IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	Case No. S101247
Plaintiff and Respondent,	)	(Superior Court No. 99CF0831)
v.	)	
EDUARDO D. VARGAS,	)	
Defendant and Appellant.	)	

AUTOMATIC APPEAL FROM THE JUDGMENT OF DEATH
OF THE SUPERIOR COURT OF ORANGE COUNTY

THE HONORABLE JOHN RYAN

APPELLANT'S OPENING BRIEF

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Under the California Appellate Project, Inc.
Assisted Case Program

DEATH PENALTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONS

LEGISLATIVE HISTORY

JURY INSTRUCTIONS

OTHER AUTHORITIES

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STATEMENT OF JURISDICTION

This appeal is from a final judgment imposing a sentence of death and is therefore automatic pursuant to Penal Code section 1239, subdivision (b).

STATEMENT OF THE CASE

On March 10, 2000, appellant, Eduardo Vargas, and two co-defendants, Matthew Miller and Eloy Gonzalez, were charged by information with 11 felony counts as follows:

Count I: Murder (Pen. Code § 187, subd. (a) [victim Jesse Muro]); count II: Second Degree Robbery (Pen. Code §§ 211, subd. (c); 212.5, subd. (c); and 213 [victim Jesse Muro]); count III: (Pen. Code §§ 211, subd. (c); 212.5 subd. (c); and 213 [victim Matthew Stuckey]); count IV: (Pen. Code §§ 211, subd. (c); 212.5, subd. (c); and 213 [victim Simon Cruz]); count V: Possession Of Firearm While On Probation (Pen. Code § 12021, subd. (a) [appellant Vargas only]); count VI: Possess Firearm While On Probation (Pen. Code § 12021, subd. (d) [appellant Gonzalez only]); count VII: Street Terrorism (Pen. Code § 186.22, subd. (a).); count VIII: Second Degree Robbery (Pen. Code §§ 664; 211, subd. (c); 1212.5, subd. (c) and 213 [Leavon Hill]); count IX: Attempted Second Degree Robbery (Pen. Code §§ 211, subd. (c); 212.5, subd. (c); and 213 [victim Cornelious Wilson]); count X: Second Degree Robbery (Pen. Code §§ 211, subd. (c); 212.5, subd. (c); and 213 [victim John Baek]); count XI: Second Degree Robbery (Pen. Code §§ 211, subd. (c); 212.5, subd. (c); and 213 [victim Hong Kim]); and count

XII: Street Terrorism (Pen. Code § 186.22, subd. (a).) (1 CT 41-45.)[1]

Counts I, II, and III stemmed from the robbery and the killing of Mr. Muro on April 1, 1999; count IV stemmed from the separate robbery of Simon Cruz on April 1, 1999; counts V, VI, and VII stemmed from the possession of the firearms and gang-related activity occurring on April 1, 1999; counts VIII-XII stemmed from separate robberies occurring on March 30, 1999. (1 CT 41-45)

Count I alleged the following special circumstance within the meaning of Penal Code sections 211 and 212.5 and section 190.2, subdivision (a)(17)(A): that the homicide was committed "while the defendant(s) [were] engaged in the commission and attempted commission

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[1] The record on appeal contains 11 bound volumes of the clerk's transcripts which are juror questionnaires and are numbered, consecutively, pages 1- 4300. They are not cited in this appeal. Additionally, there are two bound volumes, which are supplemental clerk's transcripts pertaining to additional juror questionnaires and contain pages 1- 433.

The record contains one clerk's transcript from the municipal court record that is not cited in this brief. Additionally, there are two reporter's transcripts from the municipal court record that are numbered pages 1- 418 that are not cited in this brief.

The primary portions of the record pertaining to the jury trial are four bound volumes of clerk's transcript, pages 1-1,284, and 13 bound volumes of reporter's transcripts, pages 1-3,475. The four volumes of the clerk's transcript will be cited as "CT" with the corresponding page and volume numbers. The 13 reporter's volumes will be cited as "RT" with corresponding page and volume numbers.

of the crime of robbery . . . ." (1 CT 41-45.) All counts, except V and VI, were alleged to be serious felonies within the meaning of section 1192.7, subdivision (c). (*Ibid.*)

