affiliated with Lamont gangs. She was afraid that if "there an upset of this case and these gangsters are upset, they might retaliate against me, thinking I was on the jury and I had something to do with it, because they didn't like the way decisions were made." (30 RT 7063–7064.)

The court responded by telling her that in his 13 years on the bench he had never experienced the sort of retaliation of which she was afraid. (30 RT 7065.) The juror then seemed to calm down, although she still had concerns.

The parties decided to show her a map with relevant crime scenes or important sites.[111] The prosecutor hoped to "mak[e] sure that her rental properties aren't like right next door, ord something, so this fear is compounded because she thinks those are the areas [where] she might run

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[111] The sites were Habecker Road (the house of Efrain Garza, where the Juan Carlos incident began), the address of Daniel Quintana, and the parking lot from which Leonel Paredes was kidnapped. (30 RT 7070.)

across family members or associates of these individuals." (30 RT 7070–7071.)

When the juror returned, she identified the Habecker Road property (Efrain Garza's house) as being right next door to one of her properties. (30 RT 7075.) The second location, on Ruben Road, was not close, but the third location, around 210401 San Diego Street near Hall Road, was also close to one of her properties. (30 RT 7076–7077.)

After she was shown these locations, the trial court asked her if that cause her to have any different feelings about her ability to travel to Lamont occasionally. She answered, "Well, I'm going to go by what you said. And you have been a judge for 12 years, and you haven't—in your years, you haven't experienced any retaliation against jurors. So that's what I'm—that is making me comfortable right now." (30 RT 7077–7078.) However, she still had "concerns." (30 RT 7080.)

After she was dismissed, appellant challenged her for cause. She had close connections with Lamont near the crime scenes and was compelled to go there regularly; she believed she was in a very dangerous situation and that appellant was a very dangerous person connected to other dangerous persons, i.e., "gangsters"—all before any evidence has been presented. (30 RT 7081–7082.)

The prosecutor neither joined nor opposed the challenge. (30 RT 7085.) The trial court denied the challenge, saying that the juror was honest with her feelings, and that he saw nothing that would prevent or substantially impair her from performing her duties. (30 RT 7086–7087.)

Juror No. 1 thus classified witnesses for the defense, including appellant himself, as "gangsters." (30 RT 7064.) She thought that she was in a very dangerous situation by being made to continue serving on this jury—the danger coming from appellant and other "gangsters." This prejudgement of appellant drastically lowered the prosecutor's burden of roof in the guilt phase of appellant's trial, and made a sentence of death more likely in any ensuing penalty phase.

The trial court *did not try to correct in any way her prejudgment of appellant and of this case*. Notably, the prosecution did not oppose the dismissal of this plainly biased juror. This prejudgement of this case, and of appellant's character, was plain to see, and was entirely ignored by the trial court.

The trial court's response to her was that he had not seen any retaliation against a single juror in his 13 years on the bench. That made her "comfortable," but did not eliminate her concerns. The trial court did nothing to eliminate the juror's bias against appellant. Her prejudgment of

him as a "gangster" drastically lowered the prosecutor's burden of proof for all crimes charged in the guilt phase, and pointed strongly toward death in the penalty phase. There is no evidence at all, let alone substantial evidence, that this juror's bias was acknowledged or diminished by the trial court. Instead, it was implicitly accepted by the trial court. Thus, the presumption of prejudice attached to jury misconduct was not in any way overcome. Failure to discharge her was prejudicial error.[112] It requires that all verdicts against appellant be set aside.

C. Juror No. 11 Was Biased Against Appellant

For the reasons set out at Argument II.C.8, *ante*, Juror No. 11 was biased against appellant. She favored the death penalty for all crimes such as the one at bench. Appellant's challenge for cause during voir dire should have been granted.

The additional evidence set out in Argument I.F.1 that emerged mid-trial further exposes her bias against appellant. The trial court prejudicially erred in not discharging her for cause, and in denying appellant's motion for mistrial.

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[112] The parties treated her as a prospective juror, though she had been recently sworn in. Accordingly, appellant challenged her for cause; the trial court's ruling was based on her general honesty about her fears and a finding that she was not substantially impaired. Under this standard as well, Juror No. 1 should have been dismissed.

VII. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING APPELLANT'S MOTION TO DISMISS ALL CORRECTIONAL OFFICERS FROM THIS JURY POOL

There were numerous prospective jurors in the pool who worked at one of the prisons in Kern County. Several of them survived hardship and other dismissals, and completed questionnaires.[113] Two of them served on appellant's jury.

The correctional officers who were part of this panel knew about this case, and apparently because of their general involvement with crime and punishment, they also thought that what they knew was special knowledge—knowledge gleaned from other "insiders." For example, Sam Lozano was an institutional gang investigator for the Department of Corrections:

> [Lozano]: So I do have a little more knowledge than just the average.
>
> Q: All right.
>
> A: It's not a bias.

(20 RT 4676.)

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[113] The most common employer of prospective jurors was the Department of Corrections. (See 10 RT 2478; 12 RT 2859; 14 RT 3432; 15 RT 3666; 16 RT 3791, 3832, 3849 (seated juror), 3980; 20 RT 4677, 4735; 21 RT 5144 (relative); 22 RT 5237, 5326 (applicant for job at CDC); 23 RT 5338 (former deputy at county jail), 5435; 24 RT 5705 (seated juror), 5805; 25 RT 6133.)

. . .

Q. [D]o you think you are going to be able to set aside everything that you have learned from your work and make sure you don't bring any of your expertise into this case with you or bring opinions that you have formed with you into this case?

A. Aside from just being human, yes.

Q. Explain what you mean by that.

A. Well, if there's—if I'm a juror and I'm selected and there's a question, I might have an answer where the rest of the jurors might not.

(20 RT 4680.)

When the trial court asked him if he had heard about this case from anywhere else than the news media, he answered that he had heard about it from general discussion at his workplace. (20 RT 4687.) After Mr. Lozano described what he had heard, and where he had heard it,[114] appellant challenged him for cause, arguing that "the problem with this case and having this case in Kern County keeps resurfacing, because the burden keeps shifting to the defendant to disprove rumors. We don't know all the rumors that these people have heard." (20 RT 4726.)

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[114] Mr. Lozano had heard from a co-worker, who attributed it to a relative working for the Kern County Sheriff's Office, that the decedent's penis had been cut off and put into his mouth. (20 RT 4686–4688.)

Appellant asked that correctional officers be removed from the jury panel, since they were exposed to poisonous and false rumors attributed to "inside" knowledge. The trial court denied the motion, and noted, "I will confirm that the Legislature, in their wisdom, has not excluded correctional officers from the prospective jury pool." (20 RT 4729.) The challenge for cause against Mr. Lozano was also denied. (See Arg. III.B.5, *ante*.)

Correctional officer Sherry Williams was voir dired on January 3, 2001. Appellant challenged her for cause; his challenge was denied. (Arg. II.C.22, *ante*.) When she was called to serve on the jury two weeks later, on January 17, 2001, she informed the court and other jurors that she had heard correctional officers talking about the case since her last appearance in court. (28 RT 6625.) The jury was dismissed, and she was questioned by the parties as to what she had heard.

While on the job in prison she heard fellow correctional officers say that the appellant had kidnapped Chad, stolen the vehicle, taken him to an orchard, and killed him "execution-style." (28 RT 6627.) They also said that the case was old and mentioned that appellant's health was not very good. (28 RT 6628.) She heard them saying it while walking through the locker room, going to change clothes. (28 RT 6629.)

This had happened more than once, probably three times. (28 RT 6630.) She also heard that appellant fled to Texas and had to be brought back to California. (28 RT 6630.)

Appellant moved for dismissal of the panel and again asked to dismiss all correctional officers for cause, because they all worked in an environment where this case was a staple topic of discussion, and they could not get away from hearing about it. (28 RT 6640.) He also renewed his challenge for cause against this juror, and pointed out that on her questionnaire she had indicated she would give more credit to the testimony of a police officer than to civilians. (28 RT 6644.)

Counsel further argued that her reference to an execution-style slaying that she heard from her fellow correctional officers is a conclusion the prosecutor would draw from the evidence. However, there would also be substantial defense evidence that the shooting was accidental. Reference outside the courtroom to execution-style slayings in the community and particularly from the places where many prospective jurors work, gave the prosecution an unfair advantage, and lessened its burden. All motions were denied. (28 RT 6645–6646.)

Mark Torres (No. 200151661) worked for the Department of Corrections. Appellant's challenge of him for cause, primarily because of

his belief that the death penalty should be imposed for every deliberate killing, was denied on December 18, 2000. (See Arg. III.B.1, *ante*.) When called back to serve on the jury on January 17, 2001, however, he informed the court that there was a reason why he could not be fair. The reason:

[PROSPECT. JUROR]:	My place of employment.
THE COURT:	And explain that.
PROSPECTIVE JUROR:	I work for the Department of Corrections. I don't feel I could be fair.

(28 RT 6615–6616.)

Both sides stipulated to his excusal, and the stipulation was accepted. As it dismissed Mr. Torres, the court told him, "We appreciate your honesty in your response there. We will thank and excuse you." (28 RT 6616.)

The voir dire of correctional officers in this case shows partiality, and widespread dissemination of case "facts," many of them false, at their workplaces that were damaging to appellant's character and his defense. Counsel's request, in light of what emerged during voir dire and was reported by correctional officers after voir dire, was reasonable and necessary to preserve both the appearance and reality of a fair jury pool.

Appellant has a constitutional right to a trial by an impartial jury. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 727; *In re Hamilton* (1999)

20 Cal.4th 273, 293.) In the unusual circumstances that surrounded this jury selection process, the trial court erred in not excluding correctional officers from the pool of those to be chosen to serve on appellant's jury.

VIII. RACIAL BIAS ANIMATED THE PROSECUTOR'S PEREMPTORY DISMISSAL OF BLACK AND HISPANIC PROSPECTIVE JURORS; THE TRIAL COURT'S FAILURE TO FIND A PRIMA FACIE CASE PER *BATSON/WHEELER* REQUIRES REVERSAL.

A. Factual and Procedural Background

On January 17, 2001, peremptory challenges began. When the prosecutor moved to dismiss Mr. Bell (200268054), counsel interposed an objection based on *People v. Wheeler.*[115] The trial court promptly denied the motion, and stated that it would "make a record" of its reasons later. (28 RT 6610.)

Shortly thereafter, the prosecutor excused Mrs. Delacruz (200214147). Appellant made another *Wheeler* motion, which the trial court immediately denied, again saying that it would explain later. (28 RT 6613.)

The prosecutor then excused Mr. Rodriguez (200161953). For the third time, counsel interposed an objection pursuant to *People v. Wheeler*, and for the third time the Court answered the motion with a denial, and indicated that it would explain its ruling later. (28 RT 6614.)

The prosecutor then excused Mrs. Barreto (200386220). Counsel said, "Your Honor, there will be a Wheeler (*sic*) motion. THE COURT: Motion is denied. We will make a record on that later." (28 RT 6617.)

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[115] *People v. Wheeler* (1978) 22 Cal.3d 258, 276–277.

After other potential jurors were dismissed, and during a break, the trial court made a "brief record" respecting appellant's *Wheeler* motions. It noted that Thomas Bell was an African-American; Talisa Delacruz was an Hispanic female, and Felix Rodriguez was an Hispanic male. (28 RT 6819.) Joyce Barreto appeared to be white, but her name may be Italian; it was not clear to the court. (28 RT 6620.)

Counsel for appellant stated that she was a mix of Hispanic and Filipino. The court countered by saying that Barreto was not necessarily Hispanic, and asked counsel [Gardina], "How do you know it's not Italian?" Counsel replied that "Barre*ta*" would be Italian, and argued that the prosecution's systematic exclusion of Hispanics and Blacks constituted a prima facie case of discrimination. (28 RT 6820–6822.)

The trial court said that it had considered the *Wheeler* line of cases, and found that no prima facie case was established. Therefore, the prosecutor had no duty to respond with an explanation of why it discharged those particular jurors. (28 RT 6821.) The court concluded by saying that it had considered "all the relevant circumstances" (although it did not identify any such circumstances), and that it did not find a prima facie case of discrimination:

> I have considered all of the relevant circumstances including the ethnic and racial background of other jurors in the box,

> other jurors in the panel remaining to be selected, the circumstances involving those jurors who were excused. I don't find a prima facie case. That's my ruling.

(28 RT 6622.)

The trial court's ill-considered, precipitous denial of these four *Wheeler* motions meant that it failed to exercise any discretion. It indicated that reasons would come at a later time, but when "later" came, the trial court articulated no specific reasons, and offered only a conclusory and perfunctory denial. The prosecutor was never asked to explain any of the peremptory challenges, and never did. He was told by the court it would not be necessary. (28 RT 6621.)

The abdication of its duty to specify reasons for its denial of the four *Wheeler* motions means that this Court owes the trial court's rulings, such as they were, no deference.

B. Applicable Law

"Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias." (*Batson v. Kentucky* (1986) 476 U.S. 79, 89; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276–277.) Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under

article I, section 16 of the California Constitution. (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.) At the time of appellant's trial, a defendant could make a prima facie case of bias only by demonstrating a "strong likelihood" that bias existed. (See, e.g., *People v. Howard* (1992) 1 Cal.4th 1132, 1154–1156; *People v. Crittenden*, *supra*, 9 Cal.4th at pp. 117–119.)

Such a standard was not met by pattern evidence alone.

> Although the removal of all members of a certain group may give rise to an inference of impropriety (*Wheeler*, *supra*, 22 Cal.3d at 280), we cannot say this factor was dispositive on the record. . . . [T]he trial court . . . held defendant failed to demonstrate a *strong likelihood* based on 'all the circumstances of the case' that the prosecutor's exercise of his peremptory challenges was based on group bias.

(*People v. Sanders* (1990) 51 Cal.3d 471, 500–501, emphasis added.)

In *People v. Howard*, the prosecutor had peremptorily challenged the only two prospective black jurors. In affirming, this Court held "although the removal of all members of a certain group may give rise to an inference of impropriety, especially when the defendant belongs to the same group, the inference is not conclusive." (*People v. Howard*, *supra*, 1 Cal.4th at pp. 1154–1156.) This Court held that, although the elimination of all the black jurors created an "inference" of racial discrimination, such inference did not rise to the level of a "strong likelihood" of racial discrimination, or a "conclusive" inference which was needed to present a prima facie case.

In *People v. Crittenden*, *supra*, 9 Cal.4th at pages 117–119, the prosecutor had challenged the one and only prospective black juror. This Court once again held that the standard establishing a prima facie case of discrimination was the "strong likelihood" standard, not the "inference" standard: "[T]he prosecutor's excusal of all members of a particular group may give rise to an inference of impropriety, especially if the defendant belongs to the same group. [T]hat inference, as we have observed, is not dispositive." (*Id.* at p. 119.)

Thus, given that the trial court did not articulate a standard, but indicated that it was "familiar with the Wheeler (*sic*) line of cases" (28 RT 6821), it probably applied the "strong likelihood" test. The "strong likelihood" standard was rejected by the United States Supreme Court in *Johnson v. California* (2005) 545 U.S. 162, 166–168, which held that a defendant need only raise an inference of bias to make a prima facie case.

In many cases where the trial court either applied the wrong test or did not specify any test, it nevertheless asked the prosecutor to place on the record its reasons for discharging particular jurors anyway. (See, e.g., *People v. Vines* (2011) 51 Cal.4th 830, 848–850; *People v. Thomas* (2011) 51 Cal.4th 449, 473–474; *People v. Clark* (2011) 52 Cal.4th 856, 904–905; *People v. Garcia* (2011) 52 Cal.4th 706, 744–745; *People v. Jones* (2011)

51 Cal.4th 346, 357–359; *People v. Booker* (2011) 51 Cal.4th 141, 165–167; *People v. Hawthorne* (2009) 46 Cal.4th 67, 78–80.)

> In denying defendant's *Batson/Wheeler* motions, the trial court first found no prima facie showing of discrimination, and then explained its reasons for doing so; the court, however, then invited the prosecutor to make additional remarks. The prosecutor each time concurred in the trial court's remarks and made additional observations. Thus, similar to *People v. Mills* (2010) 48 Cal.4th 158, 173–174, this case is a first stage/third stage Batson hybrid, as the record contains both the prosecutor's reasons and the trial court's evaluation (albeit implicit) of those reasons. Thus, as we did in *Mills*, we will express no opinion on whether defendant established a prima facie case of discrimination and skip to Batson's third stage and evaluate the prosecutor's reasons for challenging these prospective jurors.

(*People v. Booker, supra*, 51 Cal.4th at p. 165.)

This Court will review a trial court's denial of a motion premised upon the improper use of a peremptory challenge with deference, examining only whether substantial evidence supports its conclusions. (*People v. Cox* (2010) 187 Cal.App.4th 337, 342; *People v. Mills, supra*, 48 Cal.4th at p. 176.)

> Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] "We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges '"with great restraint."' [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as

> the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) [fn omitted]

(*People v. Lenin* (2008) 44 Cal.4th 602, 613–614.)

In this case there is no evidence to evaluate, substantial or otherwise. After all prospective jurors left the courtroom, the trial court stated summarily that it had evaluated "all the circumstances." It did not specify or identify those circumstances. It ruled that the prosecutor had no duty to explain. The only question the court posed to the prosecutor was what the prosecutor's thoughts were concerning the ethnicity of each of the four challenged prospective jurors. It is plain that the trial court abdicated its constitutional duty to provide a "sincere and reasoned" explanation for its rulings. No substantial evidence supports its rejection of appellant's *Wheeler* motions.

C. The Error Was Prejudicial

Wheeler error was formerly reversible per se. (*People v. Snow* (1987) 44 Cal.3d 216, 226–227.) In *People v. Johnson* (2006) 38 Cal.4th 1096, 1100–1101) this Court adopted the federal practice of ordering a limited remand for *Batson-Wheeler* error. But in this case, the rulings in question took place more than 11 years ago—longer than any of the time periods discussed by this Court in *Johnson*. Appellant believes it to be unrealistic

for the prosecutor or the trial court to remember the relevant circumstances of the exercise of a peremptory challenge so long ago. He therefore asks that this Court set aside all verdicts against him. If not, then appellant is entitled to a limited remand for the exercise of discretion has not yet received, and the reasons for the prosecutor's use of peremptory challenges that he has not yet heard.

IX. APPELLANT WAS PREJUDICED BY THE WRONGFUL ADMISSION OF INFLAMMATORY AND IRRELEVANT GANG EVIDENCE.

A. Procedural Background

On November 17, 2000, two weeks before jury selection, appellant filed a motion to exclude evidence of his involvement in gangs and any expert testimony to that effect. (11 CT 3187.) The prosecution filed a response on November 28, 2000, saying that it intended to present evidence from Deputy Sheriff Robert Contreras regarding "the meaning of Defendant Ramirez's tattoos," and Contreras's opinion as to whether or not appellant was in the same gang or an affiliated gang with Efrain Garza, Carlos Rosales, Daniel Quintana, Freddie De La Rosa, Willie Santiago, Hector Valenzuela, and Jose Baltazar, and about "gang members' allegiance to each other and the consequences of 'snitching.'" The prosecutor also announced its intent into present gang evidence testimony from several of the above-named individuals. (11 CT 3247–3248.)

The purpose of such evidence would be to prove "identity. Because other members of the same gang were identified, it is highly relevant and probative that Mr. Ramirez shares such membership." (11 CT 3249.)

The motion was argued on November 29, 2000. (8 RT 2123 et seq.) Appellant contended that gang evidence was not relevant to either identity

or motive, and that no one had ever remarked on appellant's tattoos, which had no probative value at all, and their only effect would be to inflame the jury. Appellant admitted being present at the crimes involving the decedent and Juan Carlos Ramirez, which rendered the logic of the *Champion*[116] case irrelevant. Testimony regarding "snitching" was not yet relevant, nor was evidence of motive, which might be relevant if the decedent was in a rival gang, but there was no evidence to that effect. (8 RT 2124 et seq.)

The prosecutor replied that he was entitled to present evidence of a gang-related crime spree, and that appellant's tattoos show him to be a gang member. He sought to present expert testimony of Deputy Contreras, a man knowledgeable about gangs in Lamont, who would opine that appellant was a gang member, and he cited *Champion* as support for the presentation of gang evidence as circumstantial evidence of appellant's involvement in carjackings, and his identity. (8 RT 2130 et seq.)

The trial court ruled that gang evidence was relevant for purposes of identity and motive and would be allowed, subject to an Evidence Code section 402 hearing and limiting instructions. (8 RT 2166.) After the trial court allowed gang evidence to be presented, it allowed appellant to add

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[116] *People v. Champion* (1995) 9 Cal.4th 879.

questions regarding attitudes toward gangs to be added to the jury questionnaire. (8 RT 2191.)

In response to Question 29 ("If evidence in this case shows the involvement of a 'street gang,' is there anything about that which would prevent you from being a fair and impartial juror?"), 48 of the 251 prospective jurors, and one seated juror, answered, "yes." (See Motion for Change of Venue Exhibit List, 19 CT 5561, Exh. E, analysis of juror questionnaires.)

Gang evidence became a defining part of the trial. In addition to the testimony of Deputy Contreras, the chief witnesses for both the prosecution and the defense, as well as appellant himself on direct examination, and more extensively on cross-examination, opined on one aspect or another of gangs—their behavior, their members, their signs and symbols. (See, e.g., 32 RT 7529–7530, 7532, 7609, 7611–7612; 33 RT 7812, 7886; 36 RT 8354, 8362, 8455; 41 RT 9268, 9390, 9391; 47 RT 10471, 10553–10554, 10556–10561.)

In the guilt phase closing argument, the prosecutor pounded home this theme. (See 52 RT 11614, 11616, 11630, 11631, 11633, 11634, 11637, 11663, 11668, 11669; 53 RT 11804, 11805, 11808, 11823, 11824, 11825, 11829.) In the penalty phase, the prosecutor asked appellant's uncle if he

had seen appellant's tattoos. (60 RT 13291.) In penalty phase closing argument, gangs were again a central theme. (62 RT 13753, 13757, 13758, 13764, 13767.)

The prosecutor pressed appellant on cross-examination with questions about whether he had assaulted gang members from Arvin, even though the prosecutor had no knowledge of such conduct. He defended his questions by saying that it was appellant who raised the subject: "They brought up the whole issue about gang rivalry, to justify the defendant's state of mind and how he felt about the kids who are Arvina, and how he figures he could justify his actions." (47 RT 10558.)

The prosecutor was wrong. It was he who fought successfully to introduce the testimony of Deputy Contreras as a gang expert. Appellant's defense was that he had done what he did because he was obliged by cultural mores to defend assaults on the females in his family. (62 RT 13671–13672.) The prosecution's evidence of actual behavior by appellant, as shown by appellant's own confession, by physical evidence, and by witnesses to what he did or did not do, was covered with a shroud of menace by gang evidence, but not improved.

B. Prejudice

It was prejudicial error for the trial court to have allowed the trial to have been hijacked by this issue. One of the jury's first requests during penalty phase deliberations was to be shown "pictures of Juan Villa Ramirez's upper body." (19 CT 5091.) Any probative value that may have inhered in appellant's status as a gang member was smothered by the prejudicial effects. It is reasonably probable that appellant's convictions, and particularly his sentence, would have been more favorable without prejudicial gang evidence being admitted against him.

Introduction of gang evidence can have a significant impact on the probability of conviction. (See *The Constitutional Failure of Gang Databases* (Nov. 2005) 2 Stanford J. Civ. Rights & Civ. Liberties 115.) Gang evidence is inflammatory in nature and tends to allow the jury to improperly infer that the defendant is criminally disposed and culpable of the charged offense, as well as other, unnamed offenses. (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.) In cases not involving the gang enhancement (§ 186.22), it has been held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal (*People v. Hernandez*, *supra*, 33 Cal.4th at

p. 1049), or if merely tangentially relevant (see *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588).

But gang evidence is not per se inadmissible; it may be admitted if otherwise relevant. (*People v. Perez*, *supra*, 114 Cal.App.3d at p. 477.) While gang evidence is carefully scrutinized before admitting it because of its inflammatory capacity (*People v. Williams* (1997) 16 Cal.4th 153, 193), it is governed by the general rule that all relevant evidence is admissible if relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192; see also *People v. Hernandez*, *supra*, 33 Cal.4th at p. 1049; *People v. Carter* (2003) 30 Cal.4th 1166, 1194; Evid. Code, §§ 210, 352.)

Gang evidence is often relevant to, and admissible regarding, a charged offense, as evidence of identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt. (*People v. Hernandez*, *supra*, 33 Cal.4th at p. 1049; *People v. Martin* (1994) 23 Cal.App.4th 76, 81 [motive]; *People v. Champion*, *supra*, 9 Cal.4th at p. 922 [identity].)

The leading cases relied on by the trial court (*Champion*, *Olguin*[117]) do not support the admission of gang evidence against appellant. The identity of the specific perpetrators in *Champion* was unknown, and the motives were related to disputes between gangs. (*People v. Champion*, *supra*, 9 Cal.4th at pp. 913–914, 921–925.) Here, appellant admitted to involvement in two of the three crimes. The issues were related to the level of his culpability, not his presence. He denied being involved with the kidnapping of Leonel Paredes, but there is no other evidence of gang membership regarding either Leonel or the perpetrators. Appellant's membership or non-membership in a gang had no relevance to any of the issues in the case. His guilt hinged on the reliability of Leonel's eyewitness identification.

"The word 'gang' . . . connotes opprobrious implications. . . . [T]he word 'gang' takes on a sinister meaning when it is associated with

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[117] In *People v. Olguin* (1994) 31 Cal.App.4th 1355, the probative value of rap lyrics found in search of defendant's home three weeks after murder of gang member was not substantially outweighed by inflammatory nature of the lyrics which contained general threats of violence against rival gang of which victim was a member. The crime was alleged to be gang-related and gang membership was important, as was evidence of witnesses not appearing because of fear of gang retaliation. Here, there was no evidence that anyone did not appear because of fear of gang retaliation, and there was no evidence that the decedent and the Gomez brothers were acting as members of the Arvinas or any other gang when they attacked Maria Villa's house.

activities." (*People v. Perez*, *supra*, 114 Cal.App.3d at p. 479.) Given its highly inflammatory impact, this Court has condemned the introduction of such evidence if it is only tangentially relevant to the charged offenses. (*People v. Cox*, *supra*, 53 Cal.3d at p. 660; *People v. Hernandez*, *supra*, 33 Cal.4th at p. 1047.) "Gang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.)

In this case, there is no other reason for its admission. An early, and powerful, expression of the pernicious effect of this error was Juror No. 1's request to be taken off the jury for fear that "these *gangsters*" might retaliate against her or her property in Lamont, made right after opening argument. (See Args. I.E & VI, *ante*.) The erroneous admission of this evidence was so serious as to violate his federal constitutional rights to due process, rendering his trial fundamentally unfair. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Partida* (2005) 37 Cal.4th 428, 439.)

X. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING INTO EVIDENCE APPELLANT'S STATEMENT OF JULY 24, 1998.

A. Factual and Legal Background

On June 5, 2000, appellant filed a motion to suppress his incriminating statement of July 24, 1998. (9 CT 2385 et seq.) The prosecutor replied on June 21, 2000. (10 CT 2867 et seq.)

The motion was heard on June 26, 2000. (4 RT 1358 et seq.) Tape recordings of statements by appellant on July 19, 1998, in Texas, and July 24, 1998, in Bakersfield, were introduced into evidence, along with transcripts. (Exhs. 1, 1A, 2 and 2A; see 5 RT 1382–1383.)[118] The parties agreed that the trial court should review them before hearing live testimony and argument. (4 RT 1366–1367.) Accordingly, proceedings were adjourned until the next day.

On June 27, 2000, Sgt. Glenn Johnson testified that he was in charge of the homicide detail of the Kern County Sheriff's Office in 1998. He traveled to El Paso, Texas, with Sgt. Rosemary Wahl to pick up appellant after he was arrested while crossing the border. On July 19, 1998, he met appellant in an El Paso jail, and recorded an interview with him. (5 RT

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[118] The transcript of the July 24, 1998, statement presented to the jury appears at 14 CT 4135–4180.

1373.) The interview consisted of Johnson and Wahl telling appellant that they knew he did it, they could prove he did it without anything from him, and that it was in his interest to present his side of the crime if it were something less than a cold-blooded murder and if he wanted to get a more lenient sentence. Appellant repeatedly denied involvement with the crime, and at the end of the interview, he said, "I don't have anything else to say to you guys." (5 RT 1374, 1386–1388.) Sgt. Johnson did not consider that statement to be an invocation of *Miranda*[119] rights. (5 RT 1377.)

Five days later Sgt. Johnson and Sgt. Wahl returned to Texas to pick up appellant and take him back to Bakersfield. They met him at an El Paso jail around 10:00 a.m. on July 24, 1998, and drove him to the airport. On the way to the airport, Johnson advised appellant of his *Miranda* rights while he was driving. He did so from memory, over his shoulder as he drove, and did not ask appellant if he understood each right until he was done. Appellant did not then talk to the officers. (5 RT 1377–1380, 1391–1392, 1535–1536.)

About eight hours later, appellant was in the jail at Norris Road in Kern County. He had been in the custody and presence of Johnson and Wahl the entire time. Along the way to the station from the airport, Johnson

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[119] *Miranda v. Arizona* (1966) 384 U.S. 436.

stopped and bought hamburgers for the three of them. They ate the burgers in Interrogation Room A, which was equipped with a tape recorder. (5 RT 1396.) While Sgt. Johnson was out of the room, Sgt. Wahl came to him and said she thought appellant was ready to make a statement. She activated the recorder, and returned to the interrogation room. (5 RT 1418–1420.)

The recording of appellant's statement began in the middle of an ongoing conversation. (5 RT 1383–1384.) Johnson testified that the conversation had been going on for about five minutes or so. (5 RT 1396–1397, 1411.) About 10 minutes into the tape, Johnson reminded appellant that he had Mirandized him in the car, and repeated those rights, omitting the right to remain silent. He then asked appellant if he wanted to waive his rights and continue, and appellant indicated that he did. Appellant then acknowledged his role in the shooting of Chad Yarbrough. (14 CT 4143 et seq.)

After argument, the trial court found that appellant was properly advised of his *Miranda* rights on July 19, and that he voluntarily waived them. The trial court further found that appellant's statement, "I don't have nothing else to say," was not an invocation of his right to remain silent, but rather, taken in context, a statement that he had nothing else to say at that

particular time rather than an invocation of his right to remain silent. (5 RT 1496–1497.)

The trial court further found that appellant was duly advised of his *Miranda* rights again by Sgt. Johnson on the drive from the jail to the airport on July 24, and that appellant waived those rights. (5 RT 1499.) Finally, the trial court found there were no promises of leniency or coercion on either of the days in question that would make his statements involuntary. (5 RT 1497.)

The prosecutor asked the court to clarify its finding regarding a waiver of appellant's *Miranda* rights on July 24:

> Did the court find that was an implied waiver based on contact and statement on the evening of the 24th, as opposed to an express waiver? That seems to be the issue, whether or not it's an express or implied waiver. I argued it as implied waiver as—well, as his statements after the reminder that, yeah, he could talk.

(5 RT 1499.)

The trial court found that it was sufficient for it to state its finding on the ultimate question of law that the defendant was duly advised of his *Miranda* rights, and waived those rights. "The evidence in the record is the basis for my ruling." (5 RT 1500.)

B. Appellant Did Not Make a Voluntary, Knowing and Intelligent Waiver of His Constitutional Rights to Remain Silent and to be Represented by Counsel

In *Miranda v. Arizona*, *supra*, the United States Supreme Court held that where law enforcement officers undertake custodial interrogation of a suspect, specific procedural safeguards must be followed to protect the individual's Fifth and Fourteenth Amendment privileges against self-incrimination, and Sixth and Fourteenth Amendment rights to representation by counsel. Before any questioning begins, the accused must be warned that he has a right to remain silent; that any statement may be used against him; that he has the right to the presence of an attorney during questioning; and that if he cannot afford an attorney, one will be appointed at public expense.

> Without proper safeguards, the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprized of his rights and the exercise of those rights must be fully honored.

(*Miranda v. Arizona*, *supra*, 384 U.S. at p. 467; see also *Dickerson v. United States* (2000) 530 U.S. 428, 435.)

Thereafter, an accused may waive his rights. However, the waiver must be not just voluntary, but also knowing and intelligent. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464; *People v. Frye* (1998) 18 Cal.4th 894, 987.)

> The inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was a product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]

(*Moran v. Burbine* (1986) 475 U.S. 412, 421.)

When an in-custody suspect invokes his right to either silence or counsel, interrogation must cease. (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 473–474; *People v. Enraca* (2012) 53 Cal.4th 735, 752; *Edwards v. Arizona* (1981) 451 U.S. 477, 485–486; *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1122.) Interrogation includes both express questioning and "words or actions . . . the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301.)

> After a suspect has invoked the right to counsel, police officers may nonetheless resume their interrogation if "the

> suspect '(a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.'" (*Connecticut v. Barrett* (1987) 479 U.S. 523, 527 [Citations.].)

(*People v. Davis* (2009) 46 Cal.4th 539, 596.)

There is a presumption against waiver. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373.) The prosecution bears the burden of proving by a preponderance of the evidence that a defendant knowingly and intelligently waived his *Miranda* rights. (*Colorado v. Connelly* (1986) 479 U.S. 157, 168; *People v. May* (1988) 44 Cal.3d 309, 315–320.) Although waivers need not be in writing, they do need to be explicit. (*North Carolina v. Butler*, *supra*, 441 U.S. at p. 373.)

This Court applies federal standards in reviewing a defendant's claim that the challenged statements were elicited from him in violation of *Miranda*. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) In reviewing the trial court's rulings related to this claim, this Court accepts its resolution of disputed facts, and its evaluations of credibility, if substantially supported, but independently determines from the undisputed facts and those properly found by the trial court, whether the challenged confessions were obtained illegally. (*People v. Enraca, supra*, 53 Cal.4th at p. 753; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 128.)

In *People v. Riva* (2003) 112 Cal.App.4th 981, the court allowed a statement given after a second *Miranda* advisement an hour after he said, "I don't want to say anything more right now." The court held that the officer "acted reasonably in asking Riva this question because Riva's statement he did not want to talk anymore "right now" clearly indicated he might be willing to talk in the future." (*Id.* at p. 994.) Here, appellant invoked his *Miranda* rights in El Paso when, at the end of questioning, he said, "I don't have nothing else to say." (See Exh. 1A, p. 86.) There was no expression of any willingness to talk in the future.

The record does not indicate that appellant said anything to the officers when they picked him up five days later, or when he was *Mirandized* in the car, or throughout the eight-hour journey from El Paso to Norris Road. Since appellant invoked his right to remain silent, Johnson's second effort to give him his *Miranda* rights while driving from the El Paso jail to the airport, was a prohibited effort to reinitiate a dialogue with appellant.

Assuming that the statement, "I don't have nothin' else to say to you guys" was not an invocation of the right to remain silent (which appellant does not), the operative *Miranda* warnings were those given by Sgt. Johnson while he was driving to the airport from El Paso. The record does

not show a waiver by appellant at that time, express or implied. A careful review of the prosecutor's argument on this point[120] does not show when and how a waiver of these rights occurred. The trial court did find that appellant was *Mirandized* in the car by Sgt. Johnson at the prosecutor's request, but could not specify when or how appellant supposedly waived those rights. When the prosecutor asked the court to make a factual finding in this regard regarding a waiver, and a determination whether it was express or implied, the court could not, or would not, do so. Instead, it simply referred to the "entire record" as the basis for its finding.

But there is nothing in this record that reveals such a waiver. There is only testimony about untaped conversations with appellant and then the

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[120] "The waiver on the rights—again, getting back to my original thrust, and that was clearing up some of the misconceptions. In the room, as far as the time they were eating, again, I doubt either of them put a stopwatch on it. But Detective Wahl remembers it being about 10 minutes, and Sergeant Johnson put it at maybe 30 or 45, both of which I submit to the Court are probably not accurate, whatever time it took to eat that meal. What is clear is what happened during that meal, and that is nothing regarding further questioning on the case. It wasn't until after Sergeant Johnson had left to actually start proceedings to get the defendant booked that the defendant started asking procedural questions of Detective Wahl and then changed his demeanor to her to appear, you know, downcast, somber, different than he had been just moments before with the two of them, causing her to believe that he looked like he might want to talk now. hat's what she communicated to Sergeant Johnson. He then goes in, and it takes her a couple of minutes to put the tape in and get the tape started." (5 RT 1469.)

taped conversation of the parties, which does not include anything specific other than a partial reminder after 10 minutes or so of conversation about the earlier admonition in the car back in Texas. No testimony was presented that appellant responded at all to Johnson in the car.

Appellant was first interviewed on July 19, 1998. He was picked up in El Paso on the morning of the 24th and flown back to California; eight hours later he was in an interrogation room. For the entire trip, he was in the custody of the two officers. They had been talking with appellant for 30 to 45 minutes before the tape was turned on, with the sole intention of obtaining a statement from appellant. He finally talked to them, and after a few moments, the recorder was turned on. Where is the waiver? To imply a waiver because he started talking would effectively eliminate the right to remain silent. The admission of appellant's statement violated the state and federal constitutional rights enumerated above.

C. Appellant's Confession Was Involuntary

The Fourteenth Amendment to the United States Constitution and article I, section 15, of the California Constitution bar the prosecution from using a defendant's involuntary confession. (*People v. Massie* (1998) 19 Cal.4th 550, 576.) Both the state and federal constitutions require the prosecution to establish, by a preponderance of the evidence, that a

defendant's confession was voluntary. (*Lego v. Twomey* (1972) 404 U.S. 477, 489; *People v. Markham* (1989) 49 Cal.3d 63, 71.) Under both state and federal law, courts apply a "totality of circumstances" test to determine the voluntariness of a confession. (*Withrow v. Williams* (1993) 507 U.S. 680, 693–694; *People v. Williams* (1997) 16 Cal.4th 635, 660.)

In determining whether a confession was voluntary, "[t]he question is whether defendant's choice to confess was not 'essentially free' because his will was overborne." (*People v. Memro* (1995) 11 Cal.4th 786, 827.) On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. (*People v. Jones* (1998) 17 Cal.4th 279; *People v. Memro*, *supra*, 11 Cal.4th at p. 826.)

Under the due process approach, courts look to the totality of circumstances to determine whether a confession was voluntary. The surrounding physical circumstances, as well as the techniques employed by interrogators and a defendant's personal characteristics, are relevant to the legal determination of voluntariness as well as the reliability of the confession. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.)

Here, the promises of leniency in a context of coercion and isolation for several hours effectively meant that appellant's will was overborne, and rendered his confession involuntary.

D. Appellant Was Prejudiced by the Admission of His July 24, 1998, Statement

If appellant's confession was elicited in violation of *Miranda* or was involuntary, its admission requires reversal unless the state can show it was harmless beyond a reasonable doubt. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 994, citing *Chapman v. California*, *supra*, 386 U.S. at p. 24 [harmless error standard applied to statements admitted in violation of *Miranda*]; *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [harmless error standard applied to admission of involuntary confession].) Respondent cannot make such a showing in this case.

Appellant's confession, played in open court on February 7, 2001 (41 RT 9274) was a centerpiece of the case against him. The prosecutor relied on the confession when cross-examining appellant, and cited his flat affect when arguing lack of remorse to the jury at the penalty phase. The power of a confession to shatter a defense is recognized even by the high court decision abolishing the rule of automatic reversal when a confession is improperly admitted. (See *Arizona v. Fulminante, supra*, 499 U.S. at pp. 313–314.) The admission of this confession, in a case where the jury

deliberated for several days before finding appellant guilty, was not harmless error, and requires that his convictions and death sentence be set aside.

XI. THE WRONGFUL ADMISSION OF A LENGTHY RECORDED STATEMENT OF CARLOS ROSALES REQUIRES REVERSAL.

Carlos Rosales, appellant's cousin, was arrested on October 14, 1997, at his house on 9920 Stobaugh Street. He was 17 years old at the time. (33 RT 7888.) Deputy Adair removed pictures from his wall that included photographs of his friends and relatives flashing what Deputy Contreras described as gang signs. Contreras testified that appellant and the others in the pictures were or had been members of Lamont gangs. (33 RT 7778–7780.)

Rosales's testimony was important to the prosecution in describing the carjacking of Juan Carlos Ramirez and placing appellant at the scene of that crime, and also in setting the stage for the carjacking of Chad Yarbrough and his truck; he was at Daniel Quintana's house when the decedent's white truck came into view. He also provided exculpatory testimony for appellant when he testified that appellant was with him and his girlfriend Ashley Medina on the night that Leonel Paredes was kidnapped. (33 RT 7881.)

Rosales testified that the first time he was interviewed, on October 22, 1997, he was scared and didn't tell the cops everything he knew; he also testified that they frequently hit him and threw him up against the wall.

(33 RT 7898.) He gave a second taped statement in January 1998, after he had been charged with and pled guilty to the robbery of Juan Carlos. He had agreed to testify, and in return for his testimony, he would plead guilty to a robbery charge and maybe a strike on his juvenile record and four years confinement time. He said that his testimony at appellant's trial was truthful. (33 RT 7882.)

On cross examination, Rosales testified that he was beaten up by deputies the night he was arrested (Oct. 14, 1997), and again on October 22, 1997, when he gave his first taped statement. Part of his plea bargain was that he would have to testify on behalf of the prosecution; that was part of the written contract that he signed. (33 RT 7891.)

Rosales understood that the deal could be taken away if he didn't follow through with his part of the deal, which was to testify against appellant. (33 RT 7892.)

During the cross examination of Carlos Rosales, the prosecutor stated that he wanted to play the tape-recorded statement of the January 1998 interview in its entirety. Counsel for appellant replied,

> We object to the playing of the tape in its entirety, in that there's a lot of information therein which the police are guessing or speculating as to facts, as to what happened or what didn't happen. By playing the tape, I think it is highly prejudicial to this defendant, in that these police officers, their assertions as to what they think the facts are, what other

> people have told them, and what they heard from third parties are, obviously, hearsay.

(34 RT 8037.)

The prosecutor argued that the tape should be played in its entirety "so the jury could hear for themselves in the tone and manner of questioning and make their own determination of whether it was proper. He repeatedly insinuated and characterized it as pressuring. I don't think there's anything pressuring when you listen to the tape." (34 RT 8040–8041.)

Counsel for appellant pointed out that January of 1998 was long after the initial coercive acts of the police and after Carlos Rosales had agreed to a plea bargain contingent on his testimony against appellant, and the lengthy (two hours and ten minutes) tape would not be relevant for that purpose. (34 RT 8043–8045.)

The trial court found that:

> [T]he evidence of the tape recording, itself, is admissible, under 352, the prejudicial effect does not substantially outweigh the probative value, to the extent that many of the questions and answers have already been read to the jury that relate to allegations made by the officers, that may or may not be true, and the Court has admonished the jury that the questions were being admitted for the limited purpose of explaining the witness's state of mind or to explain subsequent conduct.

(34 RT 8041.)

The tape was then played for the jury in its entirety. (34 RT 8078.) A transcription can be found at 13 CT 3869–14 CT 3995. The introduction of unreliable, prejudicial and impermissible material to the jury under the guise of establishing "demeanor" presented prejudicial and inadmissible evidence to appellant's jury during the guilt phase of his trial. This violated appellant's constitutional rights, including the right of due process, effective assistance to counsel, right of confrontation and cross-examination, and a fair trial as provided in article I, sections 7, 13, 15, and 16 of the California Constitution, and under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Furthermore, this contaminated his penalty phase with damaging testimony that could never have been qualified as permissible aggravating evidence as defined in section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762; *Gardner v. Florida* (1977) 430 U.S. 349, 358; *Estelle v. Smith* (1981) 451 U.S. 454, 468, fn. 11.)

The tape contains a host of hearsay allegations contained in official statements presented along with questions, along with guesses and answers by Carlos Rosales, and long rambling discourses that placed before the jury material regarding alleged criminal conduct, i.e. burglary, drug use, possession of weapons, alleged gang activity and other information that

would been excluded as impermissible aggravation in the penalty phase, because these allegations were presented as hearsay and because they would not qualify as prior criminal activity involving the use of force or the threat of force. (§ 190.3, factor (b).)

The trial court noted that it had admonished the jury that the materials admitted, including police questions, were not to be considered for the truth of the matters stated, but this admonition had limited force when followed by a tape of an interview that was more than two hours long. It was prejudicial error for the trial court to have played this lengthy and confusing tape to the jury on such a flimsy rationale. It cannot be said beyond a reasonable doubt that this error had no effect on the verdicts reached by appellant's jury. (*Chapman v. California*, *supra*, 367 U.S. at p. 23.)

XII. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTIONS FOR CRIMES AGAINST LEONEL PAREDES AND JUAN CARLOS RAMIREZ, AND THE ENTIRE JUDGMENT MUST ACCORDINGLY BE REVERSED.

At the close of the prosecution's case, appellant made a motion pursuant to section 1181.1 to dismiss counts 7, 8, and 9 (crimes against Leonel Paredes), and counts 4, 5 and 6 (crimes against Juan Carlos Ramirez). (42 RT 9450 et seq.) After argument, the trial court denied the motions. (42 RT 9467.) This ruling was wrong.

When considering a challenge to the sufficiency of the evidence to support a conviction, this Court will review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Valdez* (2004) 32 Cal.4th 73, 104.) The relevant inquiry is "'whether, after viewing the evidence in the light most favorable to the People, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.'" (*People v. Alvarez* (1996) 14 Cal.4th 155, 225, quoting *People v. Mickey* (1991) 54 Cal.3d 612, 678, fn. omitted.)

This Court does not, however, limit its review to the evidence favorable to the respondent.

> As *People v. Bassett*, *supra*, 69 Cal.2d 122, explained, "our task . . . is twofold. First, we must resolve the issue in the light of the *whole record*—i.e., the entire picture of the defendant put before the jury—and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in light of other facts.'" (69 Cal.2d at page 138.) (Fn. omitted.)

(*People v. Johnson* (1980) 26 Cal.3d 557, 576–577, emphasis in original. See also *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.)

Although the test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact, and not whether the evidence shows to the reviewing court that guilt was established beyond a reasonable doubt, the evidence must do more than merely raise a strong suspicion of the appellant's guilt. "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Here, the identification of appellant by Leonel Paredes was the core piece of evidence relied on by the prosecution, and it was not reliable.

Leonel did not identify appellant as the perpetrator nor did he pick him out of a photo lineup when first interviewed. (30 RT 7174.)

Leonel's first identification of appellant occurred 17 days after he was assaulted, on October 21, 1997, to Deputy Contreras. Just before that encounter, Rosalio told Leonel the name of appellant as the likely perpetrator, and gave him appellant's name and nickname. Leonel saw appellant on television as a suspected perpetrator of the killing in the case at bench—and when Deputy Contreras returned to show Leonel another photo lineup, Contreras told Leonel appellant's name before showing him photographs. Only after this suggestion and direction from family members and a sheriff's deputy did Leonel name appellant as a perpetrator. (See Statement of Facts, *ante*.) There was a disposable glove found in Leonel's car that was similar to a disposable glove found in the field near the decedent's body, and there were two witnesses in addition to appellant himself who testified that appellant was with them on the night of the Paredes kidnapping. The evidence against appellant does not have the "solid value" (*People v. Valdez, supra*) required to be considered substantial.

Regarding the crimes charged arising from the encounter with Juan Carlos Ramirez (kidnapping/carjacking, counts 4 & 5, and robbery,

count 6), the evidence shows that any kidnapping happened before appellant knew anything about what was happening, and that he and the three others who jumped in the back of the truck at the invitation of Hector Valenzuela and Freddie De La Rosa were essentially clueless as to what had happened until arriving at the field.

The evidence shows that the person who took property from Juan Carlos was Hector, assisted by Freddie, and that appellant was later given $20 and a chain or pendant that said "Juan" on it. There is also evidence that appellant struck and/or kicked and threatened Juan Carlos, after being told that Juan Carlos had attacked Freddie De La Rosa's sister. This evidence might sustain convictions for receiving stolen property and felony assault, but it does not support the crimes for which he was convicted.

Appellant's convictions for crimes against Leonel Paredes and Juan Carlos Ramirez should be set aside.

XIII. THE TRIAL COURT PREJUDICIALLY ERRED BY PREVENTING APPELLANT FROM CONTEMPORANEOUSLY SPECIFYING THE BASIS FOR HIS OBJECTIONS TO PROSECUTORIAL MISCONDUCT, AND BY DELAYING ITS RULINGS UNTIL ANY REMEDY WOULD BE INEFFECTIVE.

"Improper remarks by a prosecutor can 'so infect [ ] the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *People v. Hill* (1998) 17 Cal.4th 800, 819.) "To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition. The point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*People v. Earp* (1999) 20 Cal.4th 826, 858.)

On February 15, 2001, during the cross-examination of Dr. Francisco Gomez, a psychologist testifying for the defense, the following exchange occurred:

Q.	Okay. Do you know what the term consciousness of guilt means?
MR. GARDINA:	Objection, legal conclusion.
MR. BARTON:	I can ask him what his definition of it is.
THE COURT:	You can ask the witness in terms of his expertise without getting into legal definitions.

[MR. BARTON]: What do you believe that term to mean psychologically?

A. What was it again?

Q. Consciousness of guilt. We all have kids—I shouldn't say that, anyone who has kids, you catch them, they took the cookies they weren't supposed to, they hide them. That's a consciousness of guilt, right?

A. It's not a psychological term; it's not one I've used or heard.

Q. How about guilty conscience?

MR. GARDINA: Objection.

MR. BARTON: Is that a term you've ever used?

MR. GARDINA: Objection, it's improper hypothetical, it's argumentative, and it's beyond the scope.

THE COURT: All right. Don't guess or speculate. If that's—if you have some opinion about that term, you may answer.

THE WITNESS: I don't.

[MR. BARTON]: Okay. So all of the criminal persons that you interview, then, are never evaluated, you know, in these court appointments—are never evaluated in terms of their guilt, or their actions demonstrating guilt?

MR. GARDINA: Objection. Prosecutorial misconduct.

THE COURT: Well, rephrase with regard to whether he relies in any way upon those types of factors, in performing his duty.

MR. BARTON: OK.

(46 RT 10289–10290.)

During a break, the prosecutor complained about the objection on grounds of prosecutorial misconduct. He argued that he was simply exploring a bias the witness had in terms of the innocence of all those whom he evaluated, and stated,

> [i]t's my recollection the Court said if you have that motion, simply say we object, preserve a motion, and then we argue prosecutorial misconduct[121] . . . as we stated early on in this case, first after all that is not something that should be yelled out in front of the jury. Secondly, if you do have that objection, it should be well-founded and accusations like that should be well-founded. I want a hearing on that, since the allegation has been made.

(46 RT 10293.)

After stating that they would have a hearing later, the trial court said, *"I will admonish in the future, if there is a motion based on prosecutorial misconduct, you can ask for a side bar. That's not a motion to state in the presence of the jury, because it does have a prejudicial effect if the Court denies it."* (46 RT 10294, emphasis added.)

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[121] Appellant is unable to find any such prior discussion.

The court's ruling was enforced throughout the rest of the trial. Appellant filed a written motion challenging this ruling. (15 CT 4252.) After a lengthy and contentious argument on February 20, 2001, all prior motions for mistrial based on prosecutorial misconduct, and particularly objections to this process, were denied. (47 RT 10534 et seq., esp. 47 RT 10573–10595, 10618–10632.)

This unprecedented requirement of the court that motions of prosecutorial misconduct not be made in front of a jury, and that they be delayed until a future court break, flies in the face of the state and federal requirement that such motions be made promptly, together with a request for an admonition, so that any prejudicial impact could be eliminated. Otherwise, such objections have not been preserved, and will not be reviewed on appeal.

Under *People v. Green* (1980) 27 Cal.3d 1, 34, this Court examined the impact of prosecutorial misconduct in detail, and what the appropriate measures were when suspected misconduct occurs. Defense counsel must take three distinctive steps to remedy the misconduct or preserve the error: (1) object or move to strike; (2) assign the objectionable question or comment as misconduct; and (3) request that the jury be admonished or instructed to "cure" the problem.

> [A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]

(*People v. Stanley* (2006) 39 Cal.4th 913, 952.)

Counsel has been found to have fallen short of constitutionally mandated duties by both state and federal courts for failing to make prompt objections to prosecutorial misconduct. See, e.g., *Lee v. Lewis* (9th Cir. 2001) 27 Fed.Appx. 774:

> On direct appeal, the California Court of Appeal found that this incident amounted to prosecutorial misconduct, but ruled that Lee waived the error by failing to object at trial. On state habeas corpus, Lee argued to the California Supreme Court that even if the error was waived, that waiver was excused by ineffective assistance of counsel. The California Supreme Court denied Lee's habeas petition in a one-sentence summary denial. . . . Under California law, failure to object at trial is a procedural bar to appellate review on the merits. Thus, we can only consider Lee's prosecutorial misconduct claim on the merits if we find that the procedural default is excused by cause and was prejudicial. See *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000). Lee argues that the "cause" for the default was ineffective assistance of counsel. See *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397(1986). In order to demonstrate that his counsel was constitutionally ineffective, Lee must show that his lawyer's performance was objectively unreasonable and that he was prejudiced therefrom. See *id.*; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

(*Lee v. Lewis, supra,* 27 Fed.Appx. 774, 775–776.)

The trial court's ruling that defense counsel was bound to "reserve a motion" in general terms and resolve it later at "side bar" rendered defense counsel necessarily ineffective, at least in terms of counsel's obligation to make timely objections. It insured that any subsequent misconduct would not be addressed in a manner sufficient to blunt or eliminate its prejudicial impact. The trial court's method meant that no admonition to jurors would ever be timely. It undercut the reliability of arguments, which were of necessity postponed, and the accuracy of any judicial ruling. In essence, it insured that no prosecutorial misdeeds would be identified as misconduct.

This method of proceeding should not be countenanced by this Court. As the next argument demonstrates, there were instances of prosecutorial misconduct identified by counsel that were not fairly resolved by the trial court. It cannot be said beyond a reasonable doubt that did not prejudice appellant. (*Chapman v. California*, *supra*, 386 U.S. at p. 26.) Appellant's convictions and death sentence must be set aside.

XIV. REPEATED INSTANCES OF PREJUDICIAL MISCONDUCT BY THE PROSECUTOR VIOLATED APPELLANT'S DUE PROCESS RIGHTS BY CONTAMINATING THE TRIAL WITH UNFAIRNESS, AND REQUIRE THAT THE JUDGMENT BE REVERSED.

"A prosecutor commits misconduct when his or her conduct either infects the trial with such unfairness as to render the subsequent conviction a denial of due process, or involves deceptive or reprehensible methods employed to persuade the trier of fact." (*People v. Dement* (2011) 53 Cal.4th 1, 49, citing *People v. Avila* (2009) 46 Cal.4th 680, 711.) Under federal law, reversal is required when "misconduct infects the trial with such 'unfairness as to make the resulting conviction a denial of due process.' *Donnelly v. DeChristoforo,* 416 U.S. 637 [parallel citations omitted]." (*Darden v. Wainwright, supra,* 477 U.S. at p. 181.) In *People v. Cash* (2002) 28 Cal.4th 703, 733, this Court wrote, "Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial." (See also *People v. Alfaro* (2007) 41 Cal.4th 1277, 1328.)

"In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review." (*People v. Alfaro, supra,* 41 Cal.4th at p. 1328) When a claim of

misconduct is based on the prosecutor's comments before the jury, "'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Smithey* (1999) 20 Cal.4th 936, 960, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Misconduct is to be considered in its cumulative impact, but will not require reversal unless this Court can conclude that "it resulted in an unfair trial in contravention of defendants' state and federal constitutional right to due process of law. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642–643; *People v. Harris* (1989) 47 Cal.3d 1047, 1084.)

"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

Throughout this case, the prosecutor posed testimonial questions that he knew to be improper and that he knew he could not prove. These questions were designed to prejudice the jury against appellant. "The rule is well established that the prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein,

together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.' [Citations.]" (*People v. Wagner* (1975) 13 Cal.3d 612, 619; see also *People v. Pitts, supra.*)

The prosecutor repeatedly violated this rule. To do so was misconduct which requires reversal.

A. The Prosecutor Improperly Attempted to Argue His Theory of the Case to the Jury by Inflammatory Questioning of Daniel Quintana

Daniel Quintana was 16 years old when the charged crimes were committed. He lived in Lamont, but went to high school in Arvin. He was called by the prosecution to testify primarily about the Carlos Rosales incident. (See Statement of Facts, *ante*.) On cross-examination, he testified about the sandbagging incident at the house of appellant's aunt, and about how he had seen broken sandbags and sand all over the cars and yard the day after her house was attacked. He also testified about the problems he had as a Lamont resident while going to school in Arvin. (32 RT 7652–7654.)

On redirect examination, the prosecutor asked,

> Q. So you had problems with Arvina guys and you were real close to Carlos' mom, and you were aware of this incident, correct?
>
> A. Yes.

Q. Did you take a Tec-9 and ever shoot anybody from Arvin three times in the back of the head because of that?

(32 RT 7661.)

Counsel promptly objected on grounds of prosecutorial misconduct, and, moved to strike the question, and moved for a mistrial. (32 RT 7661.) Out of the presence of the jury, the prosecutor defended his question as "foundational." The trial court disagreed, and addressing the prosecutor, found the question to be improper as argumentative "[t]o the extent that you were trying to make a point that animosity between the Arvin and Lamont gangs would not motivate this witness to want to cause harm to someone from Arvin. You then unnecessarily incorporated the prosecution's theory against the defendant." (32 RT 7663.) However, it denied the motion for mistrial based on outrageous prosecutorial misconduct. (32 RT 7666.)

The court subsequently informed the jury that it had sustained the defense objection and admonished jurors not to consider the question as evidence and to disregard it entirely. The prosecutor withdrew the question. (32 RT 7670—7671.)

The court's attempt to ameliorate the damage caused by the prosecutor's misconduct was insufficient and its failure to grant a mistrial was error. Calculated to inflame the jury based on the state's gang-violence

theory and graphic depiction of the crime facts, the prosecutor knew full well that his question was improper, even though he argued to the contrary when challenged by counsel and the trial court.

In *People v. LoCigno* (1961) 191 Cal.App.2d 360, 388, the court of appeal stated, "questions of the district attorney implied the existence of facts which the People made no effort to prove and had no reason to believe could be proved. This was misconduct." The rule is well established that the prosecuting attorney may not interrogate witnesses solely "'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.' [Citations.]" (*People v. Wagner* (1975) 13 Cal.3d 612, 619; see also *People v. Warren* (1988) 45 Cal.3d 471, 480–481 [suggesting facts harmful to defendant without good faith belief in existence of said facts]; *People v. Perez* (1962) 58 Cal.2d 229, 241 [asking questions suggesting facts harmful to defendant without belief facts could be proved and purpose to prove them]; *People v. Pitts* (1989) 223 Cal.App.3d 606, 722, 733–735.)

In the context of character evidence, this Court has held that "[s]o long as the People have a good faith belief that the acts or conduct about which they wish to inquire actually took place, they may so inquire.

[Citation.]" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1173; *People v. Siripongs* (1988) 45 Cal.3d 548, 578.)

Here, the prosecutor had no intention of trying to prove that Mr. Quintana had done anything resembling the behavior described in his question. Instead, he sought to highlight his view that the killing of the decedent was not only brutal, but also intentional. This "question" was a classic instance of prosecutorial misconduct and part of an ongoing pattern.

B. The Prosecutor Repeatedly Violated the Trial Court's Order Prohibiting Reference to or Evidence of Appellant's Alleged Possession of and Alleged Attempts to Purchase Other Guns and Ammunition

Appellant was arrested on August 22, 1997, and charged with possession of a weapon (a pistol) and possession of methamphetamine. (1 CT 2–3.) Appellant filed a motion in limine to exclude any mention of this weapon, which was legal, during the guilt phase of his trial. His motion was granted; the prosecutor agreed that this evidence could not be placed before the jury. (8 RT 2402–2403.)

Nevertheless, on February 2, 2001, the prosecutor introduced large color photographs on a 32-inch screen of Chinese-manufactured ammunition for that same gun through prosecution witness Lt. Tam Hodgson. (38 RT 8726–8728; see Exh. 185.)

Appellant objected to the introduction of the Chinese ammunition (38 RT 8732–8734.) The prosecution witness (Lt. Tam Hodgson) confirmed under cross-examination that the rounds and photographs of the ammunition introduced were 7.62 mm, and were incapable of fitting into the murder weapon. (38 RT 8742.)

Appellant moved for a mistral under *People v. Riser* (1956) 47 Cal.2d 556, and related cases on the basis that the precise gun and ammunition used were known to the prosecution, and the only purpose for introducing evidence of unrelated ammunition or guns was to prejudice the jury. (The motion was deferred, and argued on February 6, 2001; see 40 RT 9095–9119.)

The trial court found that it was error to present evidence of what was called the Chinese ammunition. The court further found that the error was not done in bad faith by the prosecution, and that the error was not prejudicial. The court denied the mistrial motion but excluded any further reference to the Chinese ammunition, photographs of the Chinese ammunition and all reference to other guns besides the murder weapon. (40 RT 9117–9119.)

Despite two previous rulings excluding any mention of other guns, the prosecution committed misconduct during cross-examination of

appellant by (1) inquiring into whether or not appellant had purchased other guns (in addition to the Tec-9) on the streets; and (2) making reference to bullets "we have seen on the screen" (a clear reference to evidence of other guns and ammunition). The prosecutor gestured his head in the direction of the television for emphasis, thereby reminding the jury of large color photographs of other ammo it had been directed to avoid. This was, again, misconduct. (See *People v. Dagget* (1990) 225 Cal App 3d 751 [prosecutor referred to matters excluded by earlier motion (in limine) by the court].) Appellant was forced to "reserve a motion" to avoid using the words "prosecutorial misconduct" in front of the jury. (47 RT 10468.)

On February 20, 2001, appellant filed a motion asking for a mistrial due to prosecutorial misconduct on the basis of the improper references to weapons and ammunition. (15 CT 4252.) During the session at which all of appellant's then pending prosecutorial misconduct motions were heard, the motions for mistrial, and for sanctions against the prosecutor were denied. (47 RT 1053–10598 et seq.; see esp. 47 RT 10571–10573.)

C. The Prosecutor's Accusations of Dishonesty Leveled At Defense Investigator Mosley During Cross-Examination Were Baseless, Impugned the Integrity of the Defense Team, and Constituted Misconduct

Stan Mosley was hired by counsel for appellant as an investigator. He had been a police officer for the Bakersfield Police Department for 16

years, and a private investigator for 10 years. (43 RT 9557.) Mosley's testimony was about the coded language used by drug dealers to discuss illegal transactions; it was aimed at decoding the testimony of Juan Carlos Ramirez that on October 14, 1997, he drove to a private house in his truck for a "transmission," which is was a code word for narcotics. (43 RT 9557–9559.)

Mr. Mosley's testimony was relevant on a narrow but important issue: the allegations that appellant victimized Juan Carlos Ramirez might be viewed in a different light if the jury were to infer that he was on his way to buy drugs with cash, rather than on his way to repair his truck.

On cross-examination, the prosecutor's first question was, "Mr. Mosley, you left the BPD under accusations of dishonesty; correct?" (43 RT 9561.) Counsel promptly objected on the grounds of prosecutorial misconduct and moved for mistrial. (43 RT 9561.)

Out of the presence of the jury, the prosecutor stated, "Everybody in this county knows why he quit from [*sic*] the Bakersfield Police Department—because there was pending investigation into his theft of property on cases he was involved [*sic*]." (43 RT 9561–9562.) The prosecutor made no offer of proof that any charges, formal or informal, were ever brought against Mr. Mosley for any reason whatsoever. (43 RT

9568.); his only proffer was as follows: "Everybody has knowledge of Mr. Mosley's history that [*sic*] has worked in this county and used him." (43 RT 9566.)

Defense counsel contended the question was brought in bad faith; he argued that the prosecutor knew that such allegations had been barred from admission in other cases involving the witness's expert testimony. Counsel noted that no formal accusations had ever been made against Mr. Mosley, nor any criminal charges ever filed, and that his resignation occurred some ten years prior. (43 RT 9566–9567.) Counsel complained that the prosecutor's question and purported proffer were made in bad faith.

The trial court denied the motions for prosecutorial misconduct and for a mistrial. It ruled that the prosecutor was limited to asking the witness if he had resigned from the police department. The court directed the prosecutor not to probe further as to any possible uncharged misconduct from 10 years earlier. In the presence of the jury, the court sustained the objection to the question and reminded the jury that questions are not evidence. (43 RT 9573.)

The prosecutor here improperly impugned the character of Mr. Mosley and raised the specter of misconduct by the witness involving moral turpitude without notice to appellant, and without any means or intention of

proving anything other than a general suspicion. (*People v. Wagner*, *supra*; *People v. Pitts*, *supra*.) The only basis for the prosecutor's grossly improper question was the prosecutor's personal opinions concerning the witness. The prosecutor's question was driven by bad faith and based on slander and gossip; he knew full well the damage his question would wreak on the credibility of the defense team and he was fully aware, based on prior experience with the witness, of the inadmissibility of any evidence purporting to corroborate the question.

Importantly, Mr. Mosley was a member of the defense team. This charge, made before the jury, cast aspersions on the integrity of the defense team, and thus served to undermine the defense case.

It was prejudicial error for the trial court not to have found misconduct, and not to have admonished the jury not to attribute any evidentiary value to the contents of the prosecutor's testimonial "question."

D. The Prosecutor's Questioning of Appellant Portraying Him as a Danger to "Arvinas," Despite the Prosecutor's Admission That He Had No Factual Basis for Such Questioning, Constituted Misconduct

Toward the end of appellant's direct testimony, at a sidebar concerning gang activity in Arvin, the prosecutor acknowledged that he had no evidence suggesting that appellant had ever attacked an Arvina, or

anyone else in Arvin: "I don't know of any specific incidents in Arvin." (47 RT 10442.)

Shortly thereafter, the prosecutor asked appellant on cross-examination,

[MR. BARTON:] And if an Arvina was caught in Lamont after dark by himself, and you and other Lamont 13 gang members caught him, he would be in trouble, wouldn't he?

MR. GARDINA: Objection, speculation.

THE COURT: Overruled.

THE WITNESS: If somebody else caught him, maybe.

BY MR. BARTON: You've never caused any harm to any Arvina 13 member?

MR. GARDINA: Objection, improper impeachment. I would like to reserve a motion at this time, your Honor.

THE COURT: I'm going to sustain the objection. Rephrase it.

MR. GARDINA: Move to strike.

THE COURT: There's just a question, and I have admonished the jury that questions are not evidence unless they're incorporated by an answer.

(47 RT 10450.)

As was his pattern, the prosecutor posed a question which clearly suggested the existence of facts harmful to defendant, in the absence of a good faith belief that the questions would be answered in the affirmative or with a belief that the facts could be proved, and a purpose to prove them, should their existence should be denied. (*People v. Wagner, supra; People v. Perez*, *supra*, 58 Cal.2d at p. 241; *People v. Pitts, supra.*) Just minutes before the improper questioning, the prosecutor acknowledged that he knew of no instance of ever harming any Arvina 13 member. Even at the penalty phase, no such evidence was presented.

This questioning constituted deliberate misconduct. It was plainly intended to convey to the jury that the prosecutor possessed information about appellant's gang activity and dangerousness. This is another instance of the prosecutor "testifying" in the guise of a question in order to support his theory of the case, to wit: that Chad Yarbrough was a hapless victim of irrational gang violence.

The fact that the trial court admonished the jury that questions were not evidence did not minimize the damage. Nor did the trial court bother to admonish the prosecutor for asking a question that suggested the existence of knowledge of prior misconduct that the prosecutor had no reason to believe, or ability to prove.

E. The Prosecutor's Series of Questions Insinuating That Appellant Furnished Drugs, Stole Money, and Sold Drugs, Asked Without a Good-Faith Belief That the Underlying Facts Could Be Proven, and Without Any Intent of Proving Such Facts, Constituted Misconduct

Early in the case, two charges alleging possession of methamphetamine, counts 10 and 11, had been bifurcated because of "the entire separate fact scenario" and, in the words of the prosecutor, the lack of "cross-admissibility." (6 RT 1761.)

Knowing that none of the following accusations could be proven, the prosecutor repeatedly cross-examined appellant improperly in a blatant effort to malign his character:

> Q. Mr. Ramirez, when you were arrested in 1997, specifically August 22 of 1997, that wasn't for just possessing drugs. That was for furnishing them as well to the girls whose apartment you were in?
>
> A. No, it wasn't.

(47 RT 10445.)

. . .

> Q. Did you ever go to a doctor in 1997 for your throat or tongue condition?
>
> A. No, I didn't.
>
> Q. Isn't it true you lost your jobs because of drug use?
>
> A. No.

(41 RT 10462.)

. . .

Q. Who paid your bail to get you out of jail?

[Objection]

A. My brother did.

(41 RT 10473.)

Counsel for appellant objected to each and all of these questions and asserted prosecutorial misconduct. (47 RT 10596–10603.) The trial court's ruling that these questions did not constitute misconduct was prejudicial error. (47 RT 10608.)

As repeatedly noted above, the law specifically bars the prosecutor from asking questions of a defendant suggesting "the existence of facts harmful to defendant, in the absence of a good faith belief that the questions would be answered in the affirmative or with a belief that the facts could be proved, and a purpose to prove them, should their existence should be denied." (*People v. Wagner, supra; People v. Perez, supra*; *People v. Pitts, supra; People v. LoCigno, supra.*) Moreover, Evidence Code 1101, subdivision (a) prohibits the introduction of evidence of specific instances of conduct when offered to prove the witness's conduct on a specified occasion; subdivision (b) allows proof of such conduct only when relevant

to prove some fact pertaining to the charged crimes, such as motive, opportunity, intent.

The above series of questions on cross-examination were a thinly veiled effort by the prosecutor to denigrate appellant's character. The prosecutor's questions effectively "charged" appellant with purveying drugs to young women, making bail with drug money, and being fired due to drug use. At no time did the prosecutor make an effort to prove these matters, nor did he have reason to believe they could be proved. Once again, the prosecutor utilized witness examination to communicate baseless but inflammatory innuendo to the jury.

So irrelevant and potentially prejudicial was evidence of entirely separate alleged incidents of drug possession alone, that severed counts 10 and 11 were tried separately, at a later time, and in a separate vicinage. The misconduct is particularly duplicitous in view of the prosecutor's concessions at the outset of the case that counts 10 and 11 should be bifurcated because they did not relate to the remaining 9 counts and the respective evidence was not cross-admissible. (4 RT 1341–1341.)

F. The Prosecutor's Request in Front of the Jury that Efrain Garza's Mother Be Subject To Recall at the Penalty Phase Was a Deceit Intended to Convey the Inevitability of a Penalty Phase

On January 25, 2001, the prosecutor called Beatriz Garza, mother of former codefendant Efrain Garza, to testify about who she saw at her house on the day of the shooting. After she was dismissed, the prosecutor asked that she be subject to recall: "It would be penalty. Just subject to recall. I have her information." (36 RT 7680.)

When counsel sought to make a motion, the court "reserved" the motion, and immediately asked for the next witness. (36 RT 7681.) Later, counsel specified that his motion for a mistrial was on grounds of the prosecutor's telling the jury that there would be a penalty phase in this trial. The court ruled that the jury would have understood that only as a contingency for which the prosecutor was preparing, and denied the motion. (36 RT 7710.)

The prosecutor did not call Efrain Garza's mother to the stand during penalty phase, and never intended to do so. The "contingency" referred to by the trial court never existed. The prosecutor committed misconduct in backhandedly informing the jury of the inevitability of a penalty phase.