In addition to the substantive gang charges in counts VII and XII, regarding appellant, several gang-related enhancements were alleged against appellant including that counts I-IV and VII-XI were committed "with the intent of promoting a criminal street gang." (§§ 12022.53, subds. (b),(d), and 12022.53, subd. (e)(1).)[2]; and counts I-VI, VIII, IX, and X were committed in association with a criminal street gang, "Southside" (§ 186.22, subd. (b)(1)); and that a firearm was vicariously used in counts I-IV and VIII-XI (§§ 12022.53, subd. (b) and 12022.53, subd. (e)(1).) (1 CT 41-45.) The prosecution also alleged as to counts I and II that appellant personally discharged a firearm causing the death of Jesse Muro. (§ 12022.53, subd. (d).) (1 CT 44.)

An earlier complaint charged the participation of two other co-defendants, Laura Espinoza and Amor Gonzalez, in Mr. Muro's homicide. (1 CT 1-2.) Instead of proceeding against them on their original murder charges, the government entered into plea bargains with both of them and they became the primary witnesses against appellant. (See People's

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[2]All code sections, unless otherwise noted, refer to the California Penal Code.

exhibits 111, 114.)

On March 7, 2000, appellant and co-defendants were held to answer on all charges, special circumstances and allegations. (1 CT 47, 2 RT 414.) The District Attorney chose to try appellant separately from the two remaining co-defendants. (1 RT 19-20.)

A jury was selected between January 16-18, 2001. (2 CT 578-583, 596-598; 2 RT 276- 3 RT 783.) The presentation of guilt phase evidence commenced on January 22, 2001 and concluded on January 31. (2 CT 599-632; 4 RT 1024-9 RT 2213.) The defense case lasted from January 31 to February 5. (2 CT 633-637; 9 RT 2213- 10 RT 2602.) After brief government rebuttal, the case was presented to the jury. (11 RT 2629.)

The jury deliberated for two days, on February 6 and February 8, 2001, and returned its verdicts late in the morning of February 9, returning guilty verdicts on all counts against appellant and finding the special circumstance and enhancements to be true. (2 CT 639-640, 649-658; 3 CT 785-814 [verdict forms]; 3 CT 849-855 [minute order]; 11 RT 2817-2835.) Co-defendants Eloy Gonzalez and Matthew Miller were convicted in separate trials of murder and sentenced to life without the possibility of parole and 50 years to life imprisonment respectively. (See *People v. Miller* (Cal.App. 4 Dist., March 22, 2004, as mod. April 21, 2004, No. G029025.)

[nonpub.opn.].)

On June 7, 2011, appellant filed a motion a for a new trial. (3 CT 1081-1099, 1102-1113.) The motion was heard and denied on October 4, 2001. (4 CT 1266-1267)

The penalty phase trial began on February 20 and ended on February 22. (3 CT 861-868, 12 RT 2887-3252.) The jury began its penalty phase deliberations on February 22 at 3:48 p.m., and recessed for the evening at 4:32 p.m. (3 CT 872-873.) At 9:00 a.m. on February 23, the jury began its penalty phase deliberations again, breaking for lunch at 11:54 a.m. and returning to deliberate at 1:32 p.m. (3 CT 911-912; 13 RT 3253-3255.) At 2:30 p.m., the jury reached a verdict, and it was polled in court at 3:16 p.m., returning a verdict of death. (*Ibid.*)

On June 7, 2001, appellant filed a motion for new trial based on ineffective assistance of counsel. (3 CT 1081-1099.) Appellant then filed a supplemental motion for new trial on June 21, 2001. (3 CT 1102-1113.) Appellant filed a third motion for new trial on September 26, 2001, based on a violation of article 36 of the Vienna Convention. (3 CT 1144-1157.) The motions were heard and denied on October 4, 2001. (4 CT 1266-1267.)

That same day, the court also heard appellant's "Motion to Modify or Set Aside the Death Verdict" pursuant to Penal Code section 190.4,

subdivision (e). (3 CT 951-957; 13 RT 3429-3441.) The court sentenced appellant to death. (2 CT 499; 4 CT 1278-1282; 13 RT 3465-3467.)

Regarding the non-death penalty counts, the court fashioned the sentence as follows:

On count II, the robbery of Mr. Muro, the court imposed the upper term of an additional twenty-five years to life for the section 12022.43 allegation and two years additional for the gang allegation, all stayed under section 654. (13 RT 3469). Regarding count III, the robbery of Matthew Stukkie, the court imposed the mid-term of three years plus ten years for the "vicarious [armed] enhancement" and struck the two-year gang enhancement since appellant had been previously punished on that enhancement for a principal term of fifteen years. (13 RT 3469.) Regarding count IV, the robbery of Mr. Cruz, the court imposed a consecutive term of one year (one third the mid-term of three years.) (13 RT 3470.) On count V, probationer in possession of a weapon, the court imposed the mid-term of five years concurrent to the other counts. (13 RT 3471.) Regarding count VII, street terrorism, the court imposed two years concurrently. (*Ibid.*) Regarding count VIII, the robbery of Leavon Hill, the court imposed an additional year consecutive (one third the mid-term). (*Ibid.*) On count IX, the attempted robbery of Cornelius Wilson, the court

imposed one third the mid-term, or eight months consecutive. (*Ibid.*) Regarding the Baek and Kim robberies, the court imposed an additional year on each (one third the mid-term.) (*Ibid.*) Thus, appellant's total unstayed sentence on the non-death counts is seventeen years and eight months imprisonment. (4 CT 1278-1282, 13 RT 472.) The court sentenced appellant to death for count I, the murder of Jesse Muro. (3 CT 909, 13 RT 3254.)

On October 4, 2001, the court signed the death warrant. (4 CT 1260-1263.)

This appeal is automatic to this Court following the judgment of death imposed. (Pen. Code § 1239, subd. (b).)

I

GUILT PHASE FACTS

A. Overview

Appellant and co-defendants Matthew Miller and Eloy Gonzalez, all of whom police believed were associated with the "Southside Gang" of Los Angeles, were accused of being involved in a series of robberies in the Santa Ana area between March 30, 1999, and April 2, 1999. During the last robbery, a young man named Jesse Muro died after being shot in the head. Appellant was charged with and convicted of one special circumstance, the murder of Mr. Muro during the commission of a robbery.

A young woman, Laura Espinoza, and a juvenile, Amor Gonzalez, both who have lengthy criminal records and histories of drug abuse, were also initially charged with murder. Despite being principals to the murder of Mr. Muro, they were both offered plea bargains to testify against Mr. Vargas. Ms. Espinoza was offered a time-served sentence for a plea to two robbery counts, and Amor Gonzalez was simply released from juvenile custody.

Appellant Vargas, a 22-year-old man with no prior felonies, received the death penalty, so this automatic appeal follows.

B. The Prosecution Case

1. The March 30, 1999 Baek-Kim Robberies

a. The Robbery

On the afternoon of March 30, 1999, John Baek and Hong Kim were robbed by two men. (4 RT 1094-1095, 1190.) Mr. Baek was a real estate agent and was working that afternoon with Hong Kim, Mr. Baek's "construction person," at a commercial building on 17th Street in Santa Ana, California. (4 RT 1093.) They were robbed in the early afternoon while it was still light. (4 RT 1096.)

The first person who entered the building had a gun and was "walking at a medium pace." (4 RT 1098.) Mr. Baek described the first robber to the police, but during trial, he could not remember much of the description other than that he believed the man to be "a little taller than him." (4 RT 1100, 1148.) The gunman was "skinny and not very clean." (4 RT 1148.) Mr. Baek did not see the second man very well, but he "believed that he was heavier and had longer hair." (4 RT 1148.)

After the court recessed, giving Mr. Baek a possible opportunity to further discuss the case with prosecutors, he remembered in much greater detail the description of the assailants. (4 RT 1121.) Mr. Baek agreed with the prosecutor's leading question, suggesting that the gunman "was a white

male, five-foot-ten, 150 pounds, short black hair with a light complexion." (*Ibid.*) Mr. Baek also agreed with the prosecutor that he had previously described the second person, not the gunman, as a "white male, 5 feet and 9 inches, 180 eighty pounds, black hair, medium cut." (*Ibid.*)

Mr. Baek was not nervous when the men initially entered the building because at that point he did not see a gun. (4 RT 1103.) Then, the first man pointed a gun at Mr. Baek, which made him nervous. (*Ibid.*) The first man was carrying a small dark gun similar to government's exhibit 5. (4 RT 1101.)