XV. THE PROSECUTOR'S OFFICE SHOULD HAVE BEEN RECUSED; FAILURE TO ORDER RECUSAL REQUIRES REVERSAL IN THE UNUSUAL CIRCUMSTANCES OF THIS CASE.

On June 5, 2000, appellant filed a motion to recuse the district attorney's office. (8 CT 2435 et seq.; exhibits are also found at 10 CT 2941.) The prosecutor responded on June 20, 2000. (10 CT 2852 et seq.) The motion was argued on June 26, 2000. (4 RT 1292 et seq.) The parties agreed that the evidence and argument would be admissible for all related claims, such as motions to attack the use of unadjudicated crimes in aggravation. (4 RT 1293–1294, 1298.)

Appellant filed the motion on two grounds: (1) the prosecutor's use of evidence it had previously said was false (testimony of Cipriano Ramirez) to argue that appellant personally shot and killed Javier Ibarra, after arguing twice that Gabriel Flores shot Ibarra; and (2) the decedent's aunt, Diana Yarbrough, worked as supervising clerk for the municipal court, in the same building as the prosecutor's office; municipal court judges had recused themselves because of their close relationship with Ms. Yarbrough.

The prosecutor replied that according to *People v. Watts* (1999) 76 Cal.App.4th 1250, conflicting theories were permissible if each was supported by the evidence. He argued that in the trial of Cipriano, the issue

of who was the actual shooter was not decided by the jury. In the Flores case, witnesses identified Flores, but the jury did not unanimously find that Flores personally used a firearm. (4 RT 1307–1309.) The Attorney General's office, represented by William French, agreed with the prosecution. (4 RT 1309–1312.)

The trial court erred in not granting this motion. Ms. Yarbrough not only appeared to be close to the prosecutor's office, but subsequent events showed that she actually was close to that office. (See Arg. I.F.2, *ante*.) The prosecution ultimately chose not to present the testimony of Cipriano that it had previously attacked as false, but even attempting to base a separate murder charge on testimony it had declared as false was a misguided effort to manipulate the system that the trial court should have condemned, by either granting the motion to recuse, or taking other remedial steps to preserve appellant's right to a fair trial.

In *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, this Court held that a trial court has general statutory authority to order recusal of a member of a district attorney's office, and inferentially the office itself, for a conflict of interest. (*Id.* at pp. 261–265; see also *People v. Eubanks* (1996) 14 Cal.4th 580, 590–594.) After the *Greer* decision, the Legislature added section 1424 to the Penal Code, which set forth the procedure for a

defendant to seek an order from the trial court recusing a member of the district attorney's office, or the office as a whole, for a conflict of interest. (See *People v. Griffin* (2004) 33 Cal.4th 536, 565; *People v. Millwee* (1998) 18 Cal.4th 96, 123, fn. 7.)

The statute also made a substantive change, replacing the standard set forth in *Greer* with a standard that provides that a trial court may not order recusal "unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial" (§ 1424, subd. (a)(1).) (See, e.g., *People v. Eubanks, supra*, 14 Cal.4th at p. 591; *People v. Conner* (1983) 34 Cal.3d 141, 147.) A conflict of interest exists "whenever the circumstances of a case evidence a reasonable possibility that the . . . [conflicted person or entity] may not exercise its discretionary function in an evenhanded manner." (*People v. Conner*, *supra*, 34 Cal.3d at p. 148; accord, *People v. Snow* (2003) 30 Cal.4th 43, 86.)

The prosecutor's reliance on *People v. Watts* was misplaced. It is not clear if *Watts* survives *In re Sakarias* [(2005) 35 Cal.4th 140] but it differs in a fundamental way from the case at bench, in that there was never a contention in either trial discussed by the *Watts* case that any witness was lying. The testimony from witnesses at the first trial concerned a different subject—which person was beaten—that their testimony in the second trial,

which more directly dealt with who actually committed the crime. (*People v. Watts*, *supra*, 76 Cal.App.4th at pp. 1260–1261.) At issue in the recusal motion was the testimony of Cipriano Ramirez, which the prosecutor had previously attacked as false.[122]

Ultimately the prosecutor chose not to use Cipriano's testimony, and relied on hearsay testimony of prior inconsistencies as the basis of his argument that appellant personally shot Javier Ibarra. (Arg. XVI, *post.*) At the recusal motion, however, he insisted that he had the right to not only take an inconsistent position opposed to those previously taken by his office, but to use as supporting evidence testimony previously—and successfully—labeled by that office as false. This is nothing like the case in *Watts*, and nothing like the disinterested administration of justice.

The prosecutor, after all, """is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."' [Citations.]" (*People v. Fierro* (1991)

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[122] The testimony attacked as false included the fact that Cipriano initially denied being present at the time of the crime—exactly like appellant, whose first account to the deputies investigating the case was identical to Cipriano's, and who was vigorously attacked by the prosecutor for having lied at his initial interview. (See Arg. XVI.B, *post.*)

1 Cal.4th 173, 208.) Thus, "the prosecutor must execute the duties of this representative office diligently and fairly, avoiding even the appearance of impropriety that might reflect poorly on the state." (*People v. Trevino* (1985) 39 Cal.3d 667, 682, disapproved on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1216–1221.)

The effort to use testimony against appellant that the prosecutor had earlier argued was false, and that the prosecutor personally felt to be false, as the basis of an argument that appellant personally committed a previous murder, was cynical and reprehensible, and should have been recognized as such by the trial court. Diana Yarbrough's high administrative position in local criminal justice administration already led to recuasals by municipal court judges. It created the appearance of favoritism. Her unexpected presence at a mid-trial ex parte hearing on the funding of appellant's case, and her giving the prosecutor a copy of a memo her superior directed her to prepare, further illustrates how close were the victim's family and the prosecution. It was prejudicial error for the trial court not to have granted the motion to recuse the prosecutor's office.

PENALTY PHASE

XVI. THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE OF THE FUNDAMENTALLY UNFAIR PROSECUTORIAL TACTIC, APPROVED BY THE TRIAL COURT, OF PRESENTING EVIDENCE AND ARGUMENT TO THE JURY THAT APPELLANT WAS THE SHOOTER OF JAVIER IBARRA, AFTER HAVING SUCCESSFULLY ARGUED TO TWO OTHER JURIES THAT GABRIEL FLORES WAS THE ACTUAL SHOOTER.

The key evidence presented against appellant in aggravation during the penalty phase purported to show that appellant personally shot and killed Javier Ibarra. Unbeknownst to the jury however, the prosecution had twice before presented evidence and forceful argument to two juries that Gabriel Flores, not appellant, had shot Ibarra. This deceptive switch, made without any new evidence being discovered or produced, violated appellant's right to due process of law.

A. Factual and Legal Background

On June 5, 2000, appellant filed a motion to recuse the prosecutor's office. The primary reason:[123] the prosecutor had indicated that he planned to present evidence to the jury that appellant was the one who had actually pulled the trigger and killed Javier Ibarra, despite having argued forcefully—and successfully—in two previous trials that the triggerman

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[123] The other reason related to Diana Yarbrough, the decedent's aunt and a supervising clerk in the building where the prosecutor's office was located. (See Args. I.F.2 & XV, *ante*.)

was Gabriel Flores. The evidence the prosecutor planned to offer in order to prove this contention was the unreliable and self-serving testimony of appellant's brother, Cipriano Ramirez, that the prosecutor had previously—and persuasively—told a jury was false from start to finish. Attached as exhibits to the motion were the sworn testimony of Alma Mosqueda and Ysela Nunez in the two previous proceedings, Cipriano Ramirez's testimony, and the closing arguments by the prosecutors in each of the previous trials. (9 CT 2435–2656; 10 CT 2701–2725.)[124]

The prosecutor filed an opposition to the motion to recuse on June 20, 2000 (10 CT 2852 et seq.), and argued that under the authority of *People v. Watts*, *supra*, 76 Cal.App.4th 1250, the prosecution was allowed to present inconsistent charges. The opposition indicated that it would oppose any effort to put before the jury the testimony of the previous prosecutors, because "their subjective personal theories of their respective cases are irrelevant and inadmissible." (10 CT 2855.) It also stated that the claim that Cipriano perjured himself was "unproved." (10 CT 2855.)

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[124] Exhibit A is included in the clerk's transcript at 10 CT 2701–2725. Exhibit B was available to the trial court and is part of the record for all purposes in lieu of testimony from the prosecutor, but was not included in the clerk's transcript. It is attached hereto as Appendix A.

Argument was held on June 26, 2000. (4 RT 1291 et seq.) Appellant subpoenaed the deputy district attorney who prosecuted Flores and Cipriano for the killing of Javier Ibarra, but dropped the subpoenas when the prosecutor stipulated to allowing transcripts of closing arguments in each case into evidence for all purposes, including any later arguments regarding prosecutorial inconsistency or the use of materials regarding the Javier Ibarra shooting as aggravating evidence in the penalty phase. (4 RT 1294–1298.) The motion to recuse the prosecutor's office was denied. (4 RT 1327.)

B. The Prosecution's Prior Contentions in Two Preceding Trials

On March 15, 1995, Javier Ibarra was shot and killed. Cipriano and Gabriel Flores were each tried separately for this crime in 1997–1998, and charged with murder.

At the preliminary hearing for Cipriano in November of 1997, Ysela Nunez testified that three men drove up to her apartment complex around 8:30 in the evening. She saw them clearly from her second-story window, because of the lights in the parking lot. One was wearing a light blue shirt, long sleeves, with blue jeans; another, a body-shop uniform like overalls with a zipper; and the third was wearing black pants, a black and white Pendleton checkered shirt, and a white hat. (9 CT 2463–2464.)

The three of them encountered a man accompanied by two young women. The women walked away within a minute, and the four men started arguing, and then fighting. The three newcomers were standing side by side on the right, and then the one in overalls stepped forward and took a swing at the guy on the left. The guy in blue jumped up to also swing at the guy on the left. Then, both the newcomers who were fighting with the guy on the left stepped back, and the third guy on the right, the one wearing the Pendleton, black pants, and white hat, stepped up and fired several shots at the guy on the left, who fell as he was hit. (9 CT 2464–2466.)

During the same proceeding, Alma Mosqueda testified that she was in her apartment with her two children and Christina Ramirez on that same day. After half an hour or so, Javier Ibarra knocked on the door, and came in. Javier had been there for about five minutes when she got a phone call from Cipriano. He asked if Javier were there. She affirmed that he was. He then asked if it was okay to come over and take care of business, and she said, okay, fine. (9 CT 2490.)

She and Christina tried to get Javier out of the apartment, and she had gone outside with him, but within just a couple of minutes, a car pulled up. (9 CT 2495–2496.) Three young men got out: Cipriano, appellant, and Gabriel Flores. Gabriel was wearing sweat pants, a Pendleton, and a white

cap. Cipriano was in overalls, and appellant had some kind of dark clothes on. (9 CT 2497–2498.)

Cipriano told Christina to go back inside the apartment. She did so. The last thing she saw was Javier spreading his arms out. (9 CT 2499.) She went back inside, sat on her couch, and heard gunshots. She ran outside, saw Javier on the ground, and watched the grey car drive away, with Cipriano at the wheel. (9 CT 2499–2500.)

Cipriano testified on his own behalf at his criminal trial. He said that his brother (appellant, who was then in Mexico) did the shooting. (9 RT 2650–2651.) When he was first captured, however, Cipriano denied being anywhere near the scene of the crime. In closing argument on April 30, 1998, the prosecutor described the crime as presented by the testimony:

> Cipriano and Juan Ramirez step up and begin engaging Javier Ibarra in a fight, and while they're doing that, from the testimony of Ysela Nunez, all the attention was between Javier and Cipriano and Juan, and Gabriel Flores off to the side just stands there and watches. And then, ladies and gentlemen, without any commands being yelled, without the defendant or his brother going down to the ground or being injured, without any precipitating thing that would cause this surprise shooting, Cipriano Ramirez and Juan Ramirez jump back at exactly the same time, and as they jump back, Ysela Nunez witnesses Gabriel Flores take a couple of steps forward and begin firing.

(Exh. B, Def. Mtn. to Recuse, pp. 9–10.)

The prosecutor further argued that Cipriano was a liar:

> He makes up a story about his vehicle being stolen and not being at the scene of the crime and not knowing anything about the crime and not being with Gabriel Flores that night and not being with his brother that night. . . . ladies and gentlemen, you will be instructed that an attempt to fabricate evidence—in this case to make up an alibi defense to place his car in the hands of some unknown person at the time of the shooting—an attempt to fabricate evidence, a false or misleading statement by the defendant and the flight from the scene of the crime, are all evidence of his consciousness of guilt, of his knowledge of his guilty participation in the crime.

(Exh. B, pp. 12–13.)

In rebuttal, the prosecutor summarized how Cipriano's testimony was contradicted by every part of the record, and concluded,

> [I]t's like one of those situations in everyday life that we all encounter with children or with other people that we know, that just where someone is in a situation where they are caught doing something in a criminal case, there are only so many defenses based upon the evidence against you. . . . I don't submit to you that the defendant gave a false statement to you here on the stand simply because he is the defendant in this matter but because, No. 1, it is contradicted by the evidence in the case; No. 2, he has a bias or motive to lie, and No. 3, he changed his story consistent with the evidence against him . . . that's exactly what the defendant, Cipriano Ramirez, has done or attempted to do, is to lie to get himself out of trouble, to comport his testimony with what the evidence was against him.

(Exh. B, pp. 19–20.)

Cipriano was convicted of conspiracy to commit murder and second-degree murder.[125]

On July 30, 1998, at the conclusion of the trial of Gabriel Flores, the prosecutor argued to the jury that the Mr. Flores was guilty of personally killing Javier Ibarra.

> Alma Mosqueda said the white hat was on Gabriel Flores. Nunez, who testified yesterday afternoon and this morning, says the white hat was the triggerman. Now, you know I need both of these girls to make the ID in this case because Mosqueda walked inside the house and because of that wall in her apartment she couldn't see who the shooter was, because Cipriano told her to get her kids and get back inside.
>
> So we know where people are at the scene because Mosqueda told us Cipriano was wearing the jumpsuit, Flores is wearing the white hat and the Pendleton, and Juan, the other guy. Okay. So we know these three. . . . Nunez up in the perch tells us what happened. And Nunez says white hat is the triggerman. So with that in mind, we have a distance of five to six feet. . . . Dr. Dollinger testified that those shots came in from a 45 degree angle. So, if I am the victim and the girls testified, or, excuse me, Nunez testified that blue jumpsuit was right in front of Ibarra, No. 1, or the other person was off to this side, but No. 3 in the white hat was at an angle to him. Now remember, Dr. Dollinger testified that all those shots, especially the head shot and the chest shot, came from a 45 degree angle, which Nunez testified white hat was at that

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[125] His conviction for second-degree murder was overturned because of an instructional error, and his conviction for conspiracy to commit murder was overturned on the basis of insufficient evidence. (*People v. Cipriano Villa Ramirez*, consolidated with *In re Cipriano Ramirez*, No. F032027, filed June 23, 2000.)

> position. So that corroborates or confirms those bullets coming in from No. 3, No. 3 being the white hat.

(9 CT 2708–2710.)

The prosecutor scoffed at the defense contention that appellant was picked up two days later, with a white hat:

> Let me ask you this, if they pick me up two days after the murder and I am wearing a white hat, am I a suspect because I am wearing a white hat? No. I am sure some of you have white hats, a lot of people have white hats. So what does that mean? He was wearing it on the night of the murder? No.

(10 CT 2720.) Gabriel Flores was convicted of second-degree murder.[126]

C. Appellant's Penalty Phase Trial

On February 27, 2001, the prosecutor filed a motion to admit evidence of appellant's involvement in the homicide of Javier Ibarra, as allowed by section 190.3, factor (b). (15 CT 4324 et seq.) Appellant filed an opposition to this motion the next day (15 CT 4359), along with a motion to exclude prior testimony of Cipriano Ramirez, and a motion to exclude evidence of unadjudicated criminal activity, including materials related to the Ibarra killing. (15 CT 4366 et seq.)

On March 7, 2001, the parties argued in limine motions prior to the penalty phase, including whether or not the prosecutor could place into

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[126] His convictions were affirmed on November 28, 2002. (F031754.)

evidence materials regarding appellant's involvement in the 1995 killing of Javier Ibarra, and if so, what evidence could be presented. The prosecutor described a version of the facts and indicated that he wanted to present evidence of appellant's involvement in the crime of murder, "under any number of theories," including as an aider and abettor to a murder, and a conspirator with a target crime of murder—and aider and abettor to an assault with a deadly weapon, and as an accessory to murder, or an accessory to an assault. (54 RT 12178–12179.)

Trial counsel then described the undisputed record as far as what the prosecution had presented in two previous trials. (54 RT 12180–12184.) He challenged the prosecutor's right to present evidence of "something between a misdemeanor assault and a cold-blooded first-degree murder." (54 RT 12184.)

The trial court referred to the California Judges Bench Guide as its authority, and found sufficient evidence in the prosecutor's offer of proof to put before the jury "the theories of *murder as an aider and abettor*, theory of conspiracy with the target being the crime of murder, conspiracy with the target being assault with a deadly weapon, principle in a battery charge, accessory to murder, I—I feel the offer of proof is sufficient to put all those in front of the jury." (54 RT 12189, emphasis added.)

Later, when the issue arose again prior to the presentation of penalty phase witnesses, the trial court again specified what it had ruled could be put before the jury.

> THE COURT: "I've found it in my notes. It relates to Defendant's Motion No. 18. And just to confirm, the ruling that I made is that *the People may introduce the evidence regarding the 1995 incident with respect to the following alleged crimes or criminal conduct: violation of Penal Code Section 187, crime of murder under a theory of aiding and abetting; Penal Code Section 182.1, conspiracy with a target crime of murder*; Penal Code Section 182.1, conspiracy with the target crime of assault with a deadly weapon; Penal Code Section 245 Subparagraph (a)(2), assault with a deadly weapon as an aider and abettor; and Penal Code Section 243 as a principle in battery. I have already made that ruling."

(56 RT 12609, emphasis added.)

On March 14, 2001, just before the penalty phase began, the prosecutor objected to any discussion of the trials of Gabriel Flores or Cipriano Ramirez as "irrelevant." (57 RT 12682.) Counsel for appellant generally agreed about the use of any prior convictions to impeach witnesses, but also argued that to keep the fact that the prosecution successfully charged both Cipriano and Gabriel with the murder of Javier Ibarra, and advanced the theory in both cases that Gabriel was the shooter, would be "hiding the ball." In reply, the prosecutor said,

> That is primarily what I'm objecting to, your Honor. Again, we went through this twice, once in the recusal motion and again in the in limine motions of the penalty phase. It is

> absolutely irrelevant what the mind-set of other prosecutors [in the same office] were in prosecuting cases as far as this jury is concerned. . . .

(57 RT 12684.)

Accordingly, the prosecution called Alma Mosqueda as a penalty phase witness on March 14, 2001. Ms. Mosqueda testified as she had done previously. (See Statement of Facts, Penalty Phase, *ante*.) On March 25, 1995, she lived in an apartment at 12360 Main St., AKA Weedpatch Highway. That evening, she was with her two children and Christina Rodriguez. Javier Ibarra came over, and then Cipriano Ramirez called. (57 RT 12771–12774.) He asked if they could come over and take care of business. She said okay, and then she and Christina began trying to get Javier out of the apartment. (57 RT 12781–12782.)

They were all outside when Cipriano drove up, together with appellant and Gabriel Flores.[127] She went back inside with her children; the last thing she saw was Javier spreading his hands out, as if he were inviting someone to fight. (57 RT 12794–12795.) She heard shots, and then went back outside to find Javier, shot, down on the ground. (57 RT 12791.)

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[127] Later that night, she was interviewed by a deputy, and she gave them two names—Cipriano and Juan—because she couldn't remember Gabriel's name at the time. (57 RT 12788.)

Alma was interviewed by the district attorney's office on October 24, 1997. She told the investigator at that time what she knew about the incident, including the fact that Gabriel Flores was wearing a white hat. That's what she remembered, and that's how she testified several times over the next couple of years in various proceedings. (57 RT 12807–12810, 12820–12821.)

Deputy Robert Contreras testified that he had interviewed Ms. Mosqueda the night that Javier was shot, and she gave him only two names—Juan and Cipriano Ramirez. (57 RT 12831–12832.) Deputy Daniel Fuqua testified that when he arrested appellant two days later, he also seized a white baseball cap in his possession, with lettering on it. (58 RT 12921.) Kern County Sheriff's Deputy Allan Hall testified that in a brief interview with Alma Mosqueda on the night of the murder, she mentioned only the Ramirez brothers. He also identified a hat given to him by Fuqua that he understood to be appellant's hat, and that he booked it into property as evidence. (57 RT 12929; Exh. 103.)

Hall testified that he remembered appellant telling him when he was arrested two days later that he was wearing a white shirt and a mustard-colored baseball cap the night of the shooting, and that neither Cipriano nor

Gabriel Flores wore caps. None of this was contained in his report. (58 RT 12933.)

Jesse Ibarra, Javier's brother, testified that he went by to see Alma the morning after the shooting. She told him that appellant was wearing a white hat the night before. (58 RT 12977.) Alma recalled talking with him, but did not remember telling him anything about who wore a white hat. (57 RT 12802.)

Gerardo Soto, the common-law husband of appellant's aunt, testified that he was interviewed by the police on the night the murder was committed. Appellant and Cipriano had been by earlier that night for 30 minutes or so. He told the interviewer that appellant was wearing dark clothing (a blue Pendleton), and a matching blue cap. (58 RT 12941, 12954–12955.)

Ysela Nunez, eyewitness to the shooting of Javier Ibarra, was called by appellant. (60 RT 13186.) She described what she saw out her window: two guys fought with the guy who was hanging out with the girls. (60 RT 13189.) The guy who was not fighting was wearing black pants, a black-and-white checkered Pendleton and a white hat. (60 RT 13191–13192.)

Ms. Nunez testified that one of the fighters was wearing coveralls. One was wearing jeans and a blue long-sleeved shirt. The guy with the girls

was wearing dark pants and a white t-shirt. The guy with the white cap who was standing to the side suddenly lifted a gun and shot the guy who had been with the girls, and continued shooting as the guy fell. (60 RT 13194.)

On March 20, 2001, appellant filed a motion for mistrial based on misuse of the Ibarra case. The grounds alleged were that the evidence of a conspiracy to kill Javier Ibarra was insufficient; that he was denied the right to confront and cross-examine the prosecution's witnesses (hearsay statements of Cipriano Ramirez); that Cipriano's statements were unreliable; and that the prosecutor committed misconduct by suggesting that appellant was the perpetrator of the shooting of Javier Ibarra rather than an aider and abettor or co-conspirator, after having previously shown that Gabriel Flores was the shooter. Appellant alleged that the prosecutor violated both the spirit and the letter of the court's previous ruling that evidence of appellant's uncharged misconduct in the Ibarra matter could only be introduced to show that he was at most an aider and abettor; in the penalty phase, this lesser level of culpability could be significant in the jury's deliberation as to sentence. (17 CT 5025 et seq.)

Argument on the motion was held on March 21, 2001. The court denied the motions, and relied primarily on *People v. Ray* (1994) 13 Cal.4th 313, as authority:

I merely said they met that threshold showing of substantial evidence to pursue the crime of murder as an aider and abettor, and my ruling was never either expressly stated or intended by me to preclude them from putting on whatever evidence—putting on evidence of whatever happened, whether the defendant was an aider and abettor, or some other principle (*sic*) theory. Again, an aider and abettor is a principle under the law. And I specifically had in mind the cases that counsel had all cited when I made my ruling and that was in connection with the defendants motion in limine number 18. One of the cases that I had relied upon was the case of People versus Ray. That is a 1996 case, at 13 Cal 4th, 313. And at page 350—351, actually, page 351, the court held that nothing in the relevant statutory or constitutional principles requires the prosecutor to establish that the defendant personally committed each and every act occurring during a violent criminal episode admitted under section 190.3, factor B. The sentencer in a capital proceeding is entitled to know about other incidents involving the use or threat of violence, for which the defendant is shown to be criminally liable beyond a reasonable doubt, whether he participated as an actual perpetrator or in some other capacity, and as long as penalty jurors are not materially misled about the nature and degree of the defendants individual culpability, the prosecution may rely solely on the judgment—that doesn't apply there. So again, the Ray case is consistent with the ruling I previously made, that so long as there's substantial evidence to show that the defendant participated in some capacity, which would make him a principle, that the sentencer is entitled to be presented with that evidence, consistent with the Ray holding.

So if you want to clarify your argument or focus your argument any further, Mr. Gardina, I can indicate that my ruling did not preclude the People from presenting to the jury whatever the truth is. If the theory of the People isn't borne out by the witnesses, the People are entitled to pursue the truth, just as the defense is entitled to pursue the truth, and

> I'm specifically going to find that the People did not violate my ruling.

(61 RT 13581.)

Counsel for appellant replied that the trial court

> [r]epeated several times a laundry list of crimes, for which the prosecution can proceed under, starting with murder under the theory of aider and abettor. Now, CALJIC 3.00 and 3.01 distinguishes between the perpetrator and the aider and abettor. Now, the Court as it said many times, it has extensive experience in criminal law, and if the Court truly intended that based on the offer of proof, it was going to allow the prosecution to proceed under the theory that Juan Ramirez was the principle or the perpetrator, that he was the actual shooter, in this case, if that was the Court's intent, as the Court has stated today, the Court should have included on this laundry list of crimes, the crime of murder, simple murder in the first degree, because Juan Ramirez would be perpetrator. There would be no need for aiding and abetting, no need for conspiracy. It would be simple first degree murder, and first degree murder is not in this laundry list of crimes which would describe Juan Ramirez as the shooter or the perpetrator.

(61 RT 13613–13614.)

Appellant's motion for motion for a mistrial on basis of prosecutorial misconduct in its presentation of the Ibarra/conspiracy issue was denied.

(61 RT 13616.)

At the climax of the penalty phase, the prosecutor repeatedly told appellant's jury in closing argument that appellant personally shot and killed Javier Ibarra, and that was reason enough to overpower any and all mitigation evidence:

"Some of you could say that the fact that [appellant] killed someone in 1995 was so heavy that it outweighs anything in mitigation." (62 RT 13740.)

> Javier Ibarra, the only evidence we know there is that the defendant didn't have alcohol on his breath and according to his uncle anyway didn't appear to be high or drunk when he killed somebody in 1995. . . . The *defendant personally chose to kill Chad, just like he chose to kill Javier Ibarra.* . . . The defendant was arrested two days later while on the run, wearing a white Lamont hat, and then lies about his whereabouts for that night, adopts the fake alibi of his brother regarding a stolen car, and lies about being at the apartment or in that car that night, all of which we know are lies. And, in fact, I submit to you that this probably was the hat, or one very similar to it, that he was wearing when he shot Javier Ibarra.

(62 RT 13746, 13749, 13756, emphasis added.)

The "fact" that appellant personally shot Javier Ibarra was the heart of the prosecutor's argument that appellant would be a danger to everyone around him in prison if he were not executed. (62 RT 13758.)

The trial court's reading of the *Ray* case stopped at the crucial part, omitting this Court's language that supports appellant. In *Ray*, this Court found that "as long as penalty jurors are not materially misled about the nature and degree of the defendant's individual culpability, the prosecution may rely solely on a judgment of conviction to establish his involvement in

a joint crime of violence." The Court looked specifically at what the prosecutor had argued to the jury:

> [T]he evidence established that defendant and Schultz were each convicted of murdering Bryant, that both men were presumably present when the murder occurred, and that the murder was unusually violent and close in time to the capital crimes. *In closing argument, the prosecutor did not state or imply that defendant actually stabbed or killed Bryant.*

(*People v. Ray*, 13 Cal.4th at p. 350, emphasis added.)

Thus, this Court held that evidence of a prior conviction was sufficient to show involvement in a joint crime of violence—but was careful to add that the prosecutor did not reach beyond evidence of the conviction to argue that the defendant had personally shot the victim.

Here, appellant's chief complaint is that the prosecutor did precisely that. After having successfully argued in two previous trials that Gabriel Flores was the actual shooter of Javier Ibarra, the prosecution told appellant's jury that *appellant* was the actual shooter. The prosecutor made appellant's supposed willingness to deliberately pull the trigger in 1995 a centerpiece of his argument as to why the shooting in this case was an intentional act by an experienced killer rather than an accident committed by someone on a dissolute, downhill run, and why the jury should sentence appellant to death. Appellant's jury was not informed of any part of this tactical switch. This vivid instance of prosecutorial inconsistency was

fundamentally unfair, violated appellant's right to due process of law, and requires that the death judgment be set aside.

D. Prosecutorial Inconsistency Prejudicially Violated Appellant's Right to Due Process of Law

Prosecutorial inconsistency occurs when the prosecution takes advantage of separate proceedings to advance inconsistent positions to separate fact finders, each unaware that the prosecution advanced a conflicting position at a different proceeding. When the prosecution advances a position in the trial of one defendant and then adopts an inconsistent position in the trial of another on the same facts, the prosecution is relying on a known falsity. The prosecution's exploitation of inconsistent theories to gain an advantage over a defendant violates the defendant's rights and undermines the integrity of the justice system. (See Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight* (2001) 89 Cal.L.Rev. 1423, cited by this court in *In re Sakarias* (2005) 35 Cal.4th 140, which held "that the People's use of irreconcilable theories of guilt or culpability, unjustified by a good faith justification for the inconsistency, is fundamentally unfair, for it necessarily creates the potential for—and, where prejudicial, actually achieves—a false conviction or increased punishment on a false factual basis for one of the accuseds." (35 Cal.4th at pp. 159–160.)

This Court found that such manipulation of evidence and argument in *Sakarias* violated due process:

> [F]undamental fairness does not permit the People, without a good justification, to attribute to two defendants, in separate trials, a criminal act only one defendant could have committed. By doing so, the state necessarily urges conviction or an increase in culpability in one of the cases on a false factual basis, a result inconsistent with the goal of the criminal trial as a search for truth.

(*In re Sakarias*, *supra*, 35 Cal.4th at pp. 155–156.)

In *Smith v. Groose* (8th Cir. 2000) 205 F.3d 1045, members of two criminal groups separately burglarized a home where the occupants were murdered. Lytle, a member of the second group, gave inconsistent statements to police, at one time attributing the murders to the first group and at another attributing them to the second. At the separate trials of Cunningham, a member of the first group, and Smith, a member of the second, Lytle testified the occupants were killed by the first group.

At Smith's trial, the prosecutor introduced as a prior inconsistent statement Lytle's statement implicating the second group and argued Smith was guilty of murder as an accomplice. However, at Cunningham's later trial, the prosecutor introduced Lytle's prior consistent statement implicating the first group and objected to defense efforts to impeach Lytle with the statement implicating the second group. (*Smith v. Groose*, *supra*,

205 F.3d at pp. 1047–1048.) The circuit court concluded this use of inherently contradictory factual theories violated Smith's right to due process. (*Id.* at p. 1052.)

For the government's representative, in the grave matter of a criminal trial, to "chang[e] his theory of what happened to suit the state" is unseemly at best. (*Drake v. Kemp* (11th Cir. 1985) 762 F.2d 1449, 1479.) "The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for truth." (*Ibid.*) The People may not convict two individuals of a crime only one could have committed or obtain harsher sentences against two individuals by unjustifiably attributing to each a culpable act only one could have committed.

In *Sakarias*, this Court rejected the dissent's view that "the state may seek and obtain death sentences for two defendants using inconsistent or irreconcilable factual theories that it could not use to obtain convictions against the same two." (*In re Sakarias, supra*, 35 Cal.4th at p. 161.) The dissent's view was also recently rejected by the United States Supreme Court.

In *Bradshaw v. Stumpf* (2005) 545 U.S. 175, the prosecution had argued in one proceeding that Mr. Stumpf was the triggerman, and in

another proceeding that Mr. Wesley was the triggerman. Stumpf, who pled guilty to capital murder, challenged the prosecutor's use of inconsistent theories.

The United States Supreme Court found no due process violation regarding Stumpf's guilty plea because the "the precise identity of the triggerman was immaterial to Stumpf's conviction for the aggravated murder." (*Bradshaw v. Stumpf, supra*, 545 U.S. at p. 187.) However, reduced culpability of the one who was not the actual shooter could have been very material to the choice of sentence. The high court accordingly remanded the case to the Sixth Circuit to determine if the prosecution's inconsistent arguments that two separate men were each the triggerman required reversal of the death penalty. (*Id.* at pp. 187–188; see also *Prosecutorial Inconsistency, supra*, 89 Cal.L.Rev. at pp. 1468–1470 [consistency as to both defendants' guilt of crime does not justify inconsistency as to culpability, where pertinent to capital sentence].)

Here, the prosecutor argued that each deputy had his or her own subjective evaluation of the evidence's significance, and none should be bound by any position previously taken by the office. (10 CT 2855.) A prosecutor's closing argument is an especially critical period of trial. (*People v. Alverson* (1964) 60 Cal.2d 803, 805.) Since it comes from an

official representative of the People, it carries great weight. (*People v. Talle* (1952) 111 Cal.App.2d 650, 677.) To refer to a closing argument as a "subjective personal theory" is an Alice-in-Wonderland perspective that would justify any sort of arbitrary change in position on grounds of a change in the deputy who represents the prosecutor's office.

Under this approach, different prosecutors could have prosecuted each—appellant, Gabriel Flores and Cipriano Ramirez—of having had a finger on the trigger of the only gun used to shoot Javier Ibarra, simply because each prosecutor has a different "mind-set" when they weighed the same evidence. (60 RT 12684.)

Not only are prosecutors authorized to speak for the government in criminal cases, they can unquestionably bind the government on a range of legal matters through, for example, stipulations and plea agreements. (See *Santobello v. New York* (1971) 404 U.S. 257, 262 [declaring that fulfillment of the prosecutor's promise in return for guilty plea is a necessary safeguard for the defendant]; *United States v. Clark* (1st Cir. 1995) 55 F.3d 9, 12 [finding that the government breached a binding plea agreement with the defendant]; Weinstein, Federal Evidence § 801.33[3] (Joseph M. McLaughlin, Ed., 2d ed. Supp. 2000) ["some courts have indicated that [Federal Rules of Evidence] rule 801(d)(2)(D) may be invoked against the

government, particularly when dealing with statements made by government attorneys."].)

The focus on the subjective responses of various deputies district attorney eliminates objectivity from the process, and ignores the fact that each deputy represents the sovereign who is the actual party, and has the power to dispose of the case via a plea bargain, to make binding stipulations, to drop the case entirely, or take other actions that bind the prosecutor's office, regardless of what a subsequent prosecutor thinks appropriate. Were everything open to evaluation in the manner argued for by the prosecutor in this case, finality would be but one of this new system's casualties. Appellant's right to due process of law was violated by the prosecution's switch in theories despite the lack of any new evidence at all, and requires reversal of his death sentence.

E. Refusal to Allow Appellant to Inform the Jury About the Prosecutor's Previous Contradictory Arguments Prejudicially Violated Appellant's Right to Present a Defense, and to Due Process of Law

"Confidence in the justice system cannot be affirmed if any party is free, wholly without explanation, to make a fundamental change in its version of the facts between trials, and then conceal this change from the final trier of the facts." (*United States v. GAF Corp.* (2d Cir. 1991) 928 F.2d 1253, 1260.)

In the *Stumpf* case, where the prosecution argued in two separate trials that the defendant in each was the sole triggerman, two justices would not have remanded for a new sentencing hearing. Justice Thomas, joined by Justice Scalia, wrote that the new evidence of testimony regarding the identity of the triggerman would be treated like any other newly discovered evidence casting doubt on the reliability of the sentence:

> The Bill of Rights guarantees vigorous adversarial testing of guilt and innocence and conviction only by proof beyond a reasonable doubt. These guarantees are more than sufficient to deter the State from taking inconsistent positions; a prosecutor who argues inconsistently risks undermining his case, for opposing counsel will bring the conflict to the factfinder's attention. See *ante*, at 2408 (Souter, J., concurring) (noting that *Wesley's jury was informed that Stumpf had already been sentenced to death for the crime*).