Mr. Baek gave the first man his pager; his wallet, which contained some money; a Visa; and a Master Card. (4 CT 1106-1107.) After the robbery, Mr. Baek went to his car and reported the robbery from his cell phone and then went to the bank and reported the loss of his credit cards. (4 RT 1108-1109.)

Later that afternoon, Mr. Baek learned that two purchases had been made on his credit cards that he had not authorized, one for $27.00, and another for $329.00. (4 RT 1108-1109.) Both purchases had been made at WorldNet Pager, a store Mr. Baek had never been before. (*Ibid.*)

Within "about one month," the police showed Mr. Baek three "six packs." (4 RT 1110.) In the first "six pack," Matthew Miller was in the

number five position; in the second "six pack," Eloy Gonzalez was in the number two position; and in the third "six pack," appellant was in the number five position. (Exhibit 7.)

Mr. Baek identified appellant as the man who pointed the gun at him, the individual in the number five position in the third "six pack.[3] (4 RT 1111-1113.) At trial, Mr. Baek did not remember the specific photographs, only that he circled the person in the photographic lineup who had the gun. (4 RT 1111-1112.) When he made his identification of the man with the gun on April 8, "he was positive." (4 RT 1119.)

Mr. Baek could not remember telling the police that the individuals in position two and five of the first "six pack" looked similar to the second person who did not have a gun. (4 RT 1114.) Matthew Miller was in the number five position of the first "six pack." (Exhibit 7.)

Mr. Baek later attended a live lineup at the jail, and at trial, he remembered identifying the same person from the lineup whom he had circled on the "six pack" as having the gun. (4 RT 1115.) The parties

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[3]Officer Guillermo Arostegui wrote the names of the person and the position on the back of each "six packs." (7 RT 1733.) He mistakenly wrote "Vargas, Number 5" on the back of the first "six pack," and "Miller, Number 5" on the back of the third "six pack." (7 RT 1733-1734.) Mr. Vargas was actually in the fifth position of the third "six pack," and Mr. Miller was in the fifth position of the first "six pack." (*Ibid.*)

stipulated that the form Mr. Baek filled out at the live lineup, referred to as a "chit," was misplaced, lost, or destroyed. (4 RT 1167-1168.)

Mr. Baek could not remember writing down, "maybe number three, younger" at the live lineup. (4 RT 1179.) He remembered making the identification at the live lineup with "great confidence." (4 RT 1179.) He also remembered asking the police as he left the lineup, "[D]id I get the right guy?" (4 RT 1180.)

Hong Kim testified, with the assistance of a Korean interpreter, that he saw Mr. Baek hold up his hands during the robbery "so he did the same thing." (4 RT 1191.) Mr. Kim saw a gun and "was a little afraid" because, at first, he didn't realize he was being robbed. (*Ibid.*) His checkbook was taken and he did not get his property back. (4 RT 1191-1192.) Mr. Kim told the police that the gunman did not point the gun at him. (4 RT 1193.) However, in court, Mr. Kim testified that the gunman "held the gun in both hands swinging it side to side." (*Ibid.*) He said the discrepancy between his testimony and his statement to the police was "due to a language barrier." (*Ibid.*)

Santa Ana Police Officer Edward Zaragoza received a radio dispatch at 2:55 p.m. to respond to the robberies. (4 RT 1198.) When he arrived, he interviewed Mr. Baek and Mr. Kim, who both were "a little shaken and

scared." (4 RT 1199.) He then checked the area for suspects. (*Ibid.*)

Mr. Baek described the robber with the gun as "approximately 5 feet and 10 inches tall, 150 pounds, short black hair, light complected, wearing medium dark clothing." (4 RT 1200.) The other robber was "approximately five feet and nine inches tall, 180 eighty pounds, medium black hair with the same type of clothing." (*Ibid.*) Mr. Kim believed the gunman held the gun in his left hand, but he was not able to give further information about them. (4 RT 1201.) He said he believed he would be unable to identify either of them if he saw them again. (*Ibid.*)

On cross-examination, Officer Zaragoza admitted that the information he received was a composite of information received both from Mr. Baek and Mr. Kim. (4 RT 1207-1208.) He could not recall specifically what each witness told him although both of them provided some of the details. (4 RT 1207-1208.)

b. The Use of Stolen Credit Cards at WorldNet Pagers

Perly Abdelnour owned a store called WorldNet Pagers. (4 RT 1211.) On March 30, 1999, sometime in the afternoon, three young men came into the store. (4 RT 1212-1213.) One of the men was Eloy Gonzalez, whom he had known for about three-and-one -half years, and who was a client. (4 RT 1213-1214.) The three men were talking together

and appeared to be friends. (*Ibid.*)

Mr. Gonzalez paid for some previously used air time on his cell phone using a credit card. (4 RT 1214, 1218.) The receipt from the purchase indicated the amount was $27.00. (4 RT 1216.) Mr. Abdelnour remembered two other men with Mr. Gonzalez. (4 RT 1218.) Mr. Abdelnour testified at Mr. Gonzalez's and Mr. Miller's trial and identified Matthew Miller as the man who was with Mr. Gonzalez and purchased the two pagers and the prepaid card. (4 RT 1219.)

Either Mr. Gonzalez or Mr. Miller filled out a contract for the purchase of the pagers using the name "Carlos Juan Rodriguez." (4 RT 1220-1221, 1230.) The total charges for the two pagers and the prepaid cards were $329.99. (4 RT 1222.) According to the credit card records, one of Mr. Baek's credit cards was used at WorldNet Pagers at 2:59 p.m. (4 RT 1218.)

A Santa Ana police officer showed Mr. Abdelnour three "six packs," and he identified two people from them who had been in the group of three in the store earlier. (4 RT 1226-1227.) Mr. Abdelnour was shown the same three "six packs," in the same order, as Mr. Baek.[4] (Exhibit 19.) Mr.

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[4]Officer Guillermo also transposed Mr. Vargas and Mr. Miller on the writing on the back of the "six packs" shown to Mr. Abdelnour. (7 RT 1736.) Officer Guillermo wrote in his police report that "Mr. Abdelnour,

Abdelnour recognized his initials on the second and third "six packs." (4 RT 1227.) He identified the individual he circled on the second "six pack" as Eloy Gonzalez, the man who had an account with him. (*Ibid.*) He identified the individual in the third "six pack" as a person who was with Mr. Gonzalez. (4 RT 1228.) The person he circled in the third "six pack" was appellant. (Exhibit 19.) He was positive of the identification at that time. (4 RT 1228.)

On cross-examination, he said the individual in the third "six pack," who was identified as appellant, was one of the people with Mr. Gonzalez, not necessarily the person who made the purchase with Mr. Gonzalez. (4 RT 1239.) Mr. Abdelnour never attended a live lineup. (4 RT 1242.)

At trial, Mr. Abdelnour described the third man with Mr. Miller and Mr. Gonzalez as very skinny, around 5 feet and 10 or 11 inches tall, and his hair was very short. (4 RT 1232.) He remembered Matthew Miller being taller. (*Ibid.*)

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identifying Vargas, indicated this individual looked familiar, but he felt he was a past customer, but he could not be sure." (7 RT 1740.) Mr. Abdelnour was actually making that reference to Mr. Miller. (*Ibid.*)

2. The March 30, 1999 Robbery Of Leavon Hill And The Attempted Robbery of Cornelius Wilson

a. Leavon Hill

At about 11:15 p.m., on the evening of March 30, Leavon Hill, a heavy equipment operator for the City of Anaheim, and his stepson Cornelius Wilson, were working on a truck parked in the front of Mr. Hill's house at 2327 South Laura Linda in Santa Ana. (4 RT 1254.) Three men approached them walking in a straight line. (4 RT 1257.) All of them were wearing black colors: black pants, leather tops and black baseball caps. (4 RT 1271.)

The lighting was good in the cul-de-sac. (4 RT 1271.) Mr. Hill looked at them because "it was kind of strange for them to be out at that time of night walking." (4 RT 1259.) Mr. Hill made a comment to the group about the lateness of the hour to be out walking. (*Ibid.*)

One of the men took a gun with a black handle out of a holster on the right side of his pants and pointed it at Mr. Hill's stomach, stating, "[I]t is a hold up." (4 RT 1259-1260, 1274.) Then, the man directed his attention toward Mr. Wilson. (4 RT 1261.)

The second man, who was taller, told Mr. Hill that if he moved, he would shoot him. (4 RT 1261, 1287.) Despite the warning, Mr. Hill made the decision to run into his house, reasoning that "if the man was going to

shoot him, he would have to shoot him in his back." (4 RT 1261.) When Mr. Hill ran into his house, he called the police. (4 RT 1261-1262.) They responded in about seven to ten minutes. (*Ibid.*) The third man was just standing there; "he was like the follower." (4 RT 1263.)