(*Bradshaw v. Stumpf, supra*, 545 U.S. at pp. 191–192, emphasis added.)

Here, there was no such adversarial testing. The prosecutor successfully kept from the jury the fact that his office had twice before argued that Gabriel Flores was the triggerman. No new evidence was presented—only results of the same investigation that led to the prosecutions of Gabriel Flores and Cipriano Ramirez, twisted by prosecutorial questions and insinuations.

Assuming that the prosecution was allowed to present evidence and argument supporting a new claim that appellant was actually the person

who shot Javier Ibarra, the jury was entitled to know that the prosecution had already prosecuted Gabriel Flores and Cipriano Ramirez for that crime, and argued forcefully, supported by expert testimony as well as the critical testimony of Ms. Nunez and Ms. Mosqueda, that Flores was the shooter.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants "the right to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690–691; see also *Washington v. Texas* (1967) 388 U.S. 14, 22–23; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) The right to compulsory process and confrontation are independently guaranteed by the California Constitution. (Cal. Const., art. I, § 15.) "The defendant in a criminal cause has the right . . . to compel attendance of witnesses in the defendant's behalf . . . and to be confronted with the witnesses against the defendant." (*People v. Jacinto* (2010) 49 Cal.4th 263, 268–269; *People v. Riser*, *supra*, 47 Cal.2d at p. 571.)

The prosecutor's view was that the Kern County District Attorney's office is made up of entirely separate deputy district attorneys, each with his or her own subjective view of the facts of any case that can be at odds with another deputy's view of the facts, and that this fact is not "relevant" to any proceeding. (See 10 CT 2855.) Relevant evidence is "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." (Evid. Code, § 210.) The reason the prosecutor fought to insure that the jury would not learn about its contradictory positions is that these facts would have had a devastating effect on the prosecutor's credibility in general as well as on his argument that appellant was the actual shooter. It is patent that the prosecutors' previous arguments on these same facts were relevant.

In California, Evidence Code section 1220 provides, "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." Why does this not apply to previous closing arguments regarding the shooting of Javier Ibarra? The closing argument contains the prosecutor's version of events and their context. It likely explains why the prosecutor did what he or she did in exercising discretion throughout these and related proceedings. The jury deciding appellant's fate needed to know about these prior decisions.

A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing

the interests, and in exercising the sovereign power, of the state. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.) As the United States Supreme Court has explained, the prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

The People of California, here represented by the Kern County District Attorney's office, may not hide their previous actions and contentions under the guise of hearsay, and certainly not of "irrelevance." In lieu of calling prosecutors Brownlee and Kohler to the witness stand, appellant's jury should have been able to read the transcripts of their closing arguments, which the prosecutor had stipulated to as being in evidence "for all purposes."

Appellant was deprived of his Sixth, Eighth, and Fourteenth Amendment rights to present a defense, to due process of law, and to a reliable penalty determination by the trial court's refusal to allow his jury to hear that the prosecutor had twice previously argued to two different juries that Gabriel Flores was the man who shoot Ibarra.

F. The Prosecutor Committed Misconduct by Deceptively Preparing and Presenting an Improper Argument Regarding the Javier Ibarra Case

The prosecutor's inconsistency was compounded by deception. In the spring of 2000, the prosecutor provided appellant with a notice of aggravation that suggested he intended to use the killing of Javier Ibarra, not to show that appellant was present or even that he was part of a conspiracy, but to show that he was, contrary to arguments in the two previous trials of Gabriel Flores and Cipriano Ramirez, the actual shooter of Javier Ibarra. For this purpose, he provided counsel with a copy of Cipriano's testimony at his own trial—testimony that the prosecutor had previously ridiculed and called a fabrication from start to finish. It was this action that triggered appellant's motion to recuse the prosecutor's office filed on June 6, 2000. (See Arg XV, *ante*.)

After much procedural jousting, it seemed that the prosecutor had withdrawn this aim, as well as its desire to present Cipriano's testimony, and settled for the presentation of evidence showing at the most that appellant was guilty of being an aider and abettor to that crime or a conspirator with a target crime of murder. This was the ruling made by the trial court on March 7, 2001 (54 RT 12189), and repeated on March 13, 2001 (56 RT 12609).

The prosecution's questioning of witnesses, however, made it clear that he was reverting to his original goal—a goal which he apparently never left behind. He presented hearsay testimony via Javier Ibarra's brother, Jesse, that Alma Mosqueda told him the day after the shooting that appellant was wearing a white hat. There was no contemporaneous record of this, and Alma had no memory of ever saying it. The prosecutor presented evidence of a mustard-colored hat found in appellant's presence two days later and seized by Deputy Daniel Fuqua, and made that hat an exhibit in this case. He called appellant's uncle, Geraldo Soto, and suggesting via its questions that appellant was wearing a white hat on the night of the shooting, and not a "blue hat" later that evening as described in the earlier police reports. (58 RT 12921, 12941–12946, 12953, 12977.)

The rule is well established that the prosecuting attorney may not interrogate witnesses solely for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given. (*People v. Wagner*, *supra*, 13 Cal.3d at p. 619 .) The questioning of appellant's uncle violated this principle, as did the prosecutor's questioning of Alma Mosqueda.

Ms. Mosqueda had been called by the prosecution on four prior occasions to testify the Gabriel Flores wore the "white hat." (57 RT 12810; 12807–12808.) However, the prosecutor's questioning of her at appellant's trial suggested that she was confused in the her description of the clothing of the shooting or that only two people were present, appellant and his brother Cipriano, because Gabriel Flores's name was not immediately reported to police. (57 RT 12786–12788, 12792, 12793, 12822.) Alma testified that she did not immediately mention Gabriel because she did not know his name; there was no dispute that three people confronted Javier Ibarra.

Ms. Mosqueda remembered talking with Jesse Ibarra the day after the shooting, but could not remember saying anything to him about a white hat. The prosecutor accordingly presented testimony from Jesse Ibarra to testify that Alma told him the next day that appellant was wearing a white hat. These hearsay assertions were enough for the prosecutor to overlook Ms. Mosqueda's direct and oft-repeated testimony about what she saw, as well as the other evidence and arguments it had previously presented. For the prosecutor to flatly assert in closing argument that appellant shot Javier Ibarra, to say so over and over and to cite this as a sufficient basis to overcome all mitigating evidence, was gross misconduct.

The fact that it was sanctioned by the trial court with a classic logical fallacy, i.e., an aider and abettor is a principal, and a perpetrator is a principal, and therefore an aider and abettor is a perpetrator, does not wash away the prosecutor's deceptive and prejudicial misconduct. (*People v. Pitts*, *supra*, 223 Cal.App.3d at p. 795.) Hence, appellant's death sentence must be vacated.

G. This Evidence Was Prejudicial

The prejudicial impact of this prior murder was profound. It undermined appellant's defense, which was that the actual shooting of Chad Yarbrough in the dark and from a distance of several feet, was a freak accident that came about when he jammed a clip into the weapon, which promptly spit out three bullets in less than a quarter of a second. The evidence at issue in the Ibarra case changes the picture of appellant from someone with no serious prior offenses to an experienced killer.

In closing argument, the prosecutor repeatedly charged appellant with deliberately killing Javier Ibarra, and told the jury that this fact "was enough to overcome any and all mitigating evidence presented by appellant." It was the heart of his argument that appellant was too dangerous to be allowed to live. (See 62 RT 13746, 13749, 13756, 13758.) It cannot be said beyond a reasonable doubt that the presentation of this

argument to appellant's jury made no difference in the jury's determination of whether or not a death sentence was appropriate. Appellant's death sentence must be overturned.

XVII. THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT APPELLANT PERSONALLY SHOT JAVIER IBARRA OR WAS PART OF A CONSPIRACY TO KILL JAVIER IBARRA.

Over repeated objections by appellant, the prosecution was allowed to and did introduce evidence and argument of the 1995 shooting of Javier Ibarra into the penalty phase of his trial, and named appellant as the shooter. (See XVI, *ante*.)

There was insufficient evidence to place before a penalty phase jury either the alleged conspiracy to commit murder or the scenario that appellant personally shot and killed Javier Ibarra. This "evidence" was a critically important piece of the prosecutor's case for death and was highly prejudicial.

A. Applicable Legal Standards; Review of the Evidence

The United States Supreme Court has made it clear that the "fundamental respect for humanity" underlying capital jurisprudence gives rise to "a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584, quoting *Gardner v. Florida* (1977) 430 U.S. 349, 363–364 (conc. opn. of White, J.), quoting *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Consequently, the evidence used to select death

over life must be reliable. (*Gardner*, *supra*, 430 U.S. at pp. 359–361; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428.)

Because evidence of other crimes may be particularly important to a jury considering penalty, state law provides that no juror may consider such evidence unless first convinced of its truth beyond a reasonable doubt. (*People v. Cowan* (2010) 50 Cal.4th 401, 489.) A penalty phase jury is instructed about reasonable doubt in connection with section 190.3, factors (b) and (c), namely, that before the jury can consider any prior felony convictions or any unadjudicated violent criminal activity as aggravating circumstances, it must be satisfied beyond a reasonable doubt that the defendant had in fact been convicted of the prior crime or committed the unadjudicated criminal activity. (*People v. Gonzales* (2011) 52 Cal.4th 254, 328; *People v. Morrison* (2004) 34 Cal.4th 698, 730–731; *People v. Williams* (2010) 49 Cal.4th 405, 459.) Appellant's jury was so instructed. (See 17 CT 5107, 62 RT 13726.)

When considering a challenge to the sufficiency of the evidence, this Court will review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable

doubt. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 104.) The relevant inquiry is "'whether, after viewing the evidence in the light most favorable to the People, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.'" (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 225, quoting *People v. Mickey* (1991) 54 Cal.3d 612, 678, fn. omitted.)

This Court does not, however, limit its review to the evidence favorable to the respondent.

> As *People v. Bassett*, *supra*, 69 Cal.2d 122, explained, "our task . . . is twofold. First, we must resolve the issue in the light of the *whole record*—i.e., the entire picture of the defendant put before the jury—and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in light of other facts.'" (69 Cal.2d at page 138.) [Fn.]

(*People v. Johnson* (1980) 26 Cal.3d 557, 576–577, emphasis in original.)

Although the test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact, and not whether the evidence shows to the reviewing court that guilt was established beyond a reasonable doubt, the evidence must do more than merely raise a strong suspicion of the appellant's guilt. "Evidence which merely raises a strong suspicion of

the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility and this is not a sufficient basis for an inference of fact." (*People v. Redmond*, *supra*, 71 Cal.2d at p. 755.)

B. Conspiracy

To establish conspiracy to commit murder, the prosecution must show not only that the conspirators intended to agree, but also that they intended to commit first degree murder. (*People v. Swain* (1996) 12 Cal.4th 593, 602; *People v. Cortez* (1998) 18 Cal.4th 1223, 1237.) An agreement to murder necessarily involves the "willful, deliberate and premeditated" intention to kill a human being. Thus, a conspiracy to commit murder is necessarily a conspiracy to commit premeditated first degree murder. (*Cortez, supra*, at p. 1237.)

Here, the only evidence of planning is the three men's arrival at the apartment together shortly after learning that Ibarra was present, Alma Mosqueda's efforts to get Ibarra out of the apartment as a "precaution," and Cipriano Ramirez's directive to the women to go back into the apartment. While this evidence may establish that appellant, Cipriano, and Flores planned to confront Ibarra is some physical way, it does not establish that the three men had agreed to and intended to kill him.

The only testimony resembling evidence of motive is Mosqueda's testimony that she had heard that Cipriano and Ibarra had been in a fight earlier but did not know if in fact they fought. Mosqueda testified that there was no known problem between appellant and Javier Ibarra. (57 RT 12800–12801.) This weak nonspecific evidence of ill will between Cipriano and Ibarra is not probative of a shared intent to kill.

The manner of the killing does not indicate a premeditated and deliberate killing. It appeared to be an act by Gabriel Flores in response to a fistfight between Cipriano, appellant and Ibarra. (57 RT 12797.) However, given that Cipriano and Ibarra had engaged in an earlier fight and no one was killed or engaged in the last fight, this fistfight does not indicate that either Cipriano or appellant knew Flores was armed or intended to kill Javier, and does not establish in any way an intent to kill on appellant's part.

In short, the evidence may establish that appellant, Cipriano, and Flores planned to confront Ibarra in some way, but it does not establish that the three men had agreed to and intended to commit a premeditated killing. (Compare *People v. Han* (2000) 78 Cal.App.4th 797, 799–805, and *People v. Tran* (1996) 47 Cal.App.4th 759, 772–772 [evidence of conspiracy to commit murder was held to be substantial].) Accordingly, there is

insufficient evidence to support the finding of a conspiracy to commit murder.

C. The Evidence Was Constitutionally Insufficient to Show that Appellant Shot Javier Ibarra

The evidence before this jury was that Alma Mosqueda had testified four times under oath that Gabriel Flores was wearing a white hat and that she said as much to a prosecution investigator in October of 1997; that Jesse Ibarra testified that the on the day following the shooting of Javier that Mosqueda told him that appellant was wearing a white hat (Alma reported having no memory of this); and that appellant told Deputy Hall upon being arrested two days later that he wore a mustard-colored hat and that neither Gabriel nor Cipriano wore hats; and that appellant lied about not being present at the shooting at that interview by Hall. (See closing argument at 62 RT 13755–13756.)

There are no contemporaneous records of any of this hearsay—Hall's report does not mention it, nor was Jesse Ibarra's statement recorded by the officers who interviewed him at the time of the crime. Appellant's lie exactly matched the lies of Cipriano and Gabriel, and does nothing to show that he pulled the trigger. There is nothing here of solid evidentiary value. In addition to the fact that the prosecution's office had twice before told

juries that Gabriel Flores was the shooter, there is no substantial evidence showing that appellant pulled the trigger.

D. This Evidence Was Prejudicial

The impact of a prior murder in this case was profound, and prejudicial. (See Arg. XVI.G, *ante*.) Appellant's death sentence must be set aside.

XVIII. APPELLANT'S RIGHT TO CONFRONT AND CROSS-EXAMINE THE PROSECUTION'S WITNESSES AGAINST HIM WAS VIOLATED BY INTRODUCTION OF HEARSAY STATEMENTS ALLEGEDLY MADE BY CIPRIANO RAMIREZ.

On March 16, 2001, the trial court found that Cipriano Ramirez was unavailable as a witness, having invoked his Fifth Amendment privileges. (58 RT 12873.) Over objections, the trial court allowed the prosecution to introduce hearsay statements of Cipriano Ramirez regarding the shooting of Javier Ibarra that once he learned that Javier Ibarra was at Christina Rodriguez's house, he was coming over "to take care of business," via the testimony of Deputy Robert Contreras (57 RT 12838–12839), Alma Mosqueda (57 RT 12775, 12823–12824), and Jesse Ibarra (58 RT 12976.) Appellant moved to strike the hearsay testimony of Cipriano and have the jury admonished, and moved for a mistrial. The court denied all motions. (59 RT 13028.)

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants "the right to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690–691; see also *Washington v. Texas* (1967) 388 U.S. 14, 22–23; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) The right to compulsory process and

confrontation are independently guaranteed by the California Constitution. (Cal. Const., art. I, § 15.)

> The defendant in a criminal case has the right . . . to compel attendance of witnesses in the defendant's behalf . . . and to be confronted with the witnesses against the defendant . . . [t]he right of an accused to compel witnesses to come into court and give evidence in the accused's defense is a fundamental one.

(*People v. Jacinto*, *supra*, 49 Cal.4th at pp. 268–269; *People v. Riser*, *supra*, 47 Cal.2d at p. 571.)

The United States Supreme Court has consistently refused to admit against a defendant evidence of extrajudicial statements of a codefendant or accomplice that implicates the defendant in the commission of a crime. Such statements are presumed to be unreliable: "Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect. . . . The unreliability of such evidence is intolerably compounded when the alleged 'accomplice,' as here, does not testify and cannot be tested on cross-examination." (*Bruton v. United States* (1968) 391 U.S. 123, 136; see also *Lee v. Illinois* (1986) 476 U.S. 530, 540–541.) This Court anticipated these cases. (*People v. Aranda* (1965) 63 Cal.2d 518.)

Earlier, the prosecutor's office accused Cipriano of perjury in his own trial for the crime of killing Javier Ibarra for, among other reasons, lying to the police in his first interview after the crime. (See Arg. XVI.B,

ante.) In the present case, the trial court allowed the prosecutor to introduce into evidence appellant's own statement given when he was first interviewed after the death of Javier Ibarra, and argued to the jury that it was a lie—but that statement was identical to the statement first made by Cipriano and Gabriel Flores.

The chief evidence relied on by the prosecution to argue there was a conspiracy to kill Javier Ibarra was the hearsay testimony of Cipriano Ramirez. Without these statements, there would remain only the act of shooting Javier Ibarra. As we have seen, there is no substantial evidence of a conspiracy to commit murder even with Cipriano's statements—without them, there is nothing whatsoever to support appellant's involvement in a plan to kill Javier Ibarra. For this reason as well as many others, appellant's death sentence must be reversed.

XIX. APPELLANT WAS PREJUDICED BY THE INTRODUCTION OF UNADJUDICATED CRIMINAL ACTIVITY AGAINST HIM.

A. Factual and Procedural Background

On February 23, 2001, the prosecutor filed a motion to include the "dope/gun case" as an aggravator under section 190.3, factor (b), along with the March 1995 shooting of Javier Ibarra. (15 CT 4307 et seq.) Appellant filed an opposition to this motion on February 26, 2001. (15 CT 4312 et seq.) Appellant then filed a general motion to exclude evidence of unadjudicated criminal activity in this case (15 CT 4366 et seq.) Further motions were filed on this question by appellant (15 CT 4405) and the prosecutor. (15 CT 4424.)

The matter was argued on March 6, 2001. (54 RT 12000 et seq.) The trial court found that the evidence showed appellant was present with both drugs and the firearm, and the firearm was available for defendant to put to immediate use to aid in the drug possession, and the presence of the gun and drugs was not accidental or coincidental. The trial court ruled the evidence showing appellant's presence near both the drugs and the weapon was admissible pursuant to section 190.3, factor (b), because it involved the express or implied threat to use force or violence. (54 RT 12025–12026.)

The trial court erred. These facts do not establish a threat within either the ordinary or the legal sense of the word.

B. The August 1997 Arrest of Appellant Did Not Involve Violence or the Threat of Violence

The United States Supreme Court has made it clear that the "fundamental respect for humanity" underlying capital jurisprudence gives rise to "a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." (*Johnson v. Mississippi*, *supra*, 486 U.S. at p. 584, quoting *Gardner v. Florida*, *supra*, 430 U.S. at pp. 363–364 (conc. opn. of White, J.), quoting *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Consequently, the evidence used to select death over life must be reliable and non-arbitrary. (*Gardner*, *supra*, 430 U.S. at pp. 359–361; *Godfrey v. Georgia*, *supra*, 446 U.S. at p. 428.)

In *People v. Boyd* (1985) 38 Cal.3d 762, 773–775, this Court held that California's death penalty law precludes the jury from considering evidence offered in aggravation unless it is relevant to one of the factors listed in section 190.3. Factor (b) of section 190.3 provides that the sentencer may consider as an aggravating circumstance "the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence."

Because evidence of other crimes may be particularly important to a jury considering penalty, state law provides that no juror may consider such evidence unless first convinced of its truth beyond a reasonable doubt. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 489.) A penalty phase jury is instructed about reasonable doubt in connection with section 190.3, factors (b) and (c), namely, that before the jury can consider any prior felony convictions or any unadjudicated violent criminal activity as aggravating circumstances, it must be satisfied beyond a reasonable doubt that the defendant had in fact been convicted of the prior crime or committed the unadjudicated criminal activity. (*People v. Gonzales*, *supra*, 52 Cal.4th at p. 328; *People v. Morrison*, *supra*, 34 Cal.4th at pp. 730–731; *People v. Williams*, *supra*, 49 Cal.4th at p. 459.) Appellant's jury was so instructed. (See 17 CT 5107; 62 RT 13726.)

The salient facts are that on August 22, 1997, police entered the apartment of Denise Suarez. Appellant was found hiding in the apartment in close proximity to two or three lines of methamphetamine. A handgun was close to appellant in a woman's purse. Appellant admitted to possession of the gun and drugs in a subsequent statement. Charges were pending at the time of appellant's penalty phase trial (counts 10 and 11).

Section 190.3, factor (b) directs the jury to take into account at the penalty phase "[t]he 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." Section 190.3 also states that no evidence of criminal activity shall be admitted at the penalty phase that does not meet the criteria set forth in factor (b) (excepting evidence of prior convictions).

In *People v. Boyd*, this Court held that evidence of an escape attempt that did not involve the use of force or violence against persons was not within the scope of criminal activity contemplated by factor (b), and was therefore inadmissible. The Court rejected an argument that the term "force or violence" could be construed to mean the violent injury to property, such as the removal of the metal grating to an air vent in that case, and stated: "The purpose of the statutory exclusion is to prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision." (*People v. Boyd*, *supra*, 38 Cal.3d at p. 776; see also *People v. Bacigalupo* (1991) 1 Cal.4th 103, 148.) "Such evidence must involve actual, attempted, or threatened force or violence against a person, and not merely to property." (*People v. Wallace* (2008) 44 Cal.4th 1032, 1079.)

There was no indication that the gun was illegal. No evidence showed that it was ever involved in any criminal business. Appellant was hiding under a bed, menacing no one before, during, or after the deputies' entrance into Ms. Suarez's apartment. There was no threat, express or implied.

In *People v. Bland* (1995) 10 Cal.4th 991, relied on by the trial court (54 RT 12023), this Court held that ready access to a weapon constitutes "arming" for purposes of the sentencing enhancement statute (§ 12022) when possessing both drugs and guns kept together, even though defendant was not present when officers searched his house. Being armed, however, does not automatically translate into a threat. The defendant in *Bland* was not, and could not have been, charged with threatening anyone.

In addition to *Bland*, the trial court relied on *People v. Garceau* (1993) 6 Cal.4th 140, 198–200, in which the crimes at issue were possession of a machine gun, kidnapping, and possession of an explosive device by an ex-felon, but these facts only highlight how little of a threat was posed to anyone by the facts of appellant's case. The trial court reasoned that the gun's proximity to drugs created an implied threat to use force or violence, but the mere propinquity of two inanimate objects has

never been held by any court to constitute a threat. Here, the gun itself was legal, unlike the silencer and machine gun in *Garceau.*[128]

Presenting the jury with this prior instance of misconduct corroborated the prosecutor's view of appellant as one familiar with weapons and accustomed to using them—and made it more likely that the jury would believe the other, especially damning instance of uncharged misconduct—that appellant personally shot and killed Javier Ibarra.

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[128] The prosecutor later expressed reservations about the use of this incident as an aggravator. (64 RT 13886-13887.) In response to appellant's motion to dismiss counts 10 and 11 in the interests of judicial economy after appellant was convicted of the first nine counts and sentenced to death, he noted that the trial court's finding of a threat solely on the basis of proximity of the gun to drugs was unprecedented, and might be overturned on appeal. He argued that should this case be reversed, he wanted to be able to present a subsequent penalty phase jury with a prior felony conviction pursuant to section 190.3, factor (c) for these acts rather than to try again to present them to the jury under section 190.3, factor (b). (See Arg.XXVIII, *post.*)

XX. THE TRIAL COURT PREJUDICIALLY ERRED AND THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT WHEN APPELLANT WAS IMPEACHED WITH ASSERTIONS BY THE PROSECUTOR ABOUT CONDUCT UNDERLYING A 1994 MISDEMEANOR NO CONTEST PLEA WHICH INVOLVED NO MORAL TURPITUDE.

On November 28, 2000, appellant filed a motion in limine to limit prior conduct used for impeachment if appellant elected to testify. (11 CT 3250.) The prosecutor filed a motion in limine to allow impeachment evidence of appellant on November 29, 2000. (11 CT 3268.) The parties addressed the question of which prior acts could be admitted to impeach appellant on November 30, 2000. (8 RT 2168 et seq.)

The parties agreed that under the case of *People v. Wheeler* (1992) 4 Cal.4th 284, acts that did not amount to a felony conviction, but did involve moral turpitude as defined in *People v. Castro* (1985) 38 Cal.3d 301, 316–317, could be admitted subject to the court's discretion under Evidence Code section 352.

Appellant argued that this prior incident should not be used to impeach appellant, for several reasons: (1) the elements of an auto theft were so close to carjacking charges that it would be the sort of propensity evidence forbidden by Evidence Code sections 1101 and 1101, subdivision (a), and that appellant did not actually steal the car. The police reports were given to the court for review, and they showed that appellant was not

present when the car was stolen. He pled no contest to a "joyriding" charge that did not involve any moral turpitude; there was no evidence of an intent to steal. (9 RT 2372.)

The prosecutor did not disagree with the legal principles set forth by counsel for appellant, but contended that an intent to steal may have arisen at the point where appellant fled from the police. (9 RT 2374.)

The trial court relied on *People v. Wheeler*, *supra*, 4 Cal.4th 284, and quoted the following language to direct its exercise of Evidence Code section 352:

> [A]dditional considerations may apply when evidence other than felony convictions is offered for impeachment. In general, a misdemeanor or any other conduct not amounting to a felony is a less forceful indicator of immoral character or dishonesty than is a felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, moral turpitude evaluation, which felony convictions don't present. Hence, courts may and should consider with particular care, whether the admission of such evidence might involve undue time, confusion or prejudice which outweighs its probative value.

(*People v. Wheeler*, *supra*, 4 Cal.4th at pp. 296–297.)

The trial court then applied the standard of beyond a reasonable doubt to the question of whether or not the prior conduct under the prosecutor's offer of proof (the police report) constituted moral turpitude such that it could be used to impeach appellant, and found that it did not.

[THE COURT:] I'm going to find that the appropriate standard should be proven beyond a reasonable doubt. That's my ruling. So I'm applying that standard now in terms of assessing offers of proof as to conduct which may involve moral turpitude. And are you prepared to submit it on the 1994 theft allegation?

MR. GARDINA: Yes.

MR. BARTON: Your Honor, you've already told me I don't get it in on that one. And I submitted on that, already.

THE COURT: And I'm confirming that I've applied the burden of proof beyond a reasonable doubt, and now I'm going to confirm my ruling, that I don't find there's been an adequate showing of evidence that would rise to the level of truth beyond a reasonable doubt to admit that.

(9 RT 2382–2383.)

The court offered the prosecutor an opportunity to reopen with additional evidence. The prosecutor said he would not reopen the question of using that 1994 incident to impeach appellant unless he found "case law supporting the evasion itself as moral turpitude." (9 RT 2283.)

Three months later, on the eve of appellant's testimony, memories had faded. When the parties addressed the issue of what prior acts could be used to impeach appellant, the prosecutor said,

[MR. BARTON:] Counsel and I discussed it, and there's a discrepancy on what the Court's ruling was on in limine, if you recall, for this witness.

THE COURT: That's a cross-examination issue.

MR. BARTON: Well, he may want to bring it out if the Court says it's coming in. As I recall, I get to impeach him with the fact that he had the misdemeanor conduct, not a conviction but misdemeanor conduct of auto theft and also—

MR. GARDINA: Joyriding.

MR. BARTON: Well, Counsel calls it joyriding. And also with the fact that he provided drugs to someone in the furnishing case or the case actually he was out on bail, which we have all heard about. Counsel's recollection and my notes indicate I can't mention the gun that was seized in that case, and I had withdrawn any efforts to get into the 1995 murder case.

(47 RT 10370.)

The trial court then looked for its notes taken back when the parties discussed impeachment at the guilt phase:

THE COURT: I have not had a chance to look back at my notes on the in limine motion. Which motion was that?

MR. BARTON: It was People's motion in limine to allow impeachment of the defendant. I had it numbered as three, but that might have been my numbering and not the Court's.

THE COURT: With regard to the other offers of proof of alleged moral turpitude conduct—

MR. BARTON: I think we have agreed on what the prior rulings were on those, Judge.

THE COURT: Well—

MR. BARTON: The only one we had was this incident about the shank. I'm not going to try to get into the other stuff the Court ruled on.

THE COURT: All right. Your recollection is that my tentative ruling, if it was a tentative, was to admit evidence of the auto—

MR. BARTON: Just the conduct.

THE COURT: The conduct.

MR. BARTON: It ended up being a misdemeanor conviction; so the conviction is irrelevant. And it was just the conduct. And the Court said that it was tentative, and my recollection is because there's a 352 issue. If we got the shank issue in, maybe we wouldn't get the auto issue in. If we got the auto incident in, maybe we wouldn't get the shank incident in. You couldn't really come down to 352, as far as ultimate incident to impeach, without having that 402. Is that what you recall, Mr. Gardina?

MR. GARDINA: I'm sorry?

THE COURT: That's consistent with my notes. With regard to the offer of proof on the shank incident, I can indicate a tentative, and

> Counsel can then argue it. But my tentative would be that if we admit evidence of the auto-related conduct, what we have described as auto theft or joyriding, admit that, admit evidence of the furnishing of drugs. You have got two separate incidents involving allegations of moral turpitude. And then, under 352, from a cumulative standpoint, we could exclude evidence of the shank.

(47 RT 10375–10376.)

Accordingly, when appellant came to the witness stand moments later, he was asked, "first of all, as a adult, you have a conviction for a misdemeanor; correct?

A. Yes, I do.

Q. And did you plead no contest to joyriding?

A. Yes, I did.

(47 RT 10379.)

On cross-examination, the prosecutor began by stating, "The other incidents that you stated to counsel you were involved in, I think he referred to it as a joyriding. That's when you were in a stolen car fleeing from the police that flipped and ejected people, right?

MR. GARDINA: Objection, improper impeachment.

THE COURT: Overruled.

THE WITNESS: Yes.

MR. GARDINA: Can we reserve a motion, your Honor, at this point.

THE COURT: You can reserve.

(47 RT 10448–10449.)

Later, when arguing appellant's "reserved" prosecutorial misconduct objections, the trial court stated its recollection of its ruling, which was that it had considered the auto theft conviction along with the "shank" incident, and since it was excluding the shank incident, it had allowed the appellant to be impeached by the auto theft incident. Therefore, the motion for prosecutorial misconduct in bringing up facts behind the misdemeanor conviction was denied.

The trial court's ruling was wrong in several ways. When it had time to read the relevant police reports, and carefully consider the law, prior to jury selection, it saw that there was no legal justification, pursuant to relevant case law, to allow appellant to be impeached by the conduct described in a police report that underlay his no contest pleas to a misdemeanor conviction of violating Vehicle Code section 10851. (9 RT 2382.) This ruling was correct.

People v. Wheeler, supra, concerned whether witnesses in a criminal proceeding might be impeached with misdemeanor convictions. This Court held that after passage of Proposition 8's Truth-in-Evidence amendment to

the California Constitution (Cal. Const., art. I, § 28, subd. (d)), evidence of past misdemeanor conduct bearing on a witness's veracity was admissible in a criminal proceeding subject to the trial court's discretion. *Wheeler* affirmed the requirement set out in *People v. Castro, supra*, that for conduct to bear on a witness's veracity, it had to indicate moral turpitude.

Moral turpitude is not shown where there is no evidence of an intent to steal. The prosecutor argued that an intent to steal was formed once appellant sought to avoid the police, after the car had been taken by others, but that view was rejected by the trial court, which considered the only evidence proffered by the prosecutor (a police report) as not constituting sufficiently reliable evidence of moral turpitude to be used to impeach appellant.

The court's in limine ruling did not hinge on what it would later decide to do with the allegation known as the "shank" incident, which was taken up after the court rejected the prosecutor's request to use facts underlying the 1994 misdemeanor conviction. (9 RT 2384 et seq.) Nor did the trial court indicate that the ruling was tentative. The evidence was not admissible at all, and should never have been included in any effort to balance prejudice against probable value pursuant to Evidence Code section 352. (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 295.)

As noted above, "A prosecutor commits misconduct when his or her conduct either infects the trial with such unfairness as to render the subsequent conviction a denial of due process, or involves deceptive or reprehensible methods employed to persuade the trier of fact." (*People v. Dement, supra*, 53 Cal.4th at p. 49.)

The prosecutor presented to the trial court—and appellant's counsel—a confident, but false, version of what had happened three months earlier during the consideration of in limine motions regarding the use of appellant's only prior conviction. Its false version prevailed.

It cannot be discerned from this record whether or not it was accidental, but the effects were the same—appellant was impeached with his admission, and with a damaging depiction of the conduct at issue by the prosecutor, that the trial court had correctly ruled could not be used to impeach appellant. This allowed the prosecution to begin its cross-examination of appellant by labeling him as a car thief, in a case where carjacking was a chief part of two courses of criminal conduct charged in separate counts. It cannot be said beyond a reasonable doubt that this error did not affect the jury's consideration of the charges against appellant or his sentence. His death sentence must therefore be reversed. (*Chapman v. California, supra*, 367 U.S. at p. 23.)

XXI. THE EVIDENCE PROFFERED BY THE PROSECUTION AS REBUTTAL EVIDENCE WAS TOO SPECULATIVE AND AMBIGUOUS TO BE USED FOR ANY PURPOSE.

A. Procedural Background

On February 21, 2001, the prosecutor filed a motion seeking to allow evidence of a "jail shank conspiracy" into evidence as an aggravator during the penalty phase. (15 CT 4274.) Appellant opposed the motion in a reply filed on February 26, 2001. (15 CT 4316.) A hearing pursuant to Evidence Code section 402 was held on March 6, 2001.

B. "Shank" Evidence

Officer Toody Clites worked as deputy sheriff in Lerdo, the jail where appellant was housed during his trial. (54 RT 12038.) She testified that on August 3, 1998, she heard over the intercom inmate Stearns talking with inmate Ruiz, who told him that "I'm sick and tired of all those pussy snivelers, stupid snitch bastards." (54 RT 12053.) Stearns replied, "Cheesy rats." Ruiz said, "The next time those fuckers toss my cell it's fucking on." Stearns then replied, "I'm going to take those fuckers out, too." (54 RT 12054.)[129] At some point, Stearns added, "Yeah, mother fuckers, you tell me when, brother, I'm with you all the way." (54 RT 12055.)

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[129] It's not entirely clear which statement was made by which inmate. (See 54 RT 12054, ll. 6–20.)

When asked if she heard either inmate talking about the production of weapons, Officer Clites answered yes, and quoted Stearns as saying, "So they fixed the shit. We'll just get new stuff. These people are fucking stupid." Inmate Stearns then went to speak with inmate Castro, in Cell 606. When Clites flicked the lights and told him his day room was over, Stearns went back to his cell, and inmate Castro came out and talked with inmate Ruiz. (54 RT 12057.) Castro told Ruiz, "They found my stuff. I had it by the vent. No worry, Loco. It's on, and I'm with you."[130] Ruiz then said something to Castro about shanks that had been seized from him (54 RT 12057.)

Clites testified that Castro then went upstairs and talked with Stearns. Stearns said, "Yeah, tear out the caulking on the window and seal it back with the caulking or wet towel, toilet paper. Stuff it in the area where the caulking ceilings and push it out." (54 RT 12058.) Stearns added, "I'm going down, man, for a long fucking time. So I ain't hesitating on getting the fuck out of here or taking officers out." (54 RT 12059.)

Castro then went back to his cell, and appellant asked to come out to the day room. He went upstairs and spoke to inmate Stearns. Stearns told

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[130] This reference to appellant's nickname is confusing, since he was not yet part of the scene attested to by Officer Clites, but it was never clarified.

him about "what had gone on with himself and Ruiz and Castro." They were talking about snitches and shanks and officers. (54 RT 12060.)

Clites testified that Stearns said they were fed up and they were tired and the next time the guards tossed their house or harassed them that it was going to be on, and appellant then said, "Count me in." (54 RT 12061.) Clites also testified that Ruiz said, "It's fucking on, Loco [appellant's nickname]," and appellant answered, with "Count me in." (54 RT 12062–12063.) Clites added that her notes indicate that when appellant was talking to Stearns, they talked about making additional shanks, and about taking officers out. (54 RT 12065.)