At trial, Mr. Hill did not remember anyone displaying a chrome revolver. (4 RT 1262.) However, he remembered making this statement to the police. (*Ibid.*) The man who had the black gun stole his wallet. (4 RT 1261-1262.)

When the police arrived, Mr. Hill discovered that his car stereo had been removed and placed on the seat of his truck. (4 RT 1270.) Mr. Hill believed that the second man, the taller of the two, went into his pick-up truck while the first man was "backing him up into the driveway." (4 RT 1269, 1287.) He did not know anyone named Eloy Gonzalez, nor did he give him permission to enter his truck. (4 RT 1291.)

Mr. Hill was shown three different "six packs."[5] (4 RT 1266.) The "six packs" were marked as 0001, 0002, and 0003. (*Ibid.*) In the "six pack" labeled 0001, appellant Vargas was in the number five position; in the "six pack" labeled 0002, Matthew Miller was in the number five

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[5]All witnesses were shown the same 3 "six packs"; however the "six packs" were sometimes in a different order.

position; and the "six pack" labeled 0003, Eloy Gonzalez was in the number two position. (Exhibit 2.) Mr. Hill remembered identifying the individual in position five of the "six pack" labeled 0001, appellant, as the person who backed him into the driveway. (4 RT 1266.) Mr. Hill circled photograph number five, initialed it and wrote the date. (4 RT 1266-1267.) He also verified that he said "number five backed me into the driveway." (4 RT 1266.) His statement was written on the admonishment. (4 RT 1266-1267.) The handwriting on the admonishment however was not Mr. Hill's. (*Ibid.*) Mr. Hill did not make identifications from the "six packs" numbered 0002 or 0003. (4 RT 1266.)

At trial, Mr. Hill identified appellant as the first man who had accosted him. (4 RT 1272, 1281.) At the preliminary hearing, Mr. Hill testified that one participant in the robbery was Caucasian and the other Hispanic, the Caucasian man being the taller of the two. (4 RT 1272.)

b. Cornelius Wilson

Mr. Hill did not observe most of the events involving his stepson, Cornelius Wilson, because he had ran into the house to call the police. (4 RT 1296.)

According to Mr. Wilson, at the time the men approached, his stepfather was underneath the hood of the car removing the battery cables.

(4 RT 1312.) The men approached his father, asking him for his money and wallet. (4 RT 1313.) One of the men had a black gun close to his sweatshirt. (4 RT 1314.) One of the individuals in the group did nothing. (4 RT 1320, 1331-1332.) Mr. Wilson eventually ran away, and one of the individuals chased him, telling him to stop or he would kill him. (4 RT 1316.) The individual who chased him was "a white guy." (4 RT 1318.) Nobody asked Cornelius Wilson for any money. (4 RT 1313.)

Mr. Wilson testified at trial that the gun was black. (4 RT 1314.) When the police interviewed Mr. Wilson, he said that the person who chased him had a chrome revolver; however, he could not remember telling that to the police at the trial. (4 RT 1319.) He clearly saw the person who was confronting his stepfather. (4 RT 1330-1331.) Mr. Wilson believed he was five feet and five inches tall, wearing a black hood and a baseball cap. (*Ibid.*) The person who was confronting his father was doing "all the talking." (4 RT 1332.)

Police Officer Peter Bollinger responded to the robbery call. (5 RT 1341.) He made a report that contained a composite of information given to him by both Mr. Hill and Mr. Wilson. (5 RT 1342-1343.) He was told that there were two weapons involved: one suspect had a .22-caliber revolver, that remained at his side, and the other suspect had a small, black handgun.

(5 RT 1344-1346.) Mr. Hill told Officer Bollinger that he gave the first man his wallet. (5 RT 1351.) This man was about five feet and seven inches tall, with a light mustache, a black baseball cap, and a brown leather jacket. (*Ibid.*) This was the same man that rifled through his car and pulled out his stereo. (*Ibid.*)

Santa Ana Police Officer William Barrett was assigned to investigate the Wilson robbery and attempted robbery of Mr. Hill. (5 RT 1360.) Mr. Barrett showed the same three photographic arrays to Cornelius Wilson and Leavon Hill. (5 RT 1361-1362.) These "six packs" were labeled 0001, 0002, and 0003. (5 RT 1362.) Mr. Vargas was the subject in position number five of 0001; Mr. Miller was the subject in space number five in 0002; and Mr. Gonzalez was the subject in position number two in 0003. (5 RT 1362-1363.)