On cross-examination, Officer Clites testified that she never saw a shank in appellant's possession; the shanks she saw on the day in question had been confiscated the night before from the cells of Ruiz and Stearns. Officer Clites was very concerned about officer safety, and wrote down everything she heard that was relevant to that topic. She did not write down anything that appellant said to Mr. Castro, or that Castro said to appellant. Regarding appellant's conversation with Stearns, she did not write down anything exactly that Stearns was saying. She remembered that it was some kind of summary about shanks and officers and cells being tossed. When

she heard appellant say, "I'm in, man," he was walking away from Stearns, going down the stairs back to his cell. (54 RT 12080–12081.)

The trial court found this evidence to be insufficient to show a conspiracy, and to be inadmissible under section 190.3, factor (b), but said "there may be other reasons why it could be admissible, and certainly rebuttal evidence is one theory that comes to mind depending on what evidence the defense might offer in terms of mitigation." (54 RT 12142.)

C. Drive-By Shooting

On March 22, 2001, the trial court ruled that it would allow Kern County Sheriff's Deputy Chavez to testify that years earlier, three carloads of juveniles suspected of a drive-by shooting at a residence were stopped. The report of this incident was given to the defense for the first time earlier that same day Deputy Chavez was to testify. The prosecutor's offer of proof was that appellant was found in one of the vehicles. (61 RT 13485–13486.)

Officer Chavez also would testify that there were 22-caliber casings on the rear passenger floor board that matched the four casings found in front of the home that was shot at. (61 RT 13485.) The trial court ruled that this evidence was sufficient to be presented to the jury by the prosecution to rebut any evidence appellant might present showing that he was a victim of

violence, in order to show that appellant may have been engaged in violent activity himself. (61 RT 13487.)

After argument on the question of when and how the "shank" evidence could be used by the prosecution, the trial court tentatively ruled that if appellant sought to present evidence regarding his good behavior at Camp Owen as a predictor of his future behavior, it would allow evidence of the Lerdo shank incident. (54 RT 12366.)

The evidence alluded to by the trial court was evidence via a counselor/probation officer Cegineiro and contemporary records of appellant's behavior at Camp Owen, where he had been incarcerated for three months as a 15-year-old. Counsel noted that he couldn't have written better reports himself:

> [Appellant] was found to be a peacemaker, he got along with all races, and ethnic groups, he could be used to settle disputes by the staff. He followed direction. He only needed to be corrected once and just numerous very positive statements—statements to the effect that he had moved and done things to get away from gang activity, and avoided gang activity in Camp Owens.

(49 RT 12350.)

The trial court ruled that if counselors from Camp Owen were to limit themselves to a specific character trait, e.g., he got along with all races, that would not open the door, but if any witness said that he was

well-behaved and complied with the rules, the "Ierdo shank incident would then become relevant." (49 RT 12366–12367.)

The trial court's ruling was wrong. Penalty phase rebuttal evidence is proper if it relates directly to a particular character trait defendant offers in his own behalf. (*People v. Chatman* (2006) 38 Cal.4th 344.) In *Chatman*, testimony of defendant's juvenile probation officer that defendant was untruthful, violent, volatile, and a "ticking time bomb" was proper rebuttal to defendant's penalty phase testimony that he had become like a mother and father to his siblings and had protected his mother. (*Id.* at p. 402.)

The prosecution may rebut mitigating penalty evidence with unfavorable revelations about the defendant. In rebuttal, the prosecution is bound neither by its statutory pretrial notice of aggravating evidence set forth in section 190.3, nor by the aggravating factors set forth in the statute. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 791; *People v. Boyd*, *supra*, 38 Cal.3d at pp. 775–776.) The possibility of damaging rebuttal is a necessary consideration in counsel's decision whether to present mitigating evidence about the defendant's character and background. (See *Burger v. Kemp* (1987) 483 U.S. 776, 789, fn. 7.)

The scope of rebuttal, however, "must relate directly to a particular incident or character trait defendant offers in his own behalf. . . ." (*People*

v. Rodriguez, supra, 42 Cal.3d at p. 792, fn. 24; see also *People v. Boyd, supra*, 38 Cal.3d at p. 792.) Although rebuttal evidence is not subject to the notice requirements of evidence in aggravation, the fundamental principles of due process apply to this part of the trial as well as to every other part of the trial. In *People v. Gonzales* (2006) 38 Cal.4th 932, this Court wrote,

> Denial of discovery of potential rebuttal evidence thwarts defense counsel's ability to present an intelligent defense and to make an informed tactical decision whether to present mitigating evidence. The denial forced counsel to make an uninformed, unintelligent decision. We will not require defense counsel to make an uninformed decision in any particular fashion—i.e., force counsel to present the mitigating evidence and risk unknown rebuttal—in order to challenge on appeal the prosecution's and trial court's refusal to provide or order discovery.

(*People v. Gonzales, supra*, 38 Cal.4th at p. 960. See also *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84 ["a criminal defendant's right to discovery is based on the 'fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.'"].)

Just as due process applies to the areas of discovery, so does it apply to the quality of evidence introduced in rebuttal. This evidence is no less subject to the requirement that it be reliable than is any other evidence submitted against the accused. In *People v. Martinez* (2003) 31 Cal.4th 673, the Court held,

> Although the prosecutor was entitled to rebut the defense's mitigating evidence that defendant was a peaceful person with evidence relating to that character trait [citations], Aviles's inconclusive and speculative testimony was wholly insufficient for this purpose. Without Aviles's knowing the circumstances surrounding the shooting incident, or even whether defendant participated in the shooting, evidence was essentially valueless and should have been excluded.

(*People v. Martinez*, *supra*, 31 Cal.4th at pp. 694–695.)

Here, the prosecutor's evidence that the court mistakenly allowed to be presented against defendant included the testimony of Officer Clites that appellant said, "I'm in" as he walked away from another inmate who may have been talking about an assault on staff. No such attack took place. There was no other evidence of preparation for such an attack. Appellant never threatened any staff member. There was no discovery of implements with which to pursue an attack. There is only expression of the frustrations of other inmates whose prison-made knives had just been confiscated and general expressions of bad intent in the future—and a conversation-closing remark by appellant saying he was "in" as he walked away down the stairs.

Although this "evidence" is speculative and inconclusive, its trappings of obscenity-spewing hate directed toward staff, with talk of "shanks" and "fuckers" and "shit," could hardly be more inflammatory. In light of the threat posed by this evidence, appellant did not introduce any of

the evidence of his good behavior during his only prior time of incarceration.

So, too, the last-minute notice of evidence that appellant was found in a car as a juvenile where shells were found in the back seat that resembled shells fired into an unnamed house, at an unnamed victim, is inconclusive and speculative evidence that should not have been allowed against appellant for any purpose at all.

The trial court's error in allowing these incidents to be introduced in rebuttal precluded appellant from showing that in his only prior time of incarceration, he had been an asset to his community, and earned the praise and appreciation of his counselors. The prosecutor was certainly free to minimize that experience, and show how far appellant had fallen by the time of the crime's commission, but the evidence precluded by the trial court's rulings was highly relevant to appellant's future behavior in institutional settings, a substantial topic in most penalty phase deliberations. The trial court's rulings violated appellant's Sixth, Eighth, and Fourteenth Amendment rights to reliable and accurate sentence, and require that his death sentence be set aside.

XXII. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY PROHIBITING APPELLANT FROM PRESENTING MITIGATING EVIDENCE OF ANY EVENTS THAT TOOK PLACE BEFORE THE MOMENT OF HIS BIRTH.

A. Introduction

The right to present, and to have the sentencer consider, any relevant nonstatutory mitigating evidence in support of a sentence less than death is well settled. In *Lockett v. Ohio* (1978) 438 U.S. 586, the United States Supreme Court found the Ohio statute that restricted what could be considered in mitigation unconstitutional:

> [T]he Eighth and Fourteenth Amendments require that the sentencer . . . *not be precluded* from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

(*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604, emphasis in original.)

In *Eddings v. Oklahoma* (1982) 455 U.S. 104, where the sentencing judge refused to consider the defendant's violent upbringing, the Court ruled that the sentencer, although free to determine the weight to be given relevant mitigating evidence, may not give it no weight by excluding such evidence from consideration: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." (*Eddings*, 455 U.S. at p. 113–114, emphasis in original.)

The U.S. Supreme Curt has never wavered since approving states' reinstatement of the death penalty in the 1970s in requiring that anyone subject to execution must be allowed to present any evidence in mitigation that might move a sentencer to vote for a sentence less than death. Counsel do not perform as constitutionally required in a death penalty case if they fail to develop, prepare and present evidence of the defendant's background to the jury; contextual evidence of life circumstances has often led to jury verdicts of less than death. (See, e.g., *Sears v. Upton* (2010) ___ U.S. ___, 130 S.Ct. 3259; *Porter v. McCollum* (2009) 558 U.S. ___ [130 S.Ct. 447, 449]; *Rompilla v. Beard* (2005) 545 U.S. 374, 378, *Wiggins v. Smith* (2003) 539 U.S. 510, 522; *Williams v. Taylor* (2000) 529 U.S. 362, 396.)

These principles have long been recognized by this Court. (See (*People v. Coffman, supra*, 34 Cal.4th at pp. 113–116; *In re Gay* (1998) 19 Cal.4th 771, 807; *People v. Easley* (1983) 34 Cal.3d 858, 878–879.)

Although the Eighth and Fourteenth Amendment to the federal constitution require that the sentencer cannot be precluded from considering any relevant mitigating evidence, the trial court retains discretion to determine relevancy, and to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury. (*People v.*

Cain (1995) 10 Cal.4th 1, 64.) But categorical exclusion of any type of mitigating evidence has long been found to be prejudicial error in death penalty cases. (See, e.g., *Hitchcock v. Dugger* (1987) 481 U.S. 393, 396–397; *People v. Yeoman* (2003) 31 Cal.4th 93, 154.)

Here, the trial court arbitrarily decided that no evidence could be presented regarding appellant's background before the moment of his birth. This ruling was capricious, unjustified, and prejudicial.

B. Penalty Phase Testimony

Esperanza Villa was appellant's maternal grandmother. (60 RT 13204.) During his penalty phase defense, she identified pictures of the small adobe house in which appellant was born, and other people in a photograph, including appellant's father and his mother Angelita.

Q.	When you observed Angelita with her husband when they were still together in Mexico, how did he treat her?
MR. BARTON:	Objection. Irrelevant.
THE COURT:	Sustained with regard to the period prior to the birth of the defendant.

(60 RT 13210–13211.)

[MR. BRYAN]:	Do you remember how he treated Angelita in front of the older son, Lorenzo?
MR. BARTON:	Objection. Irrelevant.

MR. BRYAN: May we have a sidebar, your Honor?

THE COURT: Well, I have indicated the relevant time period. You may ask questions with that in mind.

MR. BRYAN: Your Honor, the function of the older brother Lorenzo is very important in this case.

(60 RT 13210.)

At a conference out of the jury's presence, counsel for appellant argued as follows:

[MR. BRYAN]: Your Honor, Lorenzo was the older brother. He was present during the abusive treatment of the mother. And, as is not uncommon, he became the abuser when the family moved to Lamont. And—well, anyway, that's it. He became the man of the house and was very abusive toward the younger boys, particularly the Defendant Ramirez, Juan.

THE COURT: That's what is relevant, not *going back generations*.

MR. BRYAN: I'm not going back generations. I'm trying to show Lorenzo—why he was the way he was.

THE COURT: The question is why is Juan the way he is. And if Lorenzo was abusive, then you can put in evidence of Lorenzo's abuse. Anything further?

MR. BRYAN: No. The trouble is it's going to be presented to them in a vacuum. And I'm not going to be allowed to show why Lorenzo was the way he was.

MR. BARTON: It's irrelevant.

THE COURT: *The jury will have to speculate about that.* If Lorenzo was abusive, then they can hear evidence of that and see what impact, if any, it had on Juan. That's my ruling.

(60 RT 13211–13212, emphasis added.)

When appellant's mother, Angelita Ramirez, testified, the following exchange occurred.

Q. Was Juan's father violent with you when he was drinking?

MR. BARTON: Objection, your Honor, as to prior to Juan's birth.

THE COURT: Sustained. Let's lay a foundation as to the period after Juan's birth.

(60 RT 13225.)

When appellant's aunt, Maria Villa, testified, the following exchange occurred:

Q. Did you know Angelina when she lived in Guadelupe [*sic*]?

A. Yes.

Q.	Did you know her when she lived in this house?
A.	Yes, that is her house, and that was her husband and her mother-in-law, and her children.
MR. BARTON:	Objection, narrative.
THE COURT:	Overruled.
[MR. BRYAN]:	Do you remember anything about her husband?
MR. BARTON:	Objection, relevance.
THE COURT:	During the relevant period of time, after the birth of the defendant.

(60 RT 13263–13264.)

C. The Trial Court's Categorical Rejection of All Evidence Regarding Appellant's Background Before the Moment of his Birth Was Prejudicial Error

While a factfinder may give limited *weight* to any piece of proffered mitigation evidence, the trial court violated well-established precedent by limiting the *admission* of evidence concerning appellant's background, community, caretakers, and family, to historical events that happened after he was born, depriving the jury of any chance to consider mitigation evidence from the time before he was born.

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year

> prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

(*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

A long line of cases following *Lockett* and *Eddings* confirm the importance and breadth of mitigation evidence. As the Supreme Court explained in *Penry v. Lynaugh*:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse. *California v. Brown*, 479 U.S. 538, 545, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring).

(*Penry v. Lynaugh* (1989) 492 U.S. 302, 319.)

The *Penry* opinion holds that "the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background or character or the circumstances of a crime." (*Penry v. Lynaugh*, at p. 328.) For that reason, the High Court has held that:

> In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.

(*McCleskey v. Kemp* (1987) 481 U.S. 279, 304, emphasis in original.)

A proper mitigation investigation that makes intelligible the behavior of the accused may well require "going back generations." In *Hernandez v. Martel* (C.D. Cal. 2011) 824 F.Supp.2d 1025, 1050, critical mitigation evidence included records showing three generations of psychiatric illness of psychotic proportions. Failure to locate, prepare and present this evidence led to a reversal of petitioner's death sentence.

In *In re Gay*, part of the mitigating evidence supporting this Court's reversal of petitioner's death sentence was "*a family history remarkable for extensive drug abuse in multiple generations and various branches of the family.*" (*In re Gay*, *supra*, 19 Cal.4th at p. 805, emphasis added.)

In short, mitigation evidence includes *any relevant evidence* which might persuade a juror to impose a life sentence instead of a death sentence. It may include information about the defendant, his or her personal and family history, and his or her culture and community, which together may persuade a juror to spare his life. The United States Supreme Court and this court have determined that family history and circumstances are relevant. The trial court here erred by excluding the evidence proffered by defense counsel from before appellant's birth.

D. The Error Was Prejudicial

The court's ruling further precluded appellant from presenting and having the jury consider evidence of (1) his father's abuse of his mother prior to appellant's birth in 1976; (2) the effect such abuse might have had on her health during her pregnancy with appellant or in any prior pregnancies; and (3) the effect on appellant's health and development in utero. Appellant was entitled to have the jury consider that his mother's fleeing by herself with five children to the United States resulted from a long history of maltreatment and abuse in his family that pre-dated the moment of his birth—"*a family history remarkable for extensive [ ] abuse in multiple generations and various branches of the family.*" (*In re Gay*, *supra*, 19 Cal.4th at p. 805, emphasis added.) The trial court gave no reasons for imposing this arbitrary and irrational cut-off date for such evidence of mitigation. Appellant was unconstitutionally blocked from presentation of a full and in-depth picture of his family or of the horrific context in which his family system developed—to show a meaningful context in which he spent his first few years. Such a portrait, attentive to the "possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind," is a "constitutionally indispensable part of the process of inflicting the penalty of death." (*Woodson v. North Carolina*,

supra, 428 U.S. at p. 304; *James v. Ryan* (9th Cir. 2012) 2012 WL 639292, p. 27.)

The jury deliberated for nearly 20 hours over appellant's fate. The trial court's arbitrary and unjustified refusal to consider any mitigating evidence at all regarding historic events that took place prior to the moment of appellant's birth prejudiced appellant, and requires that appellant's death sentence be set aside. When very young, appellant was largely raised by his older brother Lorenzo. The trial court said that the jury "would have to speculate" as to what happened to Lorenzo prior to appellant's birth to cause him to be abusive to his brothers (60 RT 13211–13212), but this necessity was created by the trial court out of whole cloth.

What happened to Lorenzo may well have made it more understandable, and more plausible, that Lorenzo, who had the job of being the "man" of the house thrust on him at a very young age, had a short fuse, and beat appellant badly when he was young.

The prosecutor challenged this assertion as untrue, and inconsistent with an assertion of appellant's aunt Olivia in a taped interview provided to the prosecution. (60 RT 13303.) Appellant's inability to present evidence about what happened to Lorenzo before appellant's birthday in 1976 deprived him of the opportunity to corroborate evidence that the prosecutor

contested regarding appellant's abuse as a child at the hands of Lorenzo and thus make more credible the testimony of the family about what happened to him as a child.

XXIII. WHERE THE STATE RELIES ON THE IMPACT OF A MURDER IN ASKING FOR DEATH, THE DEFENDANT SHOULD BE PERMITTED TO RELY ON THE IMPACT OF AN EXECUTION ON HIS FAMILY IN ASKING FOR LIFE.

A. Procedural Background

On March 5, 2001, the prosecutor filed a motion to exclude any evidence of the impact of appellant's execution on his family. (15 CT 4426 et seq.) The motion was argued on March 6, 2001. (54 RT 12221 et seq.) Counsel for appellant opposed the motion, and argued that a juror's sympathies cannot and should not be separated among family members of those directly concerned. (54 RT 12226.) The trial court granted the prosecutor's motion, and subsequently instructed the jury that it could take not take into account sympathy for the defendant's family in their deliberations on the appropriate penalty to be imposed. (54 RT 12227; 62 RT 13726.)

B. The Error

Failure to allow the jury to consider the impact of appellant's execution on his extended family violated well-settled principles of the Eighth and Fourteenth Amendments to the United States Constitution, and rendered his trial fundamentally unfair.

The United States Supreme Court has long held that a state may not preclude the sentencer in a capital case from considering *any* relevant evidence in support of a sentence less than death. Over 60 years ago, the high court recognized that:

> Highly relevant—if not essential—to a [sentencer's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts of individualized punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

(*Williams v. New York* (1949) 337 U.S. 241, 257; see also *Skipper v. South Carolina* (1986) 476 U.S. 1; *Eddings v. Oklahoma*, *supra*; *Lockett v. Ohio*, *supra*; *McCleskey v. Kemp* (1987) 481 U.S. 279, 306 ["[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty"]; and *Payne v. Tennessee* (1991) 501 U.S. 808, 822 ["[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce. . . ."].)

It was precisely because of the broad latitude afforded capital defendants that the Supreme Court reversed its opposition to victim impact evidence and held that "evidence about . . . the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Payne v. Tennessee*, *supra*, 501 U.S. at

p. 826.) The underlying premise of the majority decision in *Payne* is that the sentencing phase of a capital trial requires an even balance between the evidence available to the defendant and that available to the state. (*Id.* at pp. 820–826.)

In his concurring opinion, Justice Scalia explicitly noted that since the Eighth Amendment required the admission of all mitigating evidence on the defendant's behalf, it could not preclude victim impact evidence because "the Eighth Amendment permits parity between mitigating and aggravating factors." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 833.) The *Payne* majority explained that the impact of the victim's death on his surviving family members was essential for the jury to understand the victim's "uniqueness as an individual human being." (*Id.* at p. 823; accord *id.* at p. 831 [conc. opn. of O'Connor, J.] and pp. 835, 837 [Souter, J.].)

Payne explained that the Court's broad rulings requiring admission of "any mitigating evidence" were also premised on the need to ensure the jury understood the *defendant* as a "uniquely individual human being." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.) The high court has ruled that the impact of a victim's death on the victim's family is essential for the jury to understand the *victim* as a unique human being; it follows that the impact of the defendant's death on his own family is equally essential for

the jury to understand the *defendant's* uniqueness as a human being. The Supreme Court's Eighth Amendment jurisprudence has long recognized that evidence showing the defendant's uniqueness as a human being may not be excluded from a capital penalty phase. (See, e.g., *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605; *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 110.)

Courts throughout the country have recognized that a defendant's execution impact evidence is relevant to the sentencing decision. (See, e.g., *State v. Mann* (Ariz. 1997) 934 P.2d 784, 795 [noting mitigating evidence of "the effect on [defendant's children] if he were executed"]; *State v. Simmons* (Mo. 1997) 944 S.W.2d 165, 187 [noting mitigating evidence that defendant's "death at the hands of the state would injure his family"]; *State v. Rhines* (S.D. 1996) 548 N.W.2d 415, 446–447 [noting mitigating evidence of "the negative effect [defendant's] death would have on his family]; *State v. Benn* (Wash. 1993) 845 P.2d 289, 316 [noting mitigating evidence of "the loss to his loved ones if he were sentenced to death"]; *State v. Stevens* (Ore. 1994) 879 P.2d 162, 167–168 [concluding that the Supreme Court's mandate for unfettered consideration of mitigating circumstances required consideration of the impact of an execution on the defendant's family]; *Lawrie v. State* (Del. 1993) 643 A.2d 1336, 1339 [noting that defendant's "execution would have a substantially adverse

impact on his seven-year-old son . . . and on [defendant's] mother"]; *Richmond v. Rackets* (D. Ariz. 1986) 640 F.Supp. 767, 792 [noting trial court's consideration of testimony relating "the impact of the execution" on defendant's family], revd. on other grounds, *Richmond v. Lewis* (1992) 506 U.S. 50; compare *State v. Wessinger* (La. 1999) 736 So.2d 162, 192 [rejecting defendant's argument that an instruction precluded the jury from considering the impact of a death sentence on the defendant's family].)

Not only does the Eighth Amendment guarantee appellant the right to place any mitigating evidence before the jury, but in the context of this case, where the victim's mother, brother and girlfriend described for the jury the impact of his loss on them,[131] principles of equal protection and fundamental fairness also require that appellant be afforded the same opportunity to present evidence of the pain and loss his execution would cause members of his family. (*Wardius v. Oregon* (1973) 412 U.S. 470.) Failure to allow appellant to also put forward such evidence trivializes the impact his loss would have on his family, and skews the moral and normative the jury was asked to make toward the imposition of death.

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[131] According to counsel for appellant, the foreperson of the jury was openly sobbing during Ms. Castro's testimony. (58 RT 12988.)

In light of *Payne v. Tennessee*, *supra*, and these other authorities from around the country, the jury in this case should have been permitted to consider the impact of a potential death sentence on appellant's family. The impact of appellant's death on his surviving family would have been a powerful way of showing his "uniqueness as an individual human being." The articulated rationale of *Payne*—that there should be *parity* between the type of evidence available to the state and the defendant at the sentencing phase of a capital case—compels a conclusion that appellant's family should have been allowed to testify as to the impact of appellant's execution on them.

This result is especially appropriate in a case like this, where the state relies on *Payne* to introduce highly emotional testimony about the impact of the crime on the victim's extended family. When the state introduces such testimony, the "parity" concerns of *Payne* are strongly implicated. Appellant should have been permitted to use sentence impact evidence as a counterweight.

Practical concerns support such an approach. In the area of victim impact, the reality is that more traditional methods of ensuring the reliability of testimony—such as cross-examination—are simply not feasible. (See *Booth v. Maryland* (1987) 482 U.S. 496, 506 [noting that it would be

"impossible" to use cross-examination to rebut victim impact evidence].) Since cross-examination cannot realistically serve to balance the scale when victim impact evidence is presented, it is only fair that sentence impact evidence be allowed.

Appellant recognizes that this Court has on several occasions rejected arguments that the federal Constitution required consideration of sentence impact. (See, e.g., *People v. Bennett* (2009) 45 Cal.4th 577, 600–602; *People v. Ochoa* (1998) 19 Cal.4th 353, 454–456; *People v. Smithey* (1999) 20 Cal.4th 936, 999–1000; *People v. Smith* (2005) 35 Cal.4th 334, 366–367.) The trial in *Ochoa* occurred before *Payne v. Tennessee* had overruled *Booth v. Maryland*, *supra*, 482 U.S. 496. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 873, n. 21.) Thus, the jury in that case was not permitted to consider "sympathy for the victim or his family." (19 Cal.4th at p. 873, n. 21.) As a consequence, the parity concerns of *Payne* were not present.[132]

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[132] The text of *Smithey* does not reveal whether it too was a pre-*Payne* trial. An examination of the record in *Smithey* shows that the jury returned a verdict of death on June 22, 1989. (*People v. Smithey*, No. S011206, CT 1117–1118, 1120, 1150.) *Payne* was decided on June 27, 1991. Thus, *Smithey* too was a pre-*Payne* case, and the parity concerns of *Payne* were not present.

But just as plainly, these parity concerns *are* implicated in this case. Here, in contrast to *Ochoa*, *Bennett*, and *Smithey*, the prosecutor *did* rely on victim impact evidence in asking for death. If victim impact is admissible to show the victim as a unique human being, and if *Payne*'s concern with parity is to mean anything, appellant should have been allowed to show his uniqueness as a human being by introducing sentence impact evidence in asking for life.

In addition, not only did the trials in *Ochoa* and *Smithey* pre-date *Payne*, but the appellate opinions in those cases all pre-dated a series of United States Supreme Court cases emphasizing the "low threshold for relevance" imposed by the Eighth Amendment. (*Smith v. Texas* (2004) 543 U.S. 37, 43; *Tennard v. Dretke* (2004) 542 U.S. 274, 285.) As these cases recognize, the Eighth Amendment does not permit a state to exclude evidence which "might serve as a basis for a sentence less than death." (*Smith v. Texas*, *supra*, 543 U.S. at p. 43.) So long as a "fact-finder could reasonably deem" the evidence to have mitigating value, a state may not preclude the defendant from presenting that evidence. (*Id.* at p. 44.; see also Arg. XX, *ante*.)

Execution impact evidence is plainly relevant under *Smith* and *Tennard*. As the United States Supreme Court has concluded, victim impact

evidence is relevant because it shows the "uniqueness" of the victim. For the very same reasons, execution impact evidence is relevant because it shows the uniqueness of the defendant. This evidence satisfies the "low threshold for relevance" precisely because a juror deciding whether appellant should live or die "could reasonably deem" the evidence to have *mitigating value*.

In *Bennett*, this Court sustained the trial court's refusal to have an expert testify regarding the impact the defendant's execution would have on his children, and relied on its previous reasoning in *Ochoa.* (*People v. Bennett*, *supra*, 45 Cal.4th at pp. 600–601.) The basis was a distinction between the evidence that the defendant is loved by his family, and the impact that his death would have upon them; "The former constitutes permissible indirect evidence of a defendant's character while the latter improperly asks the jury to spare the defendant's life because it 'believes that the impact of the execution would be devastating to other members of the defendant's family.'" (*Id.* at p. 601.)

In *Bennett*, this Court rejected the contention that because the prosecution could present victim impact evidence, appellant should be permitted to introduce execution impact evidence, by not directly addressing the issue of parity. The Court simply stated that the only

permissible mitigation evidence is that which deals with the defendant's own circumstances, not those of his family. (*People v. Bennett*, *supra*, 45 Cal.4th at p. 602.) This distinction is artificial. The impact of a defendant's execution on his family is a "circumstance of the crime" in every sense that the impact of the victim's loss on the victim's family registers.

In asking the Supreme Court to overrule *Booth* and admit victim impact testimony, the Attorney General of California formally took the position that "[i]f the death penalty is constitutional, as the Court has repeatedly held, it cannot be unconstitutional to permit the pros and cons in the particular case to be heard." (*Payne v. Tennessee*, No. 90-5721, Brief of Amicus Curiae, State of California at p. 10, 1991 WL 11007883 at p. 13.) Just as victim impact evidence represents one of the "pros" in a particular case, the devastating impact of an execution on the family of a defendant is one of the "cons."

Not only does it run afoul of the Eighth and Fourteenth Amendment's capital jurisprudence, but placing greater significance on the Yarbrough family and their loss also has every appearance of racial prejudice. The courts have and must continue to "engage[] in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." (*McCleskey v. Kemp*, *supra*, 481 U.S. at p. 309, quoting *Batson v. Kentucky*,

supra, 476 U.S. at p. 85.) "[D]iscrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice." (*United States v. Doe* (D.C. Cir. 1990) 903 F.2d 16, 21.)

In *Turner v. Murray* (1986) 476 U.S. 28, the Supreme Court held that a capital defendant accused of an interracial crime is entitled to voir dire on the issue of racial prejudice because the "range of discretion entrusted to a jury in a capital sentencing hearing" provides "a unique opportunity for racial prejudice to operate but remain undetected." (*Turner v. Murray*, 476 U.S. at p. 35.) The *McCleskey* court rejected a challenge to Georgia's death penalty system based solely on statistics, but did not dispute evidence showing a dramatic disparity in the race of the victims where death was an option—far greater than the race of the accused. The valuation of a White life over a Brown life is implicit when family members and loved ones of the former are allowed to testify in poignant detail about the impact on them of their loss, but not family members of the latter.

Although there is no parity in the behavior of the decedent and the crime for which appellant was convicted, there is no question that the Ramirez and the Villa families would suffer from the death of their son/brother/nephew/grandson commensurate with the Yarbrough family's suffering. It is fundamentally unfair, and a violation of the Eighth and

Fourteenth Amendments to the United States Constitution to diminish an execution's impact by refusing to allow testimony from those who would be most affected by it, while allowing members of the victim's family to testify about the meaning of their loss.

> From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

(*Gardner v. Florida*, *supra*, 430 U.S. at pp. 357–358.)

Appellant lives in the hearts of each member of his extended family. Refusal to allow him to present his sentencing jury with the full impact on them of a vote for death deprived him of his constitutional right to present any evidence in mitigation that might have moved one juror to vote for a sentence of less than death.

C. Conclusion: The Error Was Prejudicial

Capital defendants have a constitutional right to present to the sentencer any mitigating evidence demonstrating the appropriateness of a penalty less than death. (*Skipper v. South Carolina*, *supra*, 476 U.S. at p. 5; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) They have a corollary right to have the sentencer consider the mitigating evidence under instructions which permit the sentencer to give a reasoned, moral response to the

mitigating evidence. (*Penry v. Lynaugh*, *supra*, 492 U.S. at pp. 319–320; *Eddings v. Oklahoma*, *supra*, 455 U.S. at pp. 113–114; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) The trial court's instruction to appellant's jury that they could not consider the impact of his death on members of his family was prejudicial error.

Errors of this type require a new penalty phase unless the state can prove them harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*; *People v. Fudge* (1994) 7 Cal.4th 1075, 1117.) Here, the state will be unable to carry this burden. The jurors deliberated over 20 hours, over a span of four days. (Statement of the Case, *ante*.) As is the case with victim impact evidence, sentence impact evidence is a particularly powerful type of evidence and argument. On the record of this case, the exclusion of this mitigating evidence from the defense side of the scale cannot be deemed harmless. A new penalty phase is required.

XXIV. THE TRIAL COURT'S CONDUCT THROUGHOUT THE TRIAL DEMONSTRATED ACTUAL BIAS, THEREBY VIOLATING APPELLANT'S DUE PROCESS RIGHT TO AN IMPARTIAL TRIAL JUDGE; AUTOMATIC REVERSAL IS REQUIRED.

A. Applicable Legal Standards

The question of judicial bias is addressed by state statute. Code of Civil Procedure section 170.1 requires the disqualification of a judge whenever "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

Defendant also has a due process right to an impartial trial judge under the state and federal Constitutions. (*Arizona v. Fulminante*, *supra*, 499 U.S. at p. 309; *People v. Chatman*, *supra*, 38 Cal.4th at pp. 363–364.) The due process clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of the case. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904–905.) "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" (*Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868, 876 [129 S.Ct. 2252].)

While a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of

the circumstances in the particular case, there must exist "'the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable.'" (*Caperton, supra*, 129 S.Ct. at p. 2259; *People v. Freeman* (2010) 47 Cal.4th 993, 996.) Where only the appearance of bias is at issue, a litigant's recourse is to seek disqualification under state disqualification statutes. (*Caperton, supra*, 129 S.Ct. at p. 2259.)

A motion to disqualify a judge pursuant to Code of Civil Procedure section 170.1 must be timely made in order to preserve the issue for appeal. (Code Civ. Proc., § 170.3, subd. (c)(1); *People v. Scott* (1997) 15 Cal.4th 1188, 1206–1207.) Even if a defendant is not entitled to relief for a violation of the statute, either because he or she did not raise the issue during trial or because defendant is not entitled to relief on his claimed statutory violation, this Court will consider his federal constitutional claim. (*People v. Cowan, supra*, 50 Cal.4th at pp. 454–455.)

A trial court's numerous rulings against a party—even when erroneous—do not establish judicial bias, especially when they are subject to review. (*People v. Fuiava* (2012) 53 Cal.4th 622, 631–632; *People v. Guerra* (2006) 37 Cal.4th 1067, 1111–1112.) Expressions of opinion by a trial judge based on actual observation of the witnesses and evidence in the courtroom also do not demonstrate a bias. (*Ibid.*; *Moulton Niguel Water*

Dist. v. Colombo (2003) 111 Cal.App.4th 1210, 1219–1220; *People v. Farnam* (2002) 28 Cal.4th 107, 193–195.) To disqualify a trial judge, potential bias and prejudice must clearly be established by an objective standard. (*People v. Chatman, supra*, 38 Cal.4th at p. 363.)

A "trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression that it is allying itself with the prosecution." (*People v. Carpenter* (1997) 15 Cal.4th 312, 353.) In conducting trials, judges "'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side of the other.' [Citation.]" (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237–1238.) It is also improper for a judge to lodge an unjustified threat against an attorney. (See Rothman, *California Judicial Conduct Handbook* (2d. ed., 1999), citing Commission on Judicial Performance Annotated Reports (1992) Advisory Letter 14, p. 15; Annotated Reports (1990) Advisory Letter 12, p. 22.)

B. Bias During Voir Dire; Threats Against Counsel

1. Distorted Perceptions

Judge Twisselman's bias against appellant and defense counsel was so profound that it distorted its perceptions of what it heard and saw. (See,

e.g., Arg. III, *ante*.) The trial court's recall was selective, and its mistaken recall favored the prosecution. As noted in Argument III, after the voir dire of Terri Burton, whom all parties passed for cause, counsel for appellant, Mr. Bryan, made an entirely correct request of the trial court that it *not* refer to the death penalty as something that is ever required by the evidence and law. Judge Twisselman sharply denied ever having done such a thing. He warned counsel to "be very careful when you state things to state them accurately," and accused counsel of "misquoting the court right now." (17 RT 4317–4318.)

When the transcript was read back, however, it became clear that Mr. Bryan had correctly quoted the judge's statements, and that Judge Twisselman's direction to the prospective juror was in contravention to established laws about the decision-making process in capital cases. Even with the readback, however, Judge Twisselman obstinately refused to acknowledge his error or its significance. (17 RT 4318–4320.) It was not until the prosecutor endorsed defense counsel's position as legally correct that Judge Twisselman indirectly accepted it and moved on. (17 RT 4321.)

Similarly, during the voir dire of Glen Kellerhals (No. 200133204), Judge Twisselman ignored the heart of an objection by trial counsel. He reacted to the objection by ominously threatening to "pursue" counsel for

not acting in good faith—even though counsel's memory was accurate and the judge's perception was skewed. (Arg. II.C.25, *ante*.)

Counsel objected to the court's refusal to accept Mr. Kellerhals's repeated statements that it would be difficult, or "tough," for him to set aside his innate preference for the testimony of police officers. At the end of counsel's detailed objection to these repeated efforts, he noted that Judge Twisselman had intimidated the juror toward the end of questioning by raising his voice. (Arg. II.C.25, *ante*.)

Judge Twisselman apparently heard only counsel's point about his voice. When counsel correctly reiterated that its primary objection was the court's refusal to accept the prospective jurors' repeated answers, the judge accused counsel of changing his rationale. He then threatened to "pursue" counsel for not acting in good faith. (20 RT 4840–4668.)

A review of the actual transcript shows that the court did indeed repeatedly question Mr. Kellerhals, and at great length, and that this repeated questioning was the foundation of counsel's objection to the court's voir dire. Counsel did not opportunistically change his basis for the objection. Judge Twisselman's bias against the defense distorted his ability to listen fairly and perceive accurately the nature and substance of trial

counsel's objections. That misperception was the basis of the court's threat to "pursue" counsel, and was born of intemperance.

2. Judge Twisselman's Harassment of Defense Counsel Through Threats and Pursuit of Formal Sanctions from the State Bar

As noted above, the trial court's distortion and mischaracterization of counsel's objection after the voir dire of Mr. Kellerhals resulted in his threatening to "pursue" Mr. Bryan. After the mistrial motion was presented and argued (see Arg. III, *ante*), the trial court continued this course by again raising the specter of official sanctions, as follows:

> I'm going to deny the motion for mistrial. I again have denied for the record that I'm engaging in any kind of conscious *or unconscious* attempt to pick jurors that are biased or prejudiced in favor of either side, or that I have any quota system for picking jurors, et cetera.
>
> I appreciate counsel are going to be aggressive advocates for your sides.
>
> But once again, I *caution counsel that to the extent that you make representation about what the record is, if you feel that this court is engaging in some activity which is to be construed as unfair, then I ask you to please be careful and have a good faith basis for making those types of challenges. Because, again, they certainly can be proper, if you think there is a good faith basis for it. But, if you don't think there is a good faith basis for it, there can be subsequent proceedings, including state bar proceedings, if counsel are engaging in tactics that are not good faith.*
>
> I'm not suggesting that's happened.
>
> It's just that we don't lightly accuse either counsel or courts of being biased or unfair without good faith.
>
> If there is a lack of good faith, *there can be implications.*

I'm not saying that as a threat. I'm asking counsel to have a basis for making those kinds of accusations.

(23 RT 5486–5487, emphasis added.)

The voir dire in this case was improper, and resulted in the selection of a biased jury. Present counsel is certain that their duties include presenting this argument to this Court on appeal. The reasons that support this belief are set forth in Argument III, *ante*, and throughout the discussion of juror selection in Argument II. It was unreasonable of Judge Twisselman to assert that counsel's objections were not made in good faith. A challenge to counsel's good faith in raising these objections was itself a device that enabled him to make threats against them.

The threats against counsel by the trial court were provocative and frightening. (See 65 RT 14374–14375.) They were a serious abuse of power that negatively affected appellant's trial, and violated appellant's right to the effective assistance of counsel, to an adjudication by an unbiased tribunal, and to due process of law.

3. Favoritism Shown Toward Prosecution During Voir Dire

As noted above, the exceptional familiarity of the jury pool with this case required that counsel probe each prospective juror's knowledge of the case as well as their feelings about the death penalty. Although the trial

court did not strictly follow its three-minute limiting rule and defense counsel often got more time than that, it is also true that defense counsel was constantly under the gun to hurry up—sometimes even before they began their voir dire. (Arg. III, *ante*.)

4. Judge Quaschnick's Conclusory Exoneration of Judge Twisselman Was Error, and Is Entitled to No Weight

Judge Quaschnick's decision finds no fault at all with Judge Twisselman, and excoriates defense counsel at length for scheming to discredit an honorable man. (15 CT 4382.) It does not discuss the voir dire of Mr. Kellerhals or Mr. Burton. It characterizes the voir dire of correctional officer James Davis, No. 200291149, as follows:

> [a]n example of defendant's continued effort to create bias and prejudice of [*sic*] the court. The trial judge was very thorough in his voir dire of the jurors and was very deliberate in his effort to assure the juror could deliberate fairly and impartially without letting his personal biases and prejudices influence the verdict. The juror appeared, from the transcript, to be fair and impartial but voiced some equivocation. The prosecutor and defense stipulated to the juror being excused. After the juror was excused defense counsel again not only attacked the integrity of the Court but was disrespectful to the Court in doing so.

(15 CT 4383.)

Judge Quaschnick's summary of this voir dire omits the fact that Mr. Davis was a correctional officer who repeatedly stated that he doubted his

ability to be fair, and finally disclosed that he had shot three prisoners two days earlier, and that the event was traumatic for him. The trial court still continued to "question" Mr. Davis, until interrupted by the prosecutor, who indicated his willingness to dismiss Mr. Davis. (See 16 RT 3789–3804.)

Defense counsel did not attack the integrity of the trial court, but did challenge the court's voir dire of Mr. Davis. The trial court took great umbrage at counsel's use of the word "strenuously" to qualify his objection. (16 RT 3799) but it defies reason to describe the objection as an attack on the court's integrity. (16 RT 3798–3804.)

Judge Quaschnick was "appalled at the suggestion the trial court should be disqualified for lack of experience in death penalty cases as either a lawyer or judge. . . . This argument of counsel is so absurd it hardly warrants comment." (15 CT 4386.) It is true that there must be a first time for everyone who represents a client or presides over a trial in a death penalty case, but it is also true that the trial court here repeatedly referred to its long experience in picking non-capital juries as justification for its rulings. (See 9 RT 2236; 15 RT 3602, 3604; 16 RT 3971; 17 RT 4281; 20 RT 4861; 21 RT 4957; 23 RT 5480.)

Judge Twisselman was inordinately aggressive throughout voir dire. He rejected challenges to jurors by appellant that were not opposed by the

prosecution. (17 RT 4231; 19 RT 4452; 30 RT 7085.) He even rejected joint challenges by both the prosecutor and defense to prospective jurors. (16 RT 3888; 17 RT 4172.) It was neither irrelevant nor absurd for counsel to point out in this particular case that the trial court had never before picked a death-qualified jury.

5. Mistrial Motion

Judge Quaschnick's discussion of the mistrial motion filed by counsel makes no mention of the voir dire of prospective jurors Moreno and Krotter and Hernandez that triggered the motion, or the substance of the motion—it simply quotes the trial court's own self-depiction.

Judge Quaschnick's conclusory opinion entirely exonerated Judge Twisselman, finding that he exercised nothing but patience and judicial restraint throughout voir dire in dealing with the many attacks alleging bias and prejudice, and found that "it is also apparent that the trial court carefully ruled on all objections and conducted extensive voir dire to assure [*sic*] both the defendant and the prosecution were to receive a fair trial." (15 CT 4386.) At no point in his ruling does Judge Quaschnick acknowledge, let alone refute, any of the reasons that triggered defense counsel's concerns over the nature of voir dire in this case.

6. Conclusion

The purpose of voir dire is to discover possible biases in potential jurors. Here, Judge Twisselman's efforts to ferret out the attitudes of jurors to enable challenges for cause or peremptory challenges were sporadic. He said that he was not interested in juror's personal views—he was only concerned with whether or not they could set those views aside. Counsel's efforts to probe the attitudes of prospective jurors varied from day to day, as did the court's, but there is nothing in the record to suggest anything but good faith by counsel during voir dire. Judge Twisselman's suspicions, threats, and selective recall showed him to be biased against appellant.

C. Bias During Trial

1. Deception re Prosecutorial Inconsistency

The merits of this issue are presented elsewhere. (See Arg. XVI, *ante*.) Here, appellant highlights what seems to be judicial deception. On March 7, 2001, Judge Twisselman considered appellant's motion to preclude the use in penalty phase of uncharged misconduct, including the killing of Javier Ibarra. After argument, and after consulting the California Judge's Bench Guide, the trial court found sufficient evidence in the prosecutor's offer of proof to put before the jury "the theories of *murder as an aider and abettor*, theory of conspiracy with the target being the crime of

murder, conspiracy with the target being assault with a deadly weapon, principle [*sic*] in a battery charge, accessory to murder." (54 RT 12189, emphasis added.)

On March 13, 2001, the issue arose again. Again the court ruled under which theories the prosecutor could proceed (i.e. conspiracy and aider and abettor) to show appellant's involvement in the Ibarra shooting. (56 RT 12609.) Excluded from the specific list of crimes was simple first degree murder, or first degree murder under the theory of appellant being the shooter.

On March 20, 2001, appellant moved for mistral as the court had violated its own ruling to the detriment of appellant by allowing the prosecution to proceed under the theory that the appellant was the shooter in the Ibarra case. Judge Twisselman court answered that an aider and abetter is also a principal, so his prior ruling did not preclude the presentation of evidence showing that appellant was the perpetrator, since the perpetrator/ shooter is also a principal. (61 RT 13581, 13616.)

The trial court knew that the issue here was not whether the prosecutor could put on evidence that appellant was a participant in the shooting of Javier Ibarra, but whether or not he was the actual shooter. After several pages of argument on that very point (see 54 RT 12180–12184

for a summary of how this question had been previously addressed by the prosecution), it seemed to preclude the prosecutor from changing its theory of the case, and seemed to confine it to what it had previously argued in the trials of Gabriel Flores and Cipriano Ramirez.

Not so. Judge Twisselman never explained how his limiting the prosecutor to evidence showing appellant to be an aider and abettor on March 13, 2001, did not reasonably preclude evidence of appellant as the shooter, or why he changed his mind on March 20, 2001.

2. Ruling Without Stopping to Deliberate

Appellant has briefed the merits of the trial court's failure to grant his motions made pursuant to *Batson v. Kentucky*, *supra*, and *People v. Wheeler*, *supra*, along with the court's insistence that any objection of prosecutorial misconduct be made silently, so that they can be ruled on at a later, convenient time, because such objections are prejudicial if wrong. (Args. VII & XVIII, *ante*.)

This way of proceeding appears unprecedented. It renders trial counsel ineffective, and makes appellate review difficult. The merits of these rulings has already been addressed. Here, appellant notes the appearance, if not the reality, of prejudgment. These preconceptions are those of a biased tribunal.

3. Mid-trial Retaliatory Reporting of Defense Counsel to State Bar Done in Secret

On January 16, 2001, at the end of voir dire, appellant filed a motion to disqualify the trial judge, the Honorable Kenneth Twisselman, for cause, pursuant to Code of Civil Procedure section 170.1, subdivision (a)(6). (13 CT 3719 et seq.) The prosecutor filed a declaration in support of the trial court on January 23, 2001. (13 CT 3798 et seq.) The trial court filed a verified answer on January 24, 2001. (13 CT 3798 et seq.) On February 28, 2001, near the close of the guilt phase of appellant's trial, the Honorable James Quaschnick of the Fresno County Superior Court denied appellant's motion. (15 CT 4382 et seq.)

On June 8, 2001, appellant filed a motion for a new trial in which he argued, inter alia, that Judge Twisselman was biased. (18 CT 5301.) That motion was denied on July 20, 2001. (19 CT 5527.)

During argument on the motion for a new trial, counsel described having been frightened by threats against them by the trial court, and acting under a cloud during the trial. Counsel recalled that serious tensions began on the second day of voir dire when he used the word "strenuously" to qualify an objection, and expressed regret at the level of acrimony that pervaded the trial. Counsel cited authority for the proposition that it is

improper for a judge to lodge an unjustified threat against an attorney,[133] and added,

> [t]o my knowledge, no threats were—no charges against counsel were lodged with any authority, such as the Bar Association. But to be threatened with it, a threat can also be an abuse of power. The Commission on Judicial Performance Annotated Reports (1993) Advisory Letter 1, page 17.

(65 RT 14374.)

Judge Twisselman did not respond. After argument, the trial court denied the motion for a new trial. (65 RT 14393–14394.)

In fact, Judge Twisselman had filed a complaint against defense counsel with the State Bar during the trial, apparently just after Judge Quaschnick's ruling on February 28, 2001, near the end of guilt-phase proceedings. Counsel did not learn of the trial court's action in October 2001 when they both received correspondence from the State Bar informing them that no disciplinary action would be taken against them as a result of said complaint. (See letters of Oct. 17, 2001, and Oct. 19, 2001, from the State Bar of California to Anthony Bryan, attached hereto as Appendix A.)

"[A] biased tribunal always deprives the accused of a substantial right." (*Bracy v. Gramley*, *supra*, 520 U.S. at pp. 904-905.) The United

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[133] D. Rothman, California Judicial Conduct Handbook, 2d ed., citing the Commission on Judicial Performance Annotated Reports (1992), and Annotated Reports (1990), Advisory Letter 12, p. 22. (65 RT 14374.)

States Supreme Court has held that trial before a biased judge is an error that is "'structural,' and thus subject to automatic reversal. . . ." (*Neder v. United States* (1999) 527 U.S. 1, 8.) Judge Twisselman's bias against appellant requires that all verdicts against appellant be set aside.

XXV. THE VIOLATIONS OF APPELLANT'S RIGHTS CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT APPELLANT'S CONVICTIONS AND PENALTY BE SET ASIDE.

A. Introduction

Appellant was deprived of a fair trial and a reliable penalty in violation of customary international law as informed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man. Moreover, the death penalty, as applied in the United States and the State of California, violates customary international law as evidenced by the equal protection provisions of the above-mentioned instruments as well as the International Convention Against All Forms of Racial Discrimination.

International law sets forth minimum standards of human rights that must be followed by states that have signed treaties, accepted covenants, or otherwise accepted the applicability of these standards to their own citizens. This Court has not only the right, but the obligation, to enforce these standards.

B. Background

International law "confers fundamental rights upon all people vis-a-vis their own governments." (*Filartiga v. Pena-Irala* (2d Cir. 1980) 630 F.2d 876, 885.) International law must be considered and administered

in United States courts whenever questions of right depending on it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243, 252; *Murray v. The Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64.)

The first modern international human rights provisions appear in the United Nations Charter, which entered into force on October 24, 1945. The U.N. Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[134] By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

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[134] Article 1(3) of the U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, entered into force October 24, 1945. In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere—without regard to race, language or religion—we cannot have permanent peace and security in the world.

Robertson, Human Rights in Europe (1985) p. 22, n.22 (quoting President Truman).

In 1948, the U.N. drafted and adopted both the Universal Declaration of Human Rights (Universal Declaration)[135] and the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[136] The Universal Declaration is part of the International Bill of Human Rights,[137] which also includes the International Covenant on Civil and Political Rights (International Covenant),[138] the Optional Protocol to the International Covenant,[139] the International Covenant on Economic, Social and Cultural Rights,[140] and the human rights provisions of the U.N. Charter.

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[135] Universal Declaration of Human Rights, adopted December 10, 1948, U.N. Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization.

[136] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1951. Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. (See generally, Burgenthal, *International Human Rights in a Nutshell*, Vol. 14 (1988) p. 48.)

[137] See generally, Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731.

[138] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976.

[139] Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, entered into force March 23, 1976.

[140] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, entered into force January 3, 1976.

The United States and our Bill of Rights was the inspiration of international human rights law. Our government has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As a key participant in drafting the U.N. Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[141] In the late 1960s and throughout the 1970s, the United States became a signatory to numerous international human rights agreements and implemented human rights-specific foreign policy legislation.[142]

In the 1990s, the United States ratified three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant; President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination ("Race Convention"),[143] and the

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[141] Sohn & Burgenthal, *International Protection of Human Rights* (1973) pp. 506–509.

[142] Burgenthal, *International Human Rights*, *supra*, p. 230.

[143] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (hereinafter Race Convention). The United States deposited instruments of

International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)[144] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[145]

The United States, by signing and ratifying the International Covenant, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. Many of the substantive clauses of these

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ratification on October 20, 1994. 60 U.N.T.S. 195 (1994).

More than 100 countries are parties to the Race Convention.

[144] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 U.N. GAOR Supp. (No. 51) at p. 197, entered into force on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong., 2d Sess., 136 Cong. Rev. 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 20, 1994. 1465 U.N.T.S. 85 (1994).

[145] Burgenthal, *International Human Rights*, *supra*, p. 4.

treaties articulate customary international law and thus bind our government.[146]

Safeguards adopted by international organizations are also indicative of customary international law. The Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty adopted by the United Nations Economic and Social Council in 1984 provides, "[c]apital punishment may only be carried out pursuant to a final judgement by a competent court after legal process which gives all possible safeguards to ensure a fair trial . . . including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings." (Economic and Social Counsel Resolutions 1984/50 of 25 May 1984.) As the government of Mexico wrote in its letter sent to this Court asking it to grant appellant's request for a stay, "[t]he International Covenant on Civil and Political Rights provides criminal defendants with additional trial rights. These rights carry particular weight in capital cases." (14 CT 4075.)

The Human Rights Committee, a United Nations body that resolves complaints of violations of the International Covenant on Civil and Political

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[146] Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills," supra*, 40 Emory L.J. at p. 737.

Rights has held that "[t]he right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception." (*Gonzalez del Rio v. Peru* (1992) No. 263/1987, HRC, ¶ 5.2.) In *Richards v. Jamaica* (1997) No. 535/1993, the Committee found that a violation of this right in a capital case involving extensive pretrial publicity precluded Jamaica from lawfully carrying out an election. (See Letter from Mexico in Support of Petition for Review, 14 CT 4074–4075.)

As the United States Constitution and Supreme Court jurisprudence recognize, international law is part of the law of this land. International treaties have supremacy in this country. (U.S. Const., art. VI, § 2.) Customary international law, or the "law of nations," is equated with federal common law. (Restatement Third of the Foreign Relations Law of the United States (1987), pp. 145, 1058; see *Eye v. Robertson* (1884) 112 U.S. 580; U.S. Const. art. I, § 8 (Congress has authority to "define and punish . . . offenses against the law of nations").)

This Court has not denied these principles, but rather held that international law is essentially identical to domestic law as far as death penalty jurisprudence goes, and therefore does not prohibit a sentence in accord with state and federal constitutional requirements. (*People v.*

Hamilton (2009) 45 Cal.4th 863, 896; *People v. Jenkins* (2000) 22 Cal.4th 900, 1055.)

This Court therefore has an obligation to fully consider possible violations of international law, even where the conduct complained of is not currently a violation of domestic law. Most particularly, it should enforce violations of international law where that law provides more protections for individuals than does domestic law. One such area is race discrimination.

C. The Racial Discrimination Permeating Capital Sentencing That Is Accepted by Domestic Law Violates Binding International Law, and Requires That Appellant's Death Penalty Be Set Aside

Appellant is aware of this Court's language that a defendant "does not have to turn to international law for protection from racial discrimination. Both the state and federal Constitutions and various statutory provisions prohibit the state from engaging in racial discrimination." (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511.) A closer look, however, shows that racism is both implicitly and explicitly accepted by U.S. courts, including this Court, in the context of the death penalty.

Race discrimination is an inevitable byproduct of a system which is structured to allow discretion, even when the exercise of discretion is guided by racism. Because the death penalty is in fact imposed in the United States in a racially discriminatory manner, international law, as evidenced

by the International Covenant, the American Declaration, and the Race Convention, all of which are subscribed to by the United States, prohibits its application to appellant, a man of Hispanic background.

Article 26 of the International Covenant provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex. . . ."[147] Again, this protection is found in article 2 of the American Declaration which guarantees the right of equality before the law.[148]

The Race Convention, a signed and ratified treaty, contains extensive protections against racial discrimination. Article 5 of the Convention provides:

> [S]tates Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
> (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by

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[147] International Covenant on Civil and Political Rights, *supra*.

[148] American Declaration of the Rights and Duties of Man, *supra*.

> government officials or by any individual, group or institution. . . .[149]

Furthermore, "States Parties shall assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals and other State institutions against any acts of racial

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[149] International Convention Against All Forms of Racial Discrimination, *supra*. Indeed, long before this Convention, the United States recognized the international obligations to cease state practices that discriminated on the basis of race. See also *Oyama v. California* (1948) 332 U.S. 633, holding that the California Alien Land Law preventing an alien ineligible for citizenship from obtaining land violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion, stated that the U.N. Charter was a federal law that outlawed racial discrimination and noted:

> Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

(*Oyama v. California*, *supra*, at p. 673.) See also *Namba v. McCourt* (1949) 185 Or. 579, 204 P.2d 569, invalidating an Oregon Alien Land Law, and stating that:

> The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed . . . When our nation signed the Charter of the United Nations we thereby became bound to the following principles (article 55, subd. c, and see article 56): "Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." (59 Stat. 1031, 1046.)

(*Namba v. McCourt*, *supra*, at p. 604.)

discrimination which violate his human rights and fundamental freedoms contrary to this Convention. . . ."[150]

Section 702 of the Restatement Third of the Foreign Relations Law of the United States recognizes that a state violates international law if, as a matter of state policy, it practices, encourages or condones systematic racial discrimination. The right to be free from governmental discrimination on the basis of race is so universally accepted by nations that it constitutes a peremptory norm of international law, or *jus cogens*.[151] As such, the courts ought to consider and weigh the *jus cogens* quality of international norms; if of *jus cogens* quality, these norms should have a stronger influence against, and increase the burden of justification for, contrary state actions.[152] (See, e.g., *Kadic v. Karadzic* (2d Cir. 1995) 70 F.3d 232, 238 [prohibition against

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[150] International Convention Against All Forms of Racial Discrimination, *supra*.

[151] A peremptory norm of international law, *jus cogens*, is a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." (Vienna Convention on Consular Relations and Optional Protocols U.N.T.S. Nos. 8638–8640, vol. 596, pp. 262–512; Restatement Third of the Foreign Relations Law, *supra*.)

[152] Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society* (1988) 28 Va. J. Int'l L. 627–628.

torture has gained status as *jus cogens* because of widespread condemnation of practice].)

The death penalty in the United States has long been imposed in a racially discriminatory manner. The 1990 report of the United States General Accounting Office synthesized 28 studies and concluded that there is a "pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision.[153] In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., "those who murdered whites were found more likely to be sentenced to death than those who murdered blacks."[154] The GAO report noted that racism was "found at all stages of the criminal justice system process."[155]

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[153] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* (1990) GAO/GGD-90-57. (In *Furman v. Georgia* (1972) 408 U.S. 238, the United States Supreme Court held that Georgia and Texas state statutes governing the imposition and carrying out of the death penalty violated the Eighth and Fourteenth Amendments of the Constitution.)

[154] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing*, *supra*, p. 5.

[155] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing*, *supra*, p. 6.

The Baldus study, an empirical analysis accounting for 230 non-racial variables, also found strong evidence of racial bias. The study concluded that killers of whites in Georgia are 4.3 times more likely to be sentenced to death than killers of blacks. The racial disparity was much greater when considering the race of the victims.[156] Professor Baldus, along with statistician George Woodworth, also conducted a study of race and the death penalty in Philadelphia in the years 1996–1998. They examined a large sample of murders eligible for the death penalty between 1983 and 1993. They found that, even after controlling for levels of crime severity and the defendant's criminal background, blacks in Philadelphia were 3.9 times more likely to receive a death sentence than other similarly situated defendants.[157]

In 1994, a Staff Report by the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary concluded that "racial minorities are being prosecuted under federal death penalty law far beyond their proportion in the general population or the proposition of

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[156] Baldus, Woodworth, Zuckerman, Weiner & Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia* (1998) 83 Cornell L.Rev. 1638.

[157] Baldus et al., *supra*.

criminal offenders."[158] The report analyzed the application of specific provisions of the Anti-Drug Abuse Act of 1988 (also known as the "drug kingpin law"), which authorize the death penalty for murders committed by those involved in certain drug trafficking activities, to criminal defendants.

Significantly, the staff report found that while three-quarters of those convicted under the provisions of the Anti-Drug Abuse Act have been white and only 24 percent of the defendants have been black, just the opposite is true for those chosen for death penalty prosecutions: 78 percent of the defendants have been black and only 11 percent of the defendants have been white.[159] This contrasts sharply with the statistics of federal death penalty prosecutions before the 1972 *Furman* decision: between 1930 and 1972, 85 percent of those executed under federal law were white and 9 percent were black.[160] Looking at this information, the staff report concluded that the "dramatic racial turnaround under the drug kingpin law clearly requires remedial action."[161]

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[158] *Racial Disparities in Federal Death Penalty Prosecutions 1988–1994*, Staff Report by the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, 103 Cong. 2d Sess., March 1994.

[159] *Racial Disparities, supra.*

[160] *Racial Disparities, supra.*

[161] *Racial Disparities, supra.*

The staff report also stated that

> Nearly 40% of those executed since 1976 have been black, even though blacks constitute only 12% of the population. And in almost every death penalty case, the race of the victim is white. Last year alone, 89% of the death sentences carried out involved white victims, even though 50% of the homicides in this country have black victims. Of the 229 executions that have occurred since the death penalty was reinstated, only one has involved a white defendant for the murder of a black person.[162]

These statistics led the staff report to conclude that "Race continues to plague the application of the death penalty in the United States."[163]

In 1995, researchers at the University of Louisville found that blacks convicted for killing whites were more likely to receive the death penalty than any other offender-victim combination.[164] In fact, in 1996 "100% of the inmates [on Kentucky's death row] were there for murdering a white victim, and none were there for the murder of a black victim, despite the fact that there have been over 1,000 African-Americans murdered in Kentucky since the death penalty was reinstated."[165] This evident bias in use

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[162] *Racial Disparities*, *supra*.

[163] *Racial Disparities*, *supra*.

[164] Keil and Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976–1991* (1995) 20 Am.J.Crim.Just. 17.

[165] Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, Death Penalty Information Center (June 1998).

of the death penalty led to Kentucky's Racial Justice Act, passed in 1998, which permits race-based challenges to prosecutorial decisions to seek the death penalty.[166] There is no equivalent in California, nor is there even a jury instruction that warns the jurors to avoid race or group prejudice in their deliberations over the appropriate penalty.

In August 2009, North Carolina passed the Racial Justice Act, becoming the second state to allow statistical evidence to show racial bias in the death penalty. In an individual case, the law allows a judge to overturn the death sentence or prevent prosecutors from seeking the death penalty if bias is shown. Governor Beverly Purdue, who signed the act into law, stated "I have always been a supporter of death penalty, but I have always believed it must be carried out fairly. The Racial Justice Act ensures that when North Carolina hands down our state's harshest punishment to our most heinous criminals—the decision is based on the facts and the law, not racial prejudice." (*Perdue signs Racial Justice Act* (Aug. 11, 2009) WRAL <http://www.wral.com/news/state/story/5769609/> [as of Mar. 27, 2012].)

A recent study in North Carolina found that the odds of a defendant receiving a death sentence were three times higher if the person was

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[166] Dieter, *supra*.

convicted of killing a white person than if he had killed a black person. The study, conducted by Professors Michael Radelet and Glenn Pierce, examined 15,281 homicides in the state between 1980 and 2007, which resulted in 368 death sentences. Even after accounting for additional factors, such as multiple victims or homicides accompanied with a rape, robbery or other felony, researchers found that race was still a significant predictor of who was sentenced to death. The study will be published in the North Carolina Law Review. (M. Burns (edit.) *Study: Race plays role in N.C. death penalty* (July 22, 2010) WRAL <http://www.wral.com/news/local/story/8017956/> [as of Mar. 27, 2012].)

Although roundly condemned in the abstract, racism permeates our criminal justice system. Its persistence is encouraged by the requirement that it be photographed or documented before any court will act to condemn it. In *McCleskey v. Kemp*, *supra*, 481 U.S. 279, the United States Supreme Court rejected a federal Equal Protection challenge to a Georgia death sentence which was shown by statistical evidence to have been imposed pursuant to a statewide pattern of racially disproportionate capital sentencing.

Starting from the premise that the federal Equal Protection Clause is concerned only with state action consisting of purposeful discrimination by

official decision-makers, the *McCleskey* majority opinion first translated this principle into a requirement that, "to prevail under the Equal Protection Clause, McCleskey must prove that the decision-makers in his case acted with discriminatory purpose" (*McCleskey v. Kemp*, *supra*, 481 U.S. at p. 292) and then held that "an inference drawn from the general statistics [concerning capital sentencing patterns] to a specific decision in a trial and sentencing is simply not comparable to" statistical proof of racial discrimination in other contexts. (*Id.* at p. 294.) Hence, the majority held, any claim that a death sentence violates the federal Equal Protection Clause must be established by case-specific proof of subjective racial animus on the part of the prosecutor, jurors, judge or legislature. (*Id.* at pp. 292–299.)

Thus, the *McCleskey* majority limited the federal Equal Protection Clause to treating "the superficial, short-lived situation where we can point to one or another specific decision-maker and show that his decisions were the product of conscious bigotry," while leaving untreated "the far more basic, more intractable, and more destructive situation where hundreds upon hundreds of different public decision-makers, acting like Georgia's prosecutors and judges and juries—without collusion and in many cases

without consciousness of their own racial biases—combine to produce a pattern that bespeaks the profound prejudice of an entire population."[167]

The *McCleskey* decision was driven by a realization that racial discrimination in capital sentencing was not peculiar to Georgia, but was inevitable under any modern-day American procedure for imposing the death penalty.[168] Thus, the court saw that its only real choices were to

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[167] Amsterdam, *Race and the Death Penalty* (1988) 7 Criminal Justice Ethics 2, at p. 86.

[168] The *McCleskey* majority says repeatedly that the death penalty in the United States would be abolished de facto if the Court were to hold that a statistical showing of state-wide racially discriminatory capital-sentencing practices sufficed to invalidate death sentences imposed under those practices. (See, e.g., 481 U.S. at p. 319 ("McCleskey's wide-ranging arguments . . . basically challenge the validity of capital punishment in our multiracial society"); *id.* at pp. 312–313 ("At most, the . . . [empirical study presented by McCleskey] indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . . As this Court has recognized, any mode for determining guilt or punishment 'has its weaknesses and the potential for misuse.'. . . Specifically, 'there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death."'"); *id.* at p. 312 n. 35 ("No one contends that all sentencing disparities can be eliminated."); *id.* at p. 315 n. 37 ("The *Gregg*-type statute imposes unprecedented safeguards in the special context of capital punishment. . . . Given these safeguards already inherent in the imposition and review of capital sentences, the dissent's call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution. As we reiterate . . . , the requirement of heightened rationality in the imposition of capital punishment does not 'plac[e] totally unrealistic conditions on its use.'"); *id.* at p. 319 ("The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor [this is a euphemism for race—the only "factor" at issue in *McCleskey*] in order to operate a criminal justice system

outlaw capital punishment entirely or to tolerate racial bias in the dispensing of death sentences. It chose the latter. However legal at present in the United States, this choice clearly violates the Race Convention, and international law.

The discretion that is now a mandatory part of California's death penalty sentencing scheme guarantees that racism will have an opportunity to flourish throughout the process. The Supreme Court recognizes that any "process that . . . excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind" is intolerably inhumane. (*Woodson v. North Carolina*, *supra*, 426 U.S. at p. 304.) The problem with this now-constitutionally-required discretion, though, is that—as the Supreme Court was compelled to concede in *McCleskey*, 481 U.S. at p. 312—"'the power to be lenient [also] is the power to discriminate.'"

The same reluctance to impose the death penalty regularly which had put an end to mandatory capital sentencing sways jurors, and often prosecutors as well, to forgo the extreme punishment of death unless their outrage at a crime overwhelms their empathy for the defendant. Neither

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that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not 'plac[e] totally unrealistic conditions on its use.'"); and see *id.* at pp. 310–311.)

outrage nor empathy are dispassionate, rational processes. They are impressionistic and impulsive and are strongly moved by racial, caste, and class biases. Capital sentencing procedures conferring broad discretion on prosecutors to seek and jurors to choose a death sentence provide "a unique opportunity for racial prejudice" (*Turner v. Murray*, *supra*, 476 U.S. at p. 35) to operate in ways that courts cannot, and do not, effectively restrain.

This Court has explicitly allowed racism to be part of the process of exercising peremptory challenges of potential jurors, provided that it is not the only reason for such challenges. In *People v. Montiel* (1993) 5 Cal.4th 887, the Court wrote, "To rebut a race- or group-bias challenge, counsel need only give a *nondiscriminatory* reason which, under all the circumstances, including logical relevance to the case, appears *genuine* and thus supports the conclusion that race or group prejudice *alone* was not the basis for excusing the juror. (Citations omitted.)" (*People v. Montiel*, *supra*, 5 Cal.4th at p. 910, fn. 9; emphasis in original.)

To say that "race or group prejudice *alone*" is an impermissible basis of a peremptory challenge must mean that race bias is permissible if it is not the only basis for the exercise of a peremptory challenge. Otherwise, the word "alone" would be superfluous. It cannot have been accidentally included as part of the standard's delineation. Not only do principles of

judicial interpretation require us to give significance to each word, but the Court's emphasizing the word "alone" must mean that the word was an integral part of the standard's formulation—a part worth emphasizing.

Appellant can discern no other contribution of the word "alone" to this formulation than a recognition that *some* racism, or purposeful discrimination, is permissible, so long as it is not the only basis for the exercise of a peremptory challenge. By allowing purposeful discrimination provided that it is not the sole basis for the removal of a juror, this Court institutionalizes the routine practice of racism.

This Court has not done so in other aspects of the law. Elsewhere, it has recognized that destructive behavior may be motivated by various reasons in addition to race bias, and nevertheless condemned such behavior. (See *In re Sassounian* (1995) 9 Cal.4th 535, 549, fn. 11 [to satisfy national origin special circumstance, § 190.2, subd. (a)(16), killing need not have been *solely* because of victim's "nationality or country of origin"]; *In re M.S.* (1995) 10 Cal.4th 698, 716 [the words "because of" construed as found in the similarly worded statutes, §§ 422.6 and 422.7, to only require that the prohibited bias be a substantial factor in the commission of the crime].)

The language in *Montiel*, however, means that racism is permissible, provided it is not the only factor—indeed, there is nothing in this Court's pronouncements that would prevent it from being a substantial factor in the decision to excuse a potential juror. This Court continues to leave open the possibility that racist intent may coexist with permissible intent in the exercise of peremptory challenges. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 197; *People v. Schmeck* (2005) 37 Cal.4th 240, 276–277.)

Race discrimination is both the most detectable symptom and the most invidious consequence of the inability to rationally regulate life-and-death sentencing choices. It has persisted unchecked under every form of post-*Furman* capital-sentencing procedure. None of the statutes upheld by *Gregg v. Georgia*, *supra*, 428 U.S. 153, and its progeny are formally sufficient to cure the *Furman* arbitrariness/discrimination problem or have come close to eliminating it. To the contrary, capital sentencing decisions under the "guided discretion" type of statute sustained in *Gregg* and in effect in California have consistently been found to turn on the race of the victim and secondarily on the race of the defendant, usually in combination.

The protections of the Race Convention, International Covenant and American Declaration establish an affirmative obligation of the United States to redress racial discrimination and to proceed with vigor and

deliberation to ensure that race is not a prejudicial factor in criminal prosecutions. It is incumbent upon the Court to view the application of the death penalty in this case both in light of the international commitments the United States has made to the protection of individuals against racial discrimination, and in acceptance of the overwhelming evidence that race discrimination is an inextricable part of our death penalty scheme. Because the death penalty as applied in California is fraught with intractable discrimination and racism, it violates international norms of *jus cogens* quality. Appellant's death sentence must be reversed.

XXVI. THIS COURT SHOULD DEFER ANY FINDINGS ON THE VIENNA CONVENTION CLAIM UNTIL APPELLANT HAS BEEN AFFORDED AN OPPORTUNITY TO INVESTIGATE AND PRESENT THE CLAIM ON HABEAS CORPUS.

On December 14, 2000, appellant filed a supplemental motion to suppress his statements based on Article 36 of the Vienna Convention on Consular Relations (hereinafter Article 36). The prosecution filed an opposition to the motion on December 19, 2000. (12 CT 3363.) On December 22, 2000, the trial court ruled that suppression was not an available remedy for an Article 36 violation, citing the Ninth Circuit's then-recent decision in *United States v. Lombera-Camorlinga* (9th Cir. 2000) 206 F.3d 882, 884, cert. den. sub nom. *Lombera-Camorlinga* (2000) 531 U.S. 991; 18 RT 4523–4555.)

As part of his motion for a new trial, appellant submitted a letter from the Mexican Consulate in support of his motion, and submitted points and authorities in support of a motion for new trial and a reduction of sentence. (19 CT 5442, 5465, 5479.) These motions were argued and denied on July 20, 2001. (65 RT 14334 et seq.; 19 CT 5527.)

A. Post-Conviction Habeas Corpus Review is the Necessary Venue for the Resolution of Appellant's Argument that He Was Prejudiced by the Article 36 Violation

This Court's prior decisions on Vienna Convention claims invariably treat the issue as a matter that is properly addressed in state post-conviction proceedings. (See, e.g., *People v. Mendoza* (2007) 42 Cal.4th 686, 711 [where Article 36 violation was introduced at formal sentencing and raised on appeal, claim is instead "appropriately raised" in a habeas petition]; see also *People v. Cruz* (2008) 44 Cal.4th 636, 689, fn. 7 [noting in appellate opinion that claim asserting necessary remedy for Article 36 violation "is properly raised on habeas corpus and will be addressed and resolved in that proceeding"]; *In re Omar Fuentes Martinez* (2009) 46 Cal.4th 945, 957 [where defendant unsuccessfully sought trial continuance to permit consular consultation, noting that the "first habeas corpus petition asserted a violation of his Vienna Convention rights" and that the claim was addressed as one invoking individually-enforceable rights, "consistent with our own prior decisions"].)

The Article 36 violation in appellant's case is technically part of the record on appeal. However, as this Court has recognized, the question of prejudice arising from an Article 36 violation depends on "facts outside of the record. . . ." (*People v. Mendoza*, *supra*, 42 Cal.4th at p. 711.) No

factual findings on the question of prejudice should be made on direct appeal without the opportunity for an evidentiary hearing. Accordingly, this Court should defer any resolution of the matter on direct appeal.[169] (*Ibid.* ["Whether defendant can establish prejudice based on facts outside of the record is a matter for a habeas corpus petition"]; *In re Omar Fuentes Martinez supra*, 46 Cal.4th at p. 957 [habeas review of claim included "whether petitioner was prejudiced by any violation of his article 36 rights"].)

Appellant anticipates that habeas corpus counsel (who is not yet appointed) will likely provide additional supporting and dispositive facts concerning this issue. There is a significant likelihood that further investigation in preparation for an evidentiary hearing in this case would reveal the full extent to which the Mexican Consulate's earlier involvement "would have focused on obtaining a sentence of less than death" or, in the

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[169] Other courts have also determined that habeas review is the appropriate venue for the consideration of Article 36 claims. (See *Medellín v. Texas* (2008) 552 U.S. 491, 537, fn. 4 (conc. opn. of Stevens, J.) [noting that the "the Oklahoma Court of Criminal Appeals . . . ordered an evidentiary hearing" on whether a death-sentenced Mexican national "had been prejudiced by the lack of consular notification"]; *Torres v. State* (Okla.Crim.App. 2005) 120 P.3d 1184, 1186. As a result of the post-conviction review undertaken by the *Torres* court, it concluded that the petitioner "was actually prejudiced in the sentencing proceedings by virtue of the State's failure to provide him notice under the Vienna Convention." (*Torres*, 120 P.3d at p. 1190, fn.18.)

circumstances of this case, would also have "assisted in the guilt phase of the trial." (*Torres v. State* (Okla.Crim.App. 2005) 120 P.3d 1184, 1188.)

It appears that counsel did not become aware of the possibilities of consular assistance until December 2000, long after appellant's arrest in July 1998. If so, the issue of whether defense counsel's failure to immediately contact the consulate and seek its assistance in this case constituted incompetent representation is a matter for habeas review, one that will require development of extra-record facts. (See, e.g., *Osagiede v. United States* (7th Cir. 2008) 543 F.3d 399 [finding trial counsel ineffective for failing to raise Article 36 violation and remanding non-capital habeas case for prejudice determination]; *Valdez v. State* (Okla.Crim.App. 2002) 46 P.3d 703, 710 [finding trial counsel prejudicially ineffective for failing to "inform Petitioner he could have obtained financial, legal and investigative assistance from his consulate" based on "the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate"]; see also *Murphy v. Netherland* (4th Cir. 1997) 116 F.3d 97, 100 [in capital habeas case, observing that treaties such as the Vienna Convention "are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national"].)

Where there is a reasonable likelihood that a petitioner under sentence of death can demonstrate actual prejudice arising from a Vienna Convention violation if given a full opportunity to do so, it is all the more important to give full effect to this argument in his application for habeas corpus relief.

B. Developments Since *Medellín v. Texas* Counsel for the Preservation of Appellant's *Avena* Claim

Appellant is among the group of Mexican nationals whose cases were addressed by the International Court of Justice in *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31) [hereinafter *Avena*]. As a remedy for the violation of his Vienna Convention rights, the ICJ ordered that the United States "provide, by means of its own choosing, review and reconsideration of the convictions and sentences of [appellant and others], by taking account . . . of the violation of the rights set forth" in the Vienna Convention. (*Avena*, ¶ 153(9).) The review and reconsideration of the appellant's conviction and sentence must be "effective" and "guarantee that the violation and the possible prejudice caused by that violation will be fully examined. . . ." (*Id.* at ¶ 138, citations omitted.)

As this Court has noted, "the ICJ required that the violation of article 36 be reviewed *independently of due process provisions* of the United States Constitution." (*Martinez, supra*, 46 Cal.4th at p. 960, emphasis

added.) *Avena* stresses that "review and reconsideration" is distinct from consideration of the treaty violation as a fair trial concern during appellate or post-conviction review and operates under a different rationale:

> [T]he defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial"—a concept relevant to the enjoyment of due process rights under the United States Constitution—but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law.

(*Avena*, at ¶ 139.)

The ICJ thus ordered "review and reconsideration" in cases where it knew that the domestic courts—including this Court—had already considered an Article 36 violation in the context of post-conviction habeas proceedings.

Appellant recognizes that he may not compel this court to enforce the *Avena* Judgment. However, given the likelihood of legislative or diplomatic implementation of *Avena* consistent with the Supreme Court's decision in *Medellín v. Texas* (2008) 552 U.S. 491 (2008), to abandon the claim at this time would not be prudent. The *Medellín* Court itself was unanimous in recognizing that the national interest in securing full domestic compliance with *Avena* is "plainly compelling," by "ensuring the reciprocal

observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law." (*Medellín*, 552 U.S. at p. 524; see also p. 566 (dis. opn. of Breyer, J.) [non-compliance increases the risk of "worsening relations with our neighbor Mexico, of precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or of diminishing our Nation's reputation abroad as a result of our failure to follow the 'rule of law' principles that we preach."].)

In *Medellín*, the Supreme Court determined that neither *Avena* nor the President's determination that review be granted automatically constitutes self-executing federal law that preempts state limitations on filing successive habeas petitions. (*Medellín v. Texas*, *supra*, 552 U.S. at pp. 503–532.) The Supreme Court held that an additional step by the political branches was necessary to implement the *Avena* judgment, including action by Congress to pass implementing legislation (*Id.* at pp. 526–527), or by the President "by some other means, so long as they are consistent with the Constitution." (*Id.* at p. 530.) In so holding, Chief Justice Roberts, writing for the majority, specifically noted that "no one disputes" that the obligation to abide by the *Avena* judgment, which "flows from treaties through which the United States submitted to ICJ jurisdiction

with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States." (*Id.* at p. 504, emphasis in original.)

Although the *Medellín* Court was deeply divided on the questions presented, the Justices were in unanimous agreement on one crucial issue: Congress possesses the clear constitutional authority to implement the requirements of *Avena*. (*Medellín v. Texas*, *supra*, 552 U.S. at pp. 525–526 ["[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress"]; see also p. 535, fn. 3 (conc. opn. of Stevens, J.) [discussing "Congress' implementation options" for ICJ decisions]; and p. 566 (dis. opn. of Breyer, J.) [majority's holdings "encumber Congress with a task (postratification legislation)"].)

Responding to the Supreme Court's mandate, Senator Patrick Leahy introduced the Consular Notification Compliance Act on June 14, 2011, in order to give full effect to appellant's right to effective "review and reconsideration" of the Article 36 violation in his case. As its title and description indicate, the Consular Notification Compliance Act is intended "to facilitate compliance with Article 36 of the Vienna Convention on Consular Relations." Without opposition, the bill was formally enrolled as

S. 1194 and was referred to the Senate Committee on the Judiciary. (See 157 Cong. Rec. S3779-80 (daily ed. June 14, 2011).)

Predicting the course, and ultimate content, of legislation is a risky business. But, as the Chair of the Senate Judiciary Committee noted when introducing the legislation,

> This bill has the support of the Obama administration, including the Department of Justice, the Department of Defense, the Department of Homeland Security, and the Department of State. I have heard from retired members of the military urging passage of the bill to protect service men and women and their families overseas, and from former diplomats of both political parties who know that compliance with our treaty obligations is critical for America's national security and commercial interests. Given the long history of bipartisan support for the VCCR, there should be unanimous support for this legislation to uphold our treaty obligations. A failure to act places Americans at risk.

(157 Cong. Rec. S3780 (daily ed. June 14, 2011) (statement of Sen. Leahy).)

It is thus not merely a hypothetical possibility that the United States will adopt legislation or other means to give effect to *Avena*; there are persuasive indications that implementing legislation will be adopted. Accordingly, appellant asserts that he remains entitled to comprehensive "review and reconsideration" of the Vienna Convention violation in his case by means of an evidentiary hearing "to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the

rights set forth in the Convention," (*Avena*, at ¶ 121), so as to ascertain whether "the violation of Article 36 committed by the authorities caused actual prejudice to the defendant. . . ." (*Id.* at ¶ 122.[170])

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[170] *Cf. Torres*, 120 P.3d at pp. 1187–1188, construing the *Avena* prejudice requirement as:

> The phrase "actual prejudice" can refer only to prejudice flowing from the violation of the purpose of the Convention provision. That purpose is to ensure that a foreign citizen has the opportunity for aid from his or her government in an unfamiliar criminal jurisdiction. Whether or not the aid results in a different case outcome, a citizen must be actually prejudiced when he is denied aid his government would have provided.

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

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

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the United States 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) 548 U.S. 163, 179, fn. 6.)[171] See also *Pulley v. Harris* (1984) 465 U.S. 37,

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[171] 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

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

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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." (548 U.S. at p. 178.)

was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home)—to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 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. This Court Should Reconsider and Reject its Misplaced Reliance on Two United States Supreme Court Cases as Authority For the Erroneous Proposition That California's Death Penalty Scheme Meaningfully Narrows the Pool of Persons Eligible for Death

On June 5, 2000, appellant filed a motion to bar the death penalty from his case for failure to comply with the requirement of the Eighth Amendment that the legislative scheme in effect in California did not meaningfully narrow the class of persons eligible for the death penalty. (4 CT 2419 et seq.) On June 16, 2000, the trial court denied the motion. (4 RT 1333–1234.)

"To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.'" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citations omitted.) 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.) For example, in *People v. Stanley* (1995) 10 Cal.4th 764, the Court rejected the claim that

California's 1978 death penalty law is unconstitutional because the special circumstances fail to perform the narrowing function required by the Eighth Amendment, citing also *Pulley v. Harris*, *supra*, 465 U.S. 37, in holding "[t]his contention has been rejected by the United States Supreme Court." (*Stanley*, at pp. 842–843.)

Bacigalupo held that "California's 1978 death penalty statute is essentially identical to California's 1977 death penalty law the United States Supreme Court upheld in *Pulley v. Harris* [citations omitted] in that it 'requir[es] the jury to find at least one special circumstance beyond a reasonable doubt,' thereby 'limit[ing] the death sentence to a small subclass' of murders."[172]

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make *all* murderers eligible. (See

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[172] See also *People v. Jennings* (2010) 50 Cal.4th 616, 648–649 [stating the U.S. Supreme Ct. "has held that California's requirement of a special circumstance finding 'adequately limits the death sentence to a small sub-class of capital-eligible cases'"], quoting *Harris*, 465 U.S. at p. 53); *People v. Arias* (1996) 13 Cal.4th 92, 187 [rejecting the defendant's narrowing claim and citing *Harris*, 465 U.S. at p. 53, as "upholding the 1977 death penalty law" and *Bacigalupo*, 6 Cal.4th at p. 467 as "noting essential identity of 1978 scheme"]; *People v. Whitt* (1990) 51 Cal.3d 620, 659–660 [rejecting defendant's claim there is no "meaningful" distinction between capital and noncapital murderers because of aggravating sentencing factors common to most murders by citing *Harris* and stating "California's statute satisfies the Eighth Amendment's requirement that the category of death-eligible murderers by suitably narrowed"].

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 31 special circumstances[173] 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 murderer, per the drafters' declared intent but contrary to constitutional requirements.

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* (1983) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 500–501, 512–515.) These categories are joined by so

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[173] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now 34.

many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

This Court's belief that the United States Supreme Court resolved the constitutionality of the 1978 death penalty statute in *Pulley v. Harris* represents a fundamental misunderstanding of that decision. In *Harris*, the issue before the Supreme Court was "whether the Eighth Amendment . . . requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner." (*Harris*, 465 U.S. at pp. 43–44.) The issue in *Harris* was plainly different from the question of whether the 1978 version of the statute sufficiently narrows the pool of death-eligible murderers.

It is true that *Harris* contains the statement that the California statute, "[b]y requiring the jury to find at least one special circumstance beyond a reasonable doubt, . . . limits the death sentence to a small sub-class of capital murders." (465 U.S. at p. 53.) *Harris*, however, involved California's *1977* death penalty statute (see *Harris*, 465 U.S. at pp. 38–39, fn. 1), while the whole point of the Briggs initiative was to substantially

expand the reach of that statute to include "All murderers." Appellant challenged the 1978 statute, which the *Harris* case did not consider at all.

Furthermore, *Harris* concluded only that the 1977 California statute was constitutional "[o]n its face." (See 465 U.S. at p. 53.) The Court in *Harris* explicitly distinguished the two laws, noting that the special circumstances in the 1978 California death penalty law are "*greatly expanded*" from those in the limited in 1977 law. (465 U.S. at p. 53 fn. 13, emphasis added.) *Harris* does not in any way address, let alone resolve, the issue of whether or not the 1978 statute fails to meet the Eighth Amendment's requirement that a death penalty scheme meaningfully narrow those eligible for a death sentence.

This Court has also erroneously relied upon *Tuilaepa v. California* [(1994) 512 U.S. 967] in rejecting narrowing claims. In *People v. Sanchez* (1995) 12 Cal.4th 1, 60, this Court rejected the claim that "the 1978 death penalty law is unconstitutional . . . because it fails to narrow the class of death-eligible murderers and thus renders 'the overwhelming majority of intentional first degree murderers' death eligible," in reliance on a misunderstanding that the United States Supreme Court in *Tuilaepa* resolved this claim:

> [I]n *Tuilaepa v. California*, *supra*, and in a number of previous cases, the high court has recognized that 'the proper

> degree of definition' of death-eligibility factors 'is not susceptible of mathematical precision'; *the court has confirmed* that our death penalty law avoids constitutional impediments because it is not unnecessarily vague, *it suitably narrows the class of death-eligible persons*, and provides for an individualized penalty determination.

(*Sanchez*, 12 Cal.4th at pp. 60–61, emphasis added. See also *Arias*, 13 Cal.4th at p. 187 [rejecting narrowing claim by stating "[i]dentical claims have previously been rejected with respect to the death penalty scheme applicable in this case and to its closely related predecessor, the 1977 law" and citing to *Tuilaepa*]; see also *People v. Beames* (2007) 40 Cal.4th 907, 933–934 [rejecting the defendant's narrowing claim by citing to *Tuilaepa*, 512 U.S. at pp. 971–972, for the proposition that "the special circumstances listed in section 190.2 apply only to a subclass of murderers, not to all murderers . . . [thus] there is no merit to defendant's contention . . . that our death penalty law is impermissibly broad."].)

The issue that the United States Supreme Court resolved in *Tuilaepa* was whether the aggravating factors in section 190.3—which in California pertain only to the death selection determination, and not the death eligibility determination—are constitutional. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 969.) The Supreme Court in *Tuilaepa* explicitly said that it was *not* addressing any issue concerning the eligibility stage of the California scheme. (*Id.* at p. 975 [noting the petitioners were not

challenging their special circumstances—the eligibility phase in California's scheme—"so we do not address that part of California's scheme save to describe its relation to the selection phase"]; see also *id.* at p. 984 (conc. opn. of Stevens & Ginsburg, JJ.) [concluding that the sentencing factors used at the selection phase at issue in the cases were constitutional, based on "the assumption (unchallenged by these petitioners) that California has a statutory 'scheme' that complies with the narrowing requirement"]; *id.* at p. 994 (dis. opn. of Blackmun, J.) [observing "the Court's opinion says nothing about the constitutional adequacy of California's eligibility process" or its "extraordinarily large death pool" and clarifying "the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing"].)

In rejecting prior claims that California's statute does not adequately narrow the pool of murderers in any meaningful way, this Court has relied on two cases from the United States Supreme Court that explicitly stated they were not ruling on this question, or explicitly stated that their holding was limited to the 1977 statute, and not on the "greatly expanded" 1978 statute. This Court should look again at the reach of California's current statute. If it does, it will see that the great majority of persons convicted of murder are also eligible for death, and that the process for deciding which

individuals will face the possibility of the death penalty is as "wanton" and "freakish" as any system struck down by the high court in *Furman v. Georgia*.

B. Burden of Proof and Persuasion

Under California law, a defendant convicted of first-degree special-circumstance murder cannot receive a death sentence unless a penalty-phase jury subsequently (1) makes a factual finding that a specific aggravating circumstance or aggravating circumstances exist, (2) finds that the aggravating circumstances outweigh the mitigating circumstances, and (3) finds that death is the appropriate sentence. The jury in this case was not told that these three decisions had to be made beyond a reasonable doubt, an omission that violated the Supreme Court decisions in *Ring v. Arizona* (2002) 536 U.S. 584 and its progeny.

Nor was the jury instructed on any burden of proof or persuasion at all (except as to a prior conviction and/or other violent criminal conduct). These were errors that violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g.,

People v. Mills, *supra*, 48 Cal.4th at p. 213; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

C. Factor (a)

Section 190.3, factor (a)—which permits a jury to sentence a defendant to death based on the "circumstances of the crime"—is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and standardless, and violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment.

The jury in this case was instructed in accord with this provision. (62 RT 13724.) In addition, the jury was not required to be unanimous as to which "circumstances of the crime" amounting to an aggravating circumstance had been established, nor was the jury required to find that such an aggravating circumstance had been established beyond a reasonable

doubt, thus violating *Ring v. Arizona*, 536 U.S. 584 and its progeny[174] and appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) This Court has repeatedly rejected these arguments. (See, e.g., *People v. Mills*, *supra*, 48 Cal.4th at pp. 213–214; *People v. Mendoza* (2000) 24 Cal.4th 130, 190; *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304–305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

D. Factor (b)

During the penalty phase, the jury was instructed it could consider criminal acts which involved the express or implied use of violence. (62 RT 13724–13725.) This evidence included the shooting of Javier Ibarra and appellant's being discovered hiding under a bed in an apartment where a pistol and lines of methamphetamine were found close by. The jurors were not told that they could rely on this factor (b) evidence only if they unanimously agreed beyond a reasonable doubt that the conduct had occurred. In light of the Supreme Court decision in *Ring v. Arizona*, 536

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[174] *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296; *United States v. Booker* (2005) 543 U.S. 220; *Cunningham v. California* (2007) 549 U.S. 270.

U.S. 584 and its progeny, the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.)

In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable, non-arbitrary penalty phase determination and to freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Martinez* (2010) 47 Cal.4th 911, 968; *People v. Lewis* (2006) 39 Cal.4th 970, 1068.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

E. Written Findings

The California death penalty scheme fails to require written findings by the jury as to the aggravating and mitigating factors found and relied on, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. Even the parole board is required to set out in writing its reasoning in affirming or denying parole. (*In re Sturm* (1974) 11 Cal.3d 574.) This Court

has repeatedly rejected these arguments. (*People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

F. Intercase Proportionality Review

The California death penalty scheme fails to require intercase proportionality review, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Mills*, *supra*, 48 Cal.4th at p. 214; *People v. Martinez*, *supra*, 47 Cal.4th at p. 968.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

G. Disparate Sentence Review

The California death penalty scheme fails to afford capital defendants with the same kind of disparate sentence review as is afforded felons under the determinate sentence law, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal

protection, to reliable determinations of the appropriateness of the death penalty and of he fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Mills*, *supra*, 48 Cal.4th at p. 214; *People v. Martinez*, *supra*, 47 Cal.4th at p. 968.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

H. Cruel and Unusual Punishment

The death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. This Court has repeatedly rejected this argument. (See, e.g. *People v. McWhorter* (2009) 47 Cal.4th 318, 379.) Those decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

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.

To the extent respondent hereafter contends that any of these issues is not properly preserved because, despite *Schmeck* and the other cases cited

herein, appellant has not presented them in sufficient detail, appellant will seek leave to file a supplemental brief more fully discussing these issues.

XXVIII. APPELLANT'S CONVICTIONS ON COUNTS 10 AND 11 SHOULD BE REVERSED.

After appellant was convicted and the jury sentenced him to death, the prosecutor elected to proceed to trial on counts 10 and 11, stemming from the authorities finding appellant hiding under a bed in an apartment with lines of methamphetamine and a legal weapon in a woman's purse nearby. (See Statement of Facts & Arg. XIX, *ante*.) On April 3, 2001, appellant filed a motion to dismiss, primarily on grounds of judicial economy, and the difficulty and cost of proceeding with another change of venue motion. (18 CT 5157.)

The prosecutor's opposition, filed on April 17, 2001, emphasized the fragility of the trial court's rulings that allowed the use of these crimes as nonadjudicated aggravating factors, and asked to be allowed to proceed to obtain felony convictions that could be used under section 190.3, factor (c) at a subsequent retrial should the death penalty be reversed. (18 CT 5163.) It further emphasized the prosecutor's rights to represent the interests of society, and cited *People v. Superior Court (Pipkin)* (1997) 59 Cal.App.4th 1470, for the proposition that "a court abuses its discretion if it dismisses a case solely to accommodate judicial convenience or court congestion." (18 CT 5165.)

After argument, the trial court ruled that even if a change of venue was required, the extra cost would be small, because the trial would take only a couple of days, and it denied the motion. (64 RT 13902.) The motion should have been granted. The prosecutor's authorities stand solely for the proposition that the trial court must comply with the statutory mandate to state reasons for dismissing a conviction. (*Pipkin*, *supra*, 59 Cal.App.4th at pp. 1477–1478.)

The prosecutor argued that perhaps it was wrong for the trial court to have allowed it to present appellant's jury with evidence of the presence of a legal weapon and two or three lines of methamphetamine near him under the theory that they constituted a threat of violence. The very real possibility that the trial court's ruling in this regard would be reversed meant that the prosecution should be allowed to proceed and obtain formal convictions so they could be presented to appellant's next jury under section 190.3, factor (c), as prior felony convictions should there be a retrial. (64 RT 13884–13886.)

The prosecutor was rightly uneasy about having been allowed to present the jury with the unadjudicated acts of appellant being arrested while hiding under a bed close to a legal gun and lines of drugs. There are no cases that support his contention that these conditions imply a threat of

violence, under the direction of *People v. Boyd, supra*, and its progeny. It hoped to address that problem by obtaining felony convictions, which it thought would be admissible under section 190.3, factor (c) at a retrial of this case. Such gamesmanship does not comport with the prosecutor's duty to do justice. (*Berger v. United States, supra*, 295 U.S. at p. 88.) The convictions for these two felonies should be reversed.

XXIX. THE TRIAL JUDGE'S REFUSAL TO GIVE A LINGERING DOUBT INSTRUCTION DEPRIVED APPELLANT OF HIS RIGHT TO PRESENT THE LINGERING DOUBT DEFENSE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

Appellant proposed that his jury be instructed on lingering doubt regarding his intent to kill the decedent.[175] (See 17 CT 4932; see also 17 CT 4933, 4943–4944.) The trial court, in reliance on *People v. Earp, supra*, 20 Cal.4th 826, found that there is no constitutional entitlement to instructions on lingering doubt, although such may be argued by the defendant as a factor in mitigation. (55 RT 12301; see also 61 RT 13368.)

This Court has repeatedly ruled that although a defendant may argue that lingering doubt over whether he committed a capital offense is a mitigating circumstance which the jury should consider in deciding between life and death sentences, there is no general right to an instruction informing the jury that they may do so. (See, e.g., *People v. Enraca*, *supra*, 53 Cal.4th at p. 768; *People v. DePriest*, *supra*, 42 Cal.4th at p. 60 [no duty to instruct on lingering doubt]; *People v. Bonilla*, *supra*, 41 Cal.4th 313. But see *People v. Harrison* (2005) 35 Cal.4th 208, 259–260 [approving lingering

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[175] "Each of you may consider as a mitigating factor any lingering or residual doubt that you may have as to whether the defendant intentionally killed the victim. Lingering or residual doubt is defined as doubt concerning proof that remains after you have been convinced beyond a reasonable doubt." (17 CT 4932; see also 17 CT 4933, 4943–4944.)

doubt instruction]; *People v. Snow*, *supra*, 30 Cal.4th at p. 125 [approving similar lingering doubt instruction]; *People v. Cain*, *supra*, 10 Cal.4th at pp. 65–66 [upholding similar lingering doubt instruction].)

Nonetheless, in light of *People v. Gay* (2008) 42 Cal.4th 1195, this Court should reconsider its approach to lingering doubt instructions and conclude that this California state-law-created right to a lingering doubt defense gives rise to a Sixth-Amendment right to fully present that defense by having the trial judge inform the jury of the existence of that defense and explain its relevance to their deliberations. As the Court put it in *Gay,* California is one of those jurisdictions which "have recognized the legitimacy of a lingering-doubt defense in the penalty phase of a capital trial." (*People v. Gay*, 42 Cal.4th at p. 1221.) The Court went further, noting that lingering doubt may often be the best defense: "As other courts have noted, 'residual doubt is perhaps the most effective strategy to employ at sentencing.' [Citations.]" (*Id.* at p. 1227.)

Given this clarification of the California right to a lingering doubt defense, the Court must also recognize that this right is protected by the Sixth and Fourteenth Amendments. (*Holmes v. South Carolina* (2006) 547 U.S. 319; *Crane v. Kentucky*, *supra*, 476 U.S. 683; *Chambers v. Mississippi*, *supra*, 410 U.S. 284.) Having established the state-law

existence of a lingering doubt defense, a state must ensure that its relevance is conveyed to the trier of fact. (*Tyson v. Trig* (7th Cir. 1995) 50 F.3d 436, 448 [the right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense"]; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201–1202 ["[p]ermitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal"].)

Thus, based on *People v. Gay*'s recognition of the right to a lingering doubt defense and clarification of the penalty phase relevance of evidence raising doubts as to guilt, this Court should reconsider its prior precedents and require that appropriate instructions inform the jury that they may consider lingering doubt because otherwise the right to make such a defense "would be empty" (*Tyson v. Trigg*, *supra*, 50 F.3d at p. 448) and "of little value." (*United States v. Escobar de Bright*, *supra*, 742 F.2d at pp. 1201–1202.)

It violates the Sixth and Fourteenth Amendment right to present a defense to render its exercise empty and valueless. Rather, this Court should implement the right to present a lingering doubt defense by requiring

instructions which let the jury know that the right exists as the trial courts did in *Harrison, Snow,* and *Cain.*

The pattern of affirmances of trial judges who either give a lingering doubt instruction or refuse to give it, without any explanation of what should guide the trial judge in deciding whether or not to give the instruction leaves the defendant to a random lottery as to whether the jury receives instructions about a defense which this Court in *Gay* has noted is "perhaps the most effective strategy to employ at sentencing." (42 Cal.4th at p. 1227.) Such randomness violates the Eighth Amendment. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) Appellant suggests that the best remedy would be to overrule prior decisions and require a uniform lingering doubt instruction such as the one approved by this Court in *Harrison* and *Snow*.

The trial judge's error in refusing to give the lingering doubt instruction violated the Sixth, Eighth and Fourteenth Amendments and therefore the burden is on the state to prove that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*.) In the instant case, the prosecution cannot meet that burden. The evidence of appellant's involvement in the Leonel Paredes kidnapping was weak, and the evidence

that appellant was a major player in the kidnapping of Juan Carlos Ramirez was largely engendered long after the event; the undisputed initiators were Hector Velasquez and Freddie De La Rosa. There was physical evidence supporting appellant's version of the shooting. The likelihood of anyone, including an experienced marksman, hitting someone's head with three shots from a distance in the dark was minuscule; if appellant truly sought to deliberately kill Chad Yarbrough, he would have held the weapon much closer to the victim.

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

XXX. INTRACASE PROPORTIONALITY.

On October 23, 2000, appellant filed a motion to preclude the prosecution from seeking the death penalty against appellant. He argued that there was no justification for seeking the death penalty against him when his codefendant, who the prosecutor argued was as guilty as appellant at every step, and who had two serious prior felony convictions, had been allowed to plead guilty to a life sentence. (11 CT 3131.)

The prosecutor filed a response and opposition to this motion on November 15, 2000, arguing that Efrain Garza was not as culpable as appellant, who actually shot the decedent, and who was the "ringleader" in the two carjacking cases. The prosecutor also pointed to practicalities that led him to allow Garza to plead guilty, which was to avoid two death penalty trials, with Garza going first due to appellant's medical condition, and that "the attendant publicity of trial of Garza would have made change of venue for Ramirez a near certainty." (11 CT 3166.) After argument on March 5, 2001, the trial court denied the motion. (53 RT 11943.)

This ruling was in error. The reasons put forth by the prosecution are either not supported by the record, or serve to support appellant's contention that to impose the death penalty on him while not punishing his codefendant equably was arbitrary and capricious.

"The Constitution prohibits the arbitrary or irrational imposition of the death penalty." (*Parker v. Dugger* (1991) 498 U.S. 308, 318.) In *People v. Dillon*, *supra*, 34 Cal.3d 441, this Court found it relevant in weighing the proportionality of a sentence to consider the punishments meted out to the six codefendants; the fact that they were significantly less serious led that court to lower defendant's sentence from first to second degree murder. (34 Cal.3d at p. 488.)

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"].) This Court's review of intracase proportionality focuses on the characteristics of the defendant, and of the crime he committed (*People v. Virgil* (2011) 51 Cal.4th 1210, 1287–1288), but it is relevant to consider punishment meted out to codefendants.

The prosecutor's contentions regarding relative culpability are not supported by the record, or are selective. It was Garza who brought the Tec-9 with him to the decedent's truck. There is no evidence that appellant was in any way a leader of the kidnapping of Juan Carlos Ramirez. He and Garza were invited to get in the back of the truck at the same time; they did not know where they were going. The prosecutor contended that Garza was able to obtain a life sentence because he successfully moved to sever his

trial from appellant's trial. Here, the prosecutor argued that appellant's medical problems meant that Mr. Garza's trial had to precede his, and in order to avoid a certain change of venue, the prosecution offered Efrain a life sentence. This is an arbitrary and capricious basis for deciding who can live and who must die. The Eighth Amendment to the United States Constitution and California law prohibit the imposition of death on appellant in light of the life sentence awarded to his equally culpable codefendant.

XXXI. THE ERRORS, BOTH SINGLY AND CUMULATIVELY, OBSTRUCTED A FAIR TRIAL, AND REQUIRE REVERSAL OF APPELLANT'S GUILT PHASE CONVICTIONS.

This case was close. The jury deliberated on guilt verdicts over seven days, and spent over 25 hours in deliberating, asking questions of the court, and listening to testimony being re-read. It is reasonably probable that any of the errors in this case could have prevented appellant from being given more favorable verdict.

Many of the errors urged in this brief are sufficiently important to justify reversal in and of themselves. However, if this Court finds more than one error, but concludes that each error, standing alone, can be deemed harmless despite the factors discussed above, then this Court must also consider the cumulative effect of the errors. (*Williams v. Taylor*, *supra*, 529 U.S. at p. 399; *People v. Hill*, *supra*, 17 Cal.4th at pp. 844–845 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"]; *People v. Cardenas* (1982) 31 Cal.3d 897, 907; *People v. Duran* (1976) 16 Cal.3d 282; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36 Cal.2d 222, 233.)

"Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial

setting that is fundamentally unfair." (*Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 963; *People v. Hill*, *supra*, 17 Cal.4th at p. 844.) In such cases, "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of a the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

Each error in the guilt phase is sufficiently prejudicial to warrant reversal of appellant's convictions. Even if that were not the case, however, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors described in this brief.

XXXII. ANY SUBSTANTIAL ERROR IN EITHER PORTION OF APPELLANT'S TRIAL MUST BE DEEMED PREJUDICIAL AT THE PENALTY PHASE.

A. Errors That Were Harmless in the Guilt Phase Might Still Adversely Impact the Penalty Determination

The jury was expressly told that it should consider all of the evidence which had been received during any part of the trial of this case. (62 RT 13724.) However, since the question the jury resolves at the guilt phase is fundamentally different from the question resolved at the penalty phase, error that is harmless as to the guilt determination can be prejudicial at the penalty phase.

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal. But in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a reasonable probability that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136–137.)

An example of such evidence is a tape of Carlos Rosales's January 1998 interview of more than two hours. This tape may not have impacted

the jury's determination of guilt or innocence, but would have been inadmissable, and prejudicial, in the penalty phase of appellant's trial.

This Court has recognized that, at a capital penalty trial, lingering doubts about guilt constitute a proper factor in mitigation of the penalty. (*People v. Hawkins* (1995) 10 Cal.4th 920, 966–968.) Although the trial court refused to instruct the jury on lingering doubt as a mitigating factor (55 RT 12301; see Arg. XXIX, *ante*), it recognized that appellant could argue lingering doubt as a reason for imposing a sentence of less than death. (61 RT 13368.)

By definition, it takes less to raise a lingering doubt than it takes to raise a reasonable doubt. Guilt phase errors which might be found harmless under traditional guilt phase tests of prejudice might nonetheless have the effect of negating a lingering doubt as to intent, intoxication, or any other part of appellant's defense. Such errors may prejudicially impact the penalty determination even though they may be harmless as to the guilt verdict.

Accordingly, this Court must make a separate assessment of the impact of each guilt phase error, and of the cumulative impact of all guilt phase errors, on the penalty determination.

B. Any Substantial Error Requires Reversal of the Penalty Verdict

Prior to the adoption of California's current death penalty procedures, in which juror discretion is guided by a statutory list of aggravating and mitigating factors, this Court recognized in two key cases that assessment of the impact of an error is more difficult in a penalty trial than in a guilt trial. In addition to the language of *Hamilton*, *supra*, set out above, this Court wrote:

> [T]he jury may conceivably rest the death penalty upon any piece of introduced data or any one factor in this welter of matter. The precise point which prompts the [death] penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.
>
> We cannot determine if *other* evidence before the jury would neutralize the impact of an error and uphold a verdict. . . . We are unable to ascertain whether any error which is not purely insubstantial would cause a different result; we lack the criteria for objective judgment.
>
> Thus, *any* substantial error in the penalty trial may have affected the result; it is reasonably probable that in the absence of such error a result more favorable to the appealing party would have been reached (Citation.)

(*People v. Lines* (1964) 61 Cal.2d 164, 169.)

While it is true that juries today have more guidance in choosing the penalty than did juries in the days of the death penalty law at issue in

Hamilton and *Lines*, penalty determinations are still very different from guilt determinations. In the guilt phase, the jury makes inherently factual decisions. Exactly what events occurred? What was the defendant's state of mind when they occurred? In a penalty phase, juries make similar decisions in some respects, but they conclude with a moral and highly normative determination when they make the ultimate decision as to whether death or life without parole is the appropriate penalty.

The discretion that a jury possesses in deciding penalty remains much broader than the discretion possessed when determining guilt or innocence. Appellant's penalty phase jury was instructed that it was free to assign whatever moral or sympathetic value it deemed appropriate to each and all of the various factors it was permitted to consider. (62 RT 13733–13734.) No guilt phase jury possesses comparable discretion.

In regard to review of the impact of state-law errors on a capital penalty verdict under the modern death penalty law, this Court has modified the *Hamilton/Lines* standard and held that the correct standard is whether there is a reasonable or realistic possibility that the jury would have rendered a different verdict absent the error or errors. (*People v. Brown*, *supra*, 46 Cal.3d at p. 448.) But this court has recognized another context in which the "any substantial error" standard set forth in *Hamilton* and *Lines*

applies: Where the evidence, though sufficient to sustain the verdict, is extremely close, any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered as prejudicial. (*People v. Briggs* (1962) 58 Cal.2d 385, 407; *People v. Gonzales* (1967) 66 Cal.2d 482, 493–494; see also *People v. Hickman* (1981) 127 Cal.App.3d 365, 373.)

The United States Supreme Court has recognized the validity of the rationale underlying the conclusion reached in *Lines*:

> It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer.

(*Satterwhite v. Texas* (1988) 486 U.S. 249, 258.)

In another capital case, the Supreme Court again recognized this principle:

> In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., *Lockett v. Ohio*, 438 U.S. at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); *Andres v. United States*, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases, doubts such as those presented here should be resolved in favor of the accused"); *accord, Zant v. Stephens*, 462 U.S. 862, 884–885

> (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the improper ground, we must remand for resentencing.

(*Mills v. Maryland* (1988) 486 U.S. 367, 377.)

Certainly *any* error that impacts on the reliability of the judgment in a capital case—even if it is purely an error of state law—carries federal Eighth Amendment reliability implications. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280 at p. 305.) Furthermore, within the discussion of each error set forth in this brief, it has been shown that there are multiple reasons why the particular error should be considered federal constitutional error. Thus, every error in this case that affected the penalty determination should be reviewed under the federal constitutional standard, set forth in *Chapman v. California*, *supra*, 386 U.S. 18 [whether the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict].

The federal *Chapman* standard is also affected by the inescapable fact that the greater discretion in sentence determinations, compared to guilt determinations, makes it far more difficult to determine whether an error did or did not have an impact on the outcome. For example, in *Caldwell v. Mississippi*, *supra*, 472 U.S. 320, a death judgment was reversed when the Court found an error and concluded that it could not say that it had no effect

on the sentencing decision, that decision did not meet the standard of reliability that the Eighth Amendment requires.

C. The Penalty Trial Must Be Considered Unusually Close; No Error That Impacted the Penalty Determination Can Be Deemed Harmless

As noted above, the jury in this case for close to 20 hours over what penalty to impose on appellant. Whether this Court uses the "no effect" standard, the *Chapman* standard, or *any other standard*, it is especially clear in the present case that any guilt or penalty phase error that potentially impacted on the penalty determination must result in reversal of the penalty verdict.

CONCLUSION

For the foregoing reasons, the judgments against appellant must be reversed and his sentences set aside.

Dated: June 21, 2012

Respectfully submitted,

_____
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_____
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CERTIFICATE OF WORD COUNT

I performed a word count of this Appellant's Opening Brief, and I certify that it contains a total of 118,933 words.

DATED: June 21, 2012

Respectfully submitted,

_____

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APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

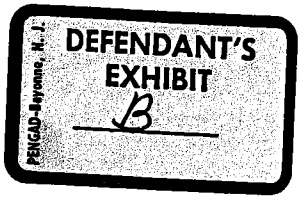
IN AND FOR THE COUNTY OF KERN

--oOo--

Department 13 Hon. Robert T. Baca, Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, versus CIPRIANO RAMIREZ, Defendant	Kern County No. 76259A

FILED Case # SC76259 A+B
Dept. B Indent (X) Ev ( ) 6-26-00
Date
By (B) TERRY McNALLY, Clerk, Deputy



April 22, 1998

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS
(closing arguments of Andrea Kohler)

For the Plaintiff: MS. ANDREA KOHLER
Deputy District Attorney

For the Defendant: MS. ROXANE BUKOWSKI
Attorney at Law

Rae Foreman, CSR 6109

COPY

Bakersfield, California, April 22, 1998

--oOo--

MS. KOHLER: Good morning, ladies and gentlemen. I would like to thank you at the outset for listening to the trial and giving it your careful consideration. There were some unforeseen delays and you were very patient through those unforeseen delays, so I will not cause any more delays and I will get to the closing argument in this case.

My grandmother told me one time that the true measure of how a person treats another person, their fellow human being, is not what they do in public when the public eye is watching but rather what they do when they believe that no one is watching, and in this case I think that's particularly true, because we know that Mr. Cipriano Ramirez, the defendant, and his coconspirators did not believe that anyone was watching them. In fact, the defendant, Cipriano Ramirez, took measures to make sure that no one was watching them. He sent in the girls with the kids before the shooting took place.

From the very beginning of this case, from the very outset the evidence has been presented and you have known that the evidence would show that it was someone other than Cipriano Ramirez, the defendant that's on trial here, that did the shooting, and you may be asking yourself at this time, "How is it legally under the law that someone who does not commit the act of shooting can be held responsible for the death, in this case, of Javier

Ibarra?" And ladies and gentlemen, in this case there are two ways, and I would like to discuss with you, first of all, the definition of a "conspiracy" and the liability under the law of persons who are coconspirators.

Now, the law defines a "conspiracy" as being an "agreement," along with other things, and I will define it fully for you, but I would like to step back for a minute and tell you what I think of the word "conspiracy." When I first hear the word "conspiracy" I always envision a darkened room where there are many people sitting around a dark table and drawing up plans, especially conspiracy to commit murder, and there are plans that are written out over periods of months, and that's what I think of when I think of a conspiracy. But the law tells us that a conspiracy is actually not defined by the amount of time within which the agreement was made, not the length of planning in which the agreement was made but rather that it be an agreement between two or more persons. And ladies and gentlemen of the jury, an agreement to commit a crime with the specific intent to commit the crime, they intended to commit the crime, followed by what's known as an "overt act" committed in the state of California for the purpose -- the overt act being committed for the purpose of furthering what the ultimate goal of the conspiracy was. You must also find that at least one of the coconspirators -- it doesn't even have to be the defendant -- committed one of those overt acts while the defendant was still a coconspirator in the conspiracy.

And what is an "overt act"? The law tells us that an overt act is not necessarily a criminal act; it's not necessarily a crime. An overt act is simply a step that's taken, an action that is made in an attempt to further the objective of the conspiracy. It can be something as innocent as getting into a vehicle and driving it to a particular location, which, if taken by itself, would not be a crime but, ladies and gentlemen, would be an action that was taken in an attempt to further the object of the conspiracy.

And ladies and gentlemen, on the verdict form in this case the conspiracy is charged as the second count, and you must all unanimously agree beyond a reasonable doubt as to that count, as to any count in the case. But there are also special findings after that second count, and those special findings list each overt act as it was listed in the information, and each of those overt acts, such as driving over to the apartment of Alma Mosqueda, each one of those has a place for "true" or "not true." Because ladies and gentlemen, if you find beyond a reasonable doubt that there was an agreement between two or more persons to commit a crime with the specific intent -- all of the stuff I've just read to you about conspiracy -- then you must all agree, as to one or more overt acts, that those were committed. You must all twelve agree on which or how many of the overt acts. If it's one or more than one overt act, you must all agree as to that overt act. And ladies and gentlemen, in this case

I would submit to you that there was much evidence regarding many overt acts taken not only by the defendant, Cipriano Ramirez, but also by Juan Ramirez, a coconspirator, and by Gabriel Flores, a coconspirator.

In looking at the evidence in a case as to intent, as to whether or not someone knew something, what their intentions were, it is sometimes necessary to look at circumstantial evidence. And circumstantial evidence, the law tells us and recognizes that circumstantial evidence is as good evidence as any other type of evidence. It tells us that looking at the circumstances, looking at the facts surrounding the conduct, the actions of someone, the circumstances of their actions, the manner in which the actions were taken, that those circumstances can tell us as reasonable people by reasonable inferences what was intended by certain actions. We don't have like in a cartoon, where you have cartoon figures thinking something, a bubble over the head to tell us, so we have to look at what's going on, what the evidence shows us at the time.

What circumstantial evidence or direct evidence do we have in this case regarding the conspiracy to murder Javier Ibarra? We have Alma's statement to Jesse. We have Alma's testimony here in court, we have Alma's previous statements, we have Yisela Nunez's testimony and the statements she made, and we have the actions of the defendant and his coconspirators. We know from Alma's testimony that the defendant did not like Javier Ibarra,

and we know that besides that basic dislike that there was something on March 15 of 1995 that the defendant did not like. We know that when he called over there to speak to Alma the tone of the conversation was a normal tone of conversation. He asked her what she was doing and who was there, but we also know that when Alma Mosqueda told the defendant, Cipriano Ramirez, that the victim, Javier Ibarra, was there, that the defendant asked her, "Javier?" and then she responded, "Yeah, Javier is over here." And then the defendant made the statement -- circumstantial evidence regarding his motive, his intentions, his motive and intention to go and take care of business, but not only himself -- but "Can we come over and take care of business?" That's a pre-offense statement, ladies and gentlemen. You will be given instruction in the law that's a pre-offense statement made by the defendant which signals an intent, a motive. And ladies and gentlemen, that's a statement that set into motion a number of events on the evening of March 15th of 1995.

We know that a conspiracy, an agreement can take place in a brief amount of time, and in this case we know that the defendant, Cipriano Ramirez, and his brother, Juan Ramirez, were friends with Gabriel Flores. And ladies and gentlemen, the friendship and association of these people is not evidence in and of itself that they formed a conspiracy. You can be friends with people, you obviously can have relatives, and that does not mean that any time you are together you are forming a conspiracy,

but I would submit that, given the close relationships between the people involved and the conduct that night, that that is an indication regarding the knowledge of all the parties of what was going to take place.

Cipriano Ramirez gets his brother, gets Gabriel Flores, and they get in Cipriano Ramirez's car. He gets in the car with two people that he knows very well. He gets in the car and he drives them for -- I think the evidence was -- and like the judge told you, you have to rely upon your memory of what the evidence was, how you've written it down, how you remember it, and if there is a dispute in that, you can always ask that the court reporter read that back -- but my recollection was that the testimony was it was approximately five minutes from the time that Cipriano Ramirez left, according to Alma Mosqueda's testimony, five or ten minutes until they arrived after she got off the phone. And ladies and gentlemen, during that five or ten minutes from the time that Alma Mosqueda got off the phone from speaking with Cipriano Ramirez after he asked her "Is it okay if we come over and take care of business?", that that is five or ten minutes, ladies and gentlemen, in which something was discussed.

And again, we don't have a bubble. We don't have a way of going back in a time machine to find out. We were not there. So we have to look at the circumstances, the resulting conduct. We know that Cipriano Ramirez has been to Alma's Mosqueda's apartment before. He knows the only

way out of Alma Mosqueda's apartment is through the front door. That's the only door that leads out of that place. And he also knows that the parking lot area is right out there in front of her front door. And we also have the diagrams and aerial photographs which show us the parking lot area in relation to where Alma Mosqueda's apartment was.

He pulls in over by her apartment and he doesn't even pull into a parking stall. He just kind of pulls in, according to the testimony of Yisela Nunez, and she saw the gray car pull in and the lights remained on, and the defendant and his coconspirators got out, left the lights on and immediately they all responded to the same location. She looks down from her second-story window and she essentially has a stadium view, a bird's eye view regarding what's going on. She dosen't have the difficult situation of when you're on the same level as something that's occurring, worrying about one person blocking another, because she's looking down into the situation in a well-lit area. They are right up there immediately and then Cipriano Ramirez sends everyone back into Alma Mosqueda's apartment, in Miss Nunez's testimony, and in Alma Mosqueda's they were sent back there almost immediately upon arriving at the scene. There was not time for the arguments and trying to resolve it that the defendant would have you believe was the situation. Instead, they were sent back in there and there were no witnesses to any shooting, no witnesses that they knew of,

but we know Yisela Nunez was watching. Then the defendant and his brother stepped forward at the same time and began fighting with Javier Ibarra, three or four punches, I believe the testimony was.

Now, ladies and gentlemen, the testimony and description regarding the actions that were taken at the time that those punches were thrown was not biased testimony. The witness was very certain. She was asked over and over again on cross-examination and direct examination to explain for the jury, to explain to the Court, to explain to the attorneys how that happened, how they moved forward, and it was almost as if, the way it was described, that it was a staged situation. All of a sudden, almost as if these guys had taken a dance class together, they stepped forward, almost as if it had been preplanned. And ladies and gentlemen, I would submit to you that the defendant and the coconspirators knew when they went over there that they were going to distract Javier Ibarra. Mr. Ibarra was not going to have a chance to run for cover. He was not going to get to see that those shots were coming. He was not going to get to try to just get out of there or duck behind something. He was going to be caught unawares. They were going to take no chances that anything would go wrong with their plan. So Cipriano Ramirez and Juan Ramirez step up and begin engaging Javier Ibarra in a fight, and while they're doing that, from the testimony of Yisela Nunez, all of the attention was between Javier and Cipriano and Juan, and

Gabriel Flores off to the side just stands there and watches. And then, ladies and gentlemen, without any commands being yelled, without the defendant or his brother going down to the ground or being injured, without anything, any precipitating thing that would cause this surprise shooting, Cipriano Ramirez and Juan Ramirez jump back exactly at the same time, and they jump back such that they are not in the line of fire, and as they jump back, as they land, Yisela Nunez witnesses Gabriel Flores to take a couple of steps forward and begin firing. And ladies and gentlemen, he didn't fire just once. He didn't fire the gun up in the air. He fired five times at the victim, an unarmed individual, and Mr. Ibarra barely had time -- from the testimony of Yisela Nunez as to how the shooting went down, and according to the testimony of Dr. Dollinger, the coroner -- barely had time to see what was coming. And ladies and gentlemen of the jury, Cipriano Ramirez, Juan Ramirez, and Gabriel Flores's conspiracy to go and take care of business was accomplished. And ladies and gentlemen, when those shots rang out, when those shots were fired by Gabriel Flores, Cipriano Ramirez and Juan Ramirez, who had stepped back exactly at the same time, were out of the way.

But I leave you with this question: No matter how tough someone may be, no matter how savvy they may be, if they don't know that shots are going to be fired, if they don't know that their friend has a gun and they're out in a relatively unprotected area and shots come from close by

and they are still looking at the victim, Javier Ibarra, what would they do? Just stand there looking at the victim as if nothing were going on? Not if they didn't expect that that was going to happen, not if they didn't know that Gabriel Flores was the one that was firing the shots. Uncontradicted testimony, uncontradicted evidence in this case from all of the evidence that you heard that when those shots were fired, despite what the defendant, Cipriano Ramirez, tells you about being surprised or shocked, despite that statement, that when those shots were fired from close by and over to the side, Cipriano Ramirez and his brother, Juan Ramirez, were still looking at the victim. They never turned and looked around. They never hit the ground. They never tried to run for cover or at least look around and see, "Hey, is this someone with Javier who sees us fighting with him? Is this someone from the apartment complex who knows him that's trying to shoot us? Is this someone that we don't know who is coming up from the side?" Or at least, "What in the world is Gabriel Flores doing?" But there's no reaction, ladies and gentlemen, and there's no reaction to something as startling as that because it was not startling to the defendant, Cipriano Ramirez. And I would submit to you that that is yet another piece of evidence regarding the plan, the intent, the agreement between Cipriano Ramirez, Juan Ramirez, and Gabriel Flores as to how they were going to go take care of business.

And then, ladies and gentlemen, we know that when

the shots were fired, from the testimony of Yisela Nunez and Dr. Dollinger, that the victim, who was shot in the left side, was somewhat in the process of turning around and trying to do something to get out of there but that he was distracted initially and that he did not have the time to react. He did not have the time to see that someone was pulling a gun on him and readying themselves to fire at him. And after that's done and after Javier Ibarra, a young man who was unarmed in this situation, despite the fact that he is on the ground laying really somewhat close to an irrigation or drainage ditch with three very significant gunshot wounds, there again is no reaction by the defendant, Cipriano Ramirez, or Juan Ramirez or Gabriel Flores, except to turn around and leave the scene.

After leaving the scene, Cipriano Ramirez, who tells us that he was so scared at the time that he gave the statement, he says at that time they leave the scene and he has them drop him off. And he makes up a convoluted story about his vehicle being stolen and not being at the scene of the crime and not knowing anything about the crime and not being with Gabriel Flores that night and not being with his brother that night, and he even goes so far as to sign a declaration, an affirmation, after it is explained to him by the police that "If your vehicle wasn't stolen, then you shouldn't sign the form," and he acknowledged that yeah, he knew that.

And ladies and gentlemen, you will be instructed that an attempt to fabricate evidence -- in this case to

make up an alibi defense to place his car in the hands of some unknown person at the time of the shooting -- an attempt to fabricate evidence, a false or misleading statement by the defendant and the flight from the scene of the crime, are all evidence of his consciousness of guilt, of his knowledge of his guilty participation in the crime.

Ladies and gentlemen, the law also tells us that a coconspirator is responsible for the natural and probable consequences of that crime, because a conspiracy to commit murder requires that you find beyond a reasonable doubt what I've read to you of the conspiracy: the agreement, the overt act, the intent. But a conspiracy does not require, a conspiracy to commit murder does not require that there be a resulting murder. For example, if the conspiracy were to play out as it did and Javier Ibarra was able to somehow miss getting shot and get away and not be murdered, then that could also be a conspiracy to commit murder. But the law tells us that one who conspires, one who conspires to commit a crime, in this case, murder, is responsible for the natural and probable consequences of that conspiracy. And ladies and gentlemen, I would submit to you that conspiring to commit murder and taking the steps that were taken, a natural and probable consequence of shooting an unarmed man multiple times from a fairly close range -- I believe the testimony was approximately ten feet, from the way that Yisela Nunez described it, or six feet -- that the natural and probable

consequences of taking those actions are the death of a human being. And that gets us to the first count.

Also, as I told you as we started out, the other theory upon which the defendant, Cipriano Ramirez, is guilty of the murder of Javier Ibarra -- and with respect to that, first let me tell you that first-degree murder requires that there be deliberation, premeditation, malice aforethought -- and we've all heard that before -- as well as the specific intent to kill and the resulting actions. And that's no surprise, I'm sure, to all of you who know what first-degree murder is from television shows, from watching Court TV or just your own knowledge of the law. And premeditation and deliberation is also one of those concepts that kind of conjures up an image of something requiring a lot of time, kind of conjures up those old movies where someone went out and tried to hire a hit person, hired a hit person, drew up a plan of the house, had them go meet at a particular time. But again, the law tells us as to premeditation and deliberation that actually that could be done in a very short unit of time, because although it sounds like a legal jargon type term, premeditation and deliberation really boils down to someone thinking something through, someone weighing the thoughts for and against, someone thinking about what they were going to do and actually deliberating on it.

And ladies and gentlemen, that can be as short a unit of time as a couple of seconds, a couple of minutes, or it can be something that encompasses much more time.

For example, someone who is late for work and it's raining and they're coming up to a stoplight and they see that the light has turned yellow, they're kind of close so that they think they might want to go through, but they've only got two or three car lengths and they're thinking, "If I don't get through this light, I'm going to be late for work, and my boss was already unhappy with me, but if I try to get through it and I hit them, I'm going to have to deal with the insurance company, and if I hit them I'm going to be late anyway." And that's a mental process that only takes a couple of seconds, but the thoughts are made and a decision is made before the person reaches that light; a decision is made based upon a weighing of the for and against as to whether or not they're going to try to make it through that light or they're going to go ahead and stop and be late for work.

Ladies and gentlemen, again, I would point back to the testimony and the circumstances surrounding it -- I don't want to go through all of it -- regarding the establishment of the conspiracy, the agreement, the steps that were taken and the ultimate actions that resulted in the death of Javier Ibarra -- as proof of that deliberation and preparation and premeditation.

And then we get to second-degree murder, and there is second-degree murder with express malice, and that is exactly the same as first-degree murder except no premeditation and deliberation. And then there is second-degree murder, implied malice, and that is, implied

malice is when there is not an express intention to kill a human being. But the law implies malice, the law finds the presence of malice when the killing resulted from an intentional act, the natural consequences of that act are dangerous to human life, and the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life.

And that also gets us to the theory of aiding and abetting. When someone is an aider and abettor, it is someone who participates in the crime; it is someone who is not just merely present at the scene of a crime but who encourages it, facilitates it, or actively participates in some manner. One who aids and abets another in the commission of a crime is not only guilty of that crime which was originally contemplated but any natural and probable consequences of that crime.

Ladies and gentlemen, I would submit to you, although the evidence has shown that there was a conspiracy amongst these three men to go and take care of business by shooting Javier Ibarra, that if you find that there was not such an intent to go over and shoot Javier Ibarra originally, that there was an intention to go over and assault him with a deadly weapon or to assault him and cause him great bodily injury by the manner of the three men going together with a firearm into a situation that could have gotten volatile -- and ladies and gentlemen, I would submit to you that the taking of a firearm, that the arming of oneself with a gun, that the presence of three

people ready to go to take care of business, one being angry -- at least we know Cipriano Ramirez was angry -- that that is an action which has a likely consequence to result in something serious happening, and ladies and gentlemen, I would submit to you that that is something which was inherently dangerous. It was inherently dangerous and likely to result in the death of Javier Ibarra, and Mr. Cipriano Ramirez is guilty of second-degree murder under that theory.

Ladies and gentlemen, there was much evidence in this case regarding the manner in which the shooting took place. There was extensive cross-examination, and I'm just about concluded with my closing argument here, but I would ask you to ask yourself that, although this was a short trial, it didn't take very long, the questions that were asked of Yisela Nunez and Alma Mosqueda and the cross-examination, both direct and cross-examination, ask yourself what bias or motivation either one of those women have to come in here and lie to you about what happened, and I submit to you that the answer to that is none, and I would ask you to find the defendant, Cipriano Ramirez, guilty of the crime of conspiracy to commit murder and the crime of murder in the first degree. Thank you.

THE COURT: Thank you, Miss Kohler.

Miss Bukowski.

(Ms. Bukowski gave her closing argument.)

THE COURT: You may proceed with your rebuttal argument, Miss Kohler.

MS. KOHLER: Thank you, your Honor.

Ladies and gentlemen, the defense, as the Court instructed you, or will instruct you but talked about with you during jury selection, does not have the burden of proof in this case. The People do, and that does not change what the defense has presented, and the defendant does not have to present a defense, but ladies and gentlemen, when a defense witness testifies in this case, the defendant himself, you must evaluate his testimony as you would that of anyone else and you must also evaluate that testimony in light of the principles of law that we provided to you.

Basically the defense is "You should believe me now because I'm telling you this to be the case because I took the stand and told you that it did not happen the way Yisela Nunez saw it because it's in direct conflict with what Yisela Nunez saw; that it did not happen with respect to the way that Alma Mosqueda told you with respect to the telephone conversation; that it did not happen the way the coroner's evidence would indicate and the crime scene sketches would show you with respect to Yisela Nunez being able to see how she saw it, that it did not happen the way Yisela Nunez saw it happen."

Ladies and gentlemen, I would submit to you that it's like one of those situations in everyday life that we all encounter with children or with other people that we know, that just like a situation in normal life, where someone is in a situation where they are caught doing

something in a criminal case, there are only so many defenses based upon the evidence against you. And the defendant wishes you to believe him, yet I would submit to you that when the defendant did not know that there were witnesses against him, when the defendant did not know that that witness, Yisela Nunez, saw everything, when the defendant did not know that Alma Mosqueda was going to come in and testify regarding that phone conversation, that the defendant's statement at that time was self-serving. The defendant's statement then was to present an alibi to the police officers that was to fabricate the report of a stolen vehicle, and the defendant's statement was admitted in this case for the only purpose of -- and you will be instructed on this -- for the limited purpose of showing or impeaching his credibility, showing that he lied on a previous occasion.

And ladies and gentlemen, I don't submit to you that the defendant gave a false statement to you here on the stand simply because he is the defendant in this matter but because, No. 1, it is contradicted by the evidence in the case; No. 2, he has a bias or motive to lie; and No. 3, he changed his story consistent with the evidence against him.

And that is no different than everyday life where someone is caught in a situation where they are caught perhaps red-handed hitting someone, and the child is asked, "Why are you hitting him?", and the child then has to respond, with a teacher who is standing there looking,

with a person that is standing there looking, giving a defense to that which would make it okay to have hit the person. Now, if there is no one watching and the teacher comes up and says, "I heard that you hit so-and-so," the defense is "I didn't do it; I wasn't there."

And ladies and gentlemen, I would submit to you that that's exactly what the defendant, Cipriano Ramirez, has done or attempted to do, is to lie to get himself out of trouble, to comport his testimony with what the evidence was against him. And ladies and gentlemen, another indicia of that is that even now under oath the defendant selects the testimony, the defense that he not only was there but that there was an argument that led him to be there, that there was a situation that required his presence there and that he had no knowledge of why they were going there other than to just try to escort Javier Ibarra off of the premises. And then he goes on to blame it on an individual who has not been arrested or located yet in this case, and I submit to you that, once again, the defendant, Cipriano Ramirez, is trying to do that which he believes will get him out of trouble. And I would ask you, ladies and gentlemen, to evaluate his credibility in light of that changed story, in light of the testimony of Yisela Nunez, in light of the testimony of Alma Mosqueda.

I would also submit to you that the evidence regarding Alma Mosqueda and Yisela Nunez is that they don't live there anymore. They don't live out at the

apartment complexes anymore, so that they are able to come in here and tell you the truth without being fearful. And ladies and gentlemen, I would submit to you that that's exactly what they did. I would also submit to you that alleviated any fear that Alma had, as you heard through the testimony of Jesse Ibarra and then through Detective Hall that there was fear on the part of Alma regarding any retaliation towards her, any retaliation if she were to snitch off the defendant, Cipriano Ramirez, or his brother, Juan Ramirez, or Gabriel Flores.

And I would also point to Detective Hall's testimony as further evidence of that, because Detective Hall, after he got the information regarding the phone call, he went out and attempted to do what a detective should do in this situation, to find her and to speak with her. And Alma Mosqueda was in hiding. Her family said she was no longer in town. He couldn't find her. He went out there and made attempts to contact relatives, and Alma Mosqueda was not going to come forward. And I would submit to you that was not out of fear of the victim's family, but that was out of fear of the defendant in this case.

We didn't hear anything during the defense closing argument regarding Yisela Nunez, any bias or motive on her part to lie. And ladies and gentlemen, I submit to you again that there was no bias or motivation, but even more than that, there was no mistake on the part of Yisela Nunez; that she was asked in different manners, she was

asked questions on cross-examination very specifically about what she saw with respect to Juan Ramirez and Cipriano Ramirez jumping back. And the defense has argued that it was a fight situation, that people were moving around as if they were in a fight. And ladies and gentlemen, we've all seen that before; we know what that is. But I submit to you that you can't get there from here. You can't get this from the evidence in this case, because Yisela Nunez was very clear on what she saw. She was very clear on the fact that Cipriano Ramirez and Juan Ramirez jumped back at the same time. She was very clear on the fact that they never looked over when the shots were fired. She was very clear on the fact that Gabriel Flores stepped up a couple of steps and then shot Javier Ibarra. She was not mistaken. She was able to see that and she told you how she was able to see that. And ladies and gentlemen, I would submit to you that there is no cloudy fighting, people moving around, but rather it was a step backwards, a jump backwards that was done at the same time and done at a critical time when Gabriel Flores could step forward and begin firing.

And ladies and gentlemen, the defendant testified under oath and expects you, the jury, to believe that instead he was engaged in a struggle with Javier Ibarra, that they were fighting, they were still all into it and doing that when the first shot was fired. And ladies and gentlemen, I submit to you that that is not reasonable, that that is not supported by the evidence -- again,

Yisela's testimony. It's also not supported by the evidence based upon the relationship of the three individuals involved as coconspirators. It is not reasonable that, according to the defendant, Juan Ramirez, or according to Alma Mosqueda and Yisela Nunez, that Gabriel Flores, based upon clothing descriptions which from the testimony and the prior statements have been consistent throughout, that Gabriel Flores would begin firing at his friend, a good friend of Cipriano Ramirez's and even better friend of his brother, Juan Ramirez, while the two were engaged in a fight. And I would submit to you that that is yet another instance where the defendant has lied. Under penalty of perjury he has told you that, and I would submit to you that that is unreasonable.

Now, in a case such as this -- and it is correct, you will get the instruction regarding circumstantial evidence and the findings that you can make from circumstantial evidence, which really requires the doing of what we do every day, and that is to look at circumstances surrounding something and to draw reasonable inferences. And ladies and gentlemen, when you go from the very first circumstance in this case, the statement that was made to Alma Mosqueda about "taking care of business," and you go through the whole chronology of how the shooting of Javier Ibarra took place, those circumstances lead to only one reasonable inference, and that is that the defendant, Juan Ramirez, and Gabriel Flores conspired to go over there and shoot Javier Ibarra.

I would submit to you also that under a second-degree murder theory -- and defense counsel touched on this in her closing -- that if you find that you have a reasonable doubt as to that conspiracy, that if you find that the killing of Javier Ibarra resulted from an intentional act and the natural consequences of that act are dangerous to human life and that the act was deliberately performed with knowledge of the danger to and with disregard for human life, when the killing is a direct result of that act it is not necessary to prove that the defendant intended that the act would result in the death of a human being. And when you take that in connection with an aiding-and-abetting theory that the defendant is responsible, that he is responsible for, by acting, advising, promoting, encouraging, instigating, and he does it with knowledge of the unlawful purpose and with the intent or purpose of committing or encouraging or facilitating the commission of that crime, that going over to take care of business with three people with a gun, a natural and probable consequence of that intentional act is that it will result in the death of a human being. I would ask you to find the defendant guilty of the counts as they are charged in the information, and I would ask you to do that in looking at all of the testimony and all of the evidence in this case.

And in reliving that night of March 19th of 1995 there were a number of actions that were taken. There were a number of steps, overt acts that were taken in

facilitating the murder of Javier Ibarra, and ladies and gentlemen, those steps did, in fact, lead to the murder of Javier Ibarra, because when someone pulls out a gun and fires it multiple times from close range at another human being, the probable result is that it will result in the death of another. And ladies and gentlemen, the locations in which Javier Ibarra was hit in the head and the chest showed clearly the intent of the shooter in this case, Gabriel Flores.

It's sometimes difficult in deliberations, because it requires that you go back there and you have to go through the credibility of witnesses, and that includes the defendant in this case. And ladies and gentlemen, I submit to you that Cipriano Ramirez has lied to you, as he lied to the police, in order to get himself out of trouble, and I would ask you to find him guilty of the crime of murder and conspiracy to commit a murder not because of that fact but because of all the circumstances in this case and the eyewitness testimony of Yisela Nunez and Alma Mosqueda, Alma Mosqueda regarding the motive of the defendant and his intentions when he went over to that apartment, because I would submit to you that the intention and the motive was to take care of business, and we know from the circumstances surrounding it what that business was. Thank you.

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STATE OF CALIFORNIA)

)ss:

COUNTY OF KERN)

I, Rae Foreman, hereby certify that I, as Official Reporter, Kern County Superior Court, was present and took down correctly in stenotypy, to the best of my ability, all the testimony and proceedings in the foregoing-entitled matter; I further certify that the pages reported and certified by me are indicated with my name and CSR number at the bottom of the page; and I further certify that the annexed and foregoing is a full, true and correct statement of such testimony.

Dated at Bakersfield, California on

_____, 2000.

_____

Official Reporter, CSR No. 6109

APPENDIX B

FILE COPY

THE STATE BAR
OF CALIFORNIA
1149 SOUTH HILL STREET, LOS ANGELES, CALIFORNIA 90015-2299

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT

TELEPHONE: (213) 765-1000
TDD: (213) 765-1566
FAX: (213) 765-1318

DIRECT DIAL: (213) 765-1334

October 17, 2001

PERSONAL AND CONFIDENTIAL

John Anthony Bryan, Esq.
1415 18th Street, #620
Bakersfield, CA 93301

In Re: Case No.: 01-O-03969

Dear Mr. Bryan:

This letter is to inform you that Judge Kenneth C. Twisselman filed a complaint with the State Bar alleging possible violations of the Rules of Professional Conduct and the State Bar Act in connection with the motion to disqualify Judge Twisselman for cause pursuant to CCP section 170.1(A)(6), that was filed on behalf of your client in the case of People v. Juan Villa Ramirez, case no. SC076259 A. Judge Twisselman felt compelled to file the complaint because of the finding made by Judge James L. Quaschnick in his ruling on the motion.

The State Bar has completed its investigation, and determined that this matter does not warrant further action. Therefore, the matter is closed.

However, please be reminded that along with your duty to vigorously defend your clients, all attorneys have a duty to maintain the respect due to the courts of justice and judicial officers pursuant to Business and Professions Code section 6068(b).

Please call me with any questions or comments you have concerning this matter.

Very truly yours,

Eli Morgenstern,
Deputy Trial Counsel

EM:fg

H:\Work\Morgenstern\Letters\Closing\Bryan Closing 10-17-01.wpd

THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Jayne Kim, Acting Chief Trial Counsel

1149 SOUTH HILL STREET, LOS ANGELES, CALIFORNIA 90015-2299

TELEPHONE: (213) 765-1000
FAX: (213) 765-1318
http://www.calbar.ca.gov

April 4, 2012

John Anthony Bryan
Haberfelde Building
1412 17th Street, Suite 306
Bakersfield, California 93301

Re: State Bar Investigation, Case Number 01-O-03969

Dear Mr. Bryan,

Enclosed you will find two letters referencing the closing of the above referenced investigation as requested. One letter is authored by Deputy Trial Counsel Eli Morgenstern and the other by me in my maiden name of Sandoval.

Should you have any questions, please do not hesitate to contact me directly at (213) 765-1223.

Sincerely,

Rose Morales
Investigator

RM

THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
INTAKE

1149 SOUTH HILL STREET, LOS ANGELES, CALIFORNIA 90015-2299

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October 19, 2001

PERSONAL AND CONFIDENTIAL

John Anthony Bryan
1415 18th Street, #620
Bakersfield, CA 93301

Re: Case Number: 01-O-03969
Complainant: State Bar Investigation

Dear Mr. Bryan:

This letter is sent to you based upon information that you are not currently represented by counsel in this matter. If this is incorrect, please advise me within **five** days so that future communications may be directed to your counsel.

The State Bar has completed the investigation of the allegations of professional misconduct reported by State Bar Investigation and determined that this matter does not warrant further action. Therefore, the matter is closed.

The decision to close this matter is without prejudice to further proceedings should additional evidence make reconsideration appropriate.

Thank you for your cooperation in this matter.

Very truly yours,

Rose Sandoval
Investigator

RS/mc

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DECLARATION OF SERVICE BY MAIL

Re: *People v. Juan Villa Ramirez*, Cal. Supreme Court No. S099844; Kern Co. Super Ct. No. SC076259A

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is PMB 422, 4110 SE Hawthorne Blvd., Portland, Oregon 97214. I served a true copy of the attached

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed as follows:

Dorothy Streutker, Esq.
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Juan Villa Ramirez
P.O. Box T-24667
San Quentin State Prison
San Quentin, CA 94974

Leanne LeMon
Deputy Attorney General
2550 Mariposa Mall, Ste 5090
Fresno, CA 93721-2271

Kern County Superior Court
Attn: Hon. Kenneth C. Twisselman
1415 Truxtun Ave.
Bakersfield, CA 93301-5215

John Anthony Bryan, Esq.
Haberfelde Bldg
1412 17th St Ste 306
Bakersfield, CA 93301

Each said envelope was then, on June 21, 2012, sealed and deposited in United States mail at Portland, Oregon, Multnomah County, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 21, 2012, in Portland, Oregon.

_____

Lisa R. Short