Mr. Wilson did not identify anyone from the "six pack" labeled 0001. On the "six pack" labeled 0002, he circled, initialed and dated the number five position, the photograph of Matthew Miller. (4 RT 1319-1320.) At the preliminary hearing, Mr. Wilson identified Mr. Miller as the one who chased him. (4 RT 1320.) The admonishment sheet identified the same individual as looking "similar to the one that chased me." (Exhibit 1.) In the "six pack" labeled 0003, Mr. Wilson stated that, on both the

admonishment sheet and in court, the people in positions one and two "looked similar but [he] couldn't be sure." (4 RT 1320.) Eloy Gonzalez was the person in the number two position of the "six pack" numbered as 0003. (Exhibit 1.)

Mr. Wilson signed the "six packs." (5 RT 1366.) Officer Barrett then separately showed Mr. Hill the "six packs." (5 RT 1368.) Officer Barrett's testimony included the results of Mr. Hill's and Mr. Wilson's "six pack" identifications. (5 RT 1367-1368.) He verified the results of the identifications made by Hill and Wilson. (5 RT 1367-1368.)

c. Mr. Gonzalez's Fingerprints Are Found On The Stereo

Santa Ana Police Officer Leslie Hodowanec lifted four fingerprints from the car stereo found on the front seat of Mr. Hill's pick-up truck. (4 RT 1307-1308.) Two of the prints came from the top of the car stereo, and two prints came from the bottom of the stereo. (4 RT 1308-1309.)

Latent print examiner, Kathy Christiansen, supervisor of the forensic service unit of the Santa Ana Police Department, examined the prints. (5 RT 1378-1382.) The fingerprints "[matched] the right thumb of the known impression of Eloy Gonzalez." (5 RT 1386.)

Ms. Christiansen discussed fingerprints in general, indicating that fingerprints, palm prints, and prints on the soles of the feet are unique. (5

RT 1383.) While two individuals may have the same points of identification on their prints, they will have regions with different bifurcations so that no individuals have identical prints. (*Ibid.*)

3. The April 1, 1999 Robbery of Simon Cruz

a. The Robbery

On April 1, 1999, Simon Cruz lived at 16282 Main Street in an apartment in Tustin, California near the Santa Ana Zoo. (5 RT 1388, 1392.) On that date, he was in a rush to arrive for a 9:00 p.m. appointment. (5 RT 1389.) On his way back to his apartment, near a mailbox outside his apartment, Mr. Cruz was robbed by two men. (5 RT 1393.)

The first man told Mr. Cruz to give him his money and said, "[D]on't turn around or I will shoot you." (5 RT 1394.) Mr. Cruz did not turn around because he believed that if he did he would be shot. (5 RT 1394.)

The first man demanded Mr. Cruz's watch, but when he took Mr. Cruz's wallet, he forgot about the watch. (5 RT 1396.) Mr. Cruz asked the man to take the money, but to drop his wallet because it had paperwork in it that he needed. (5 RT 1398.)

Mr. Cruz told the police that the first man was about six feet tall, 18 to 20 years old, Hispanic and that he was wearing a "red Pendleton style shirt" with a red bandana on his head. (5 RT 1404-1405.) At trial Mr. Cruz

could not remember giving the police the description of the clothing. (5 RT 1405.) Mr. Cruz, who is 1.65 meters[6], believed the first man was a little taller than he. (5 RT 1408-1409.)

Mr. Cruz also believed the second man was Hispanic and 18 to 20 years old. (5 RT 1405.) Mr. Cruz believed the two men were Hispanic because they spoke Spanish with perfect accents and at the end of the robbery the second man said, "[V]amonos."[7] (5 RT 1405.)

Shortly before the Cruz robbery, Nannie Marshall, Cruz's apartment manager, witnessed a man blocking the entrance to the apartment complex. (10 RT 2553.) He had a red, plaid shirt and a red bandana. (10 RT 2554-2555.) He was approximately 25 years old, muscular, and had a ponytail. (10 RT 2555-2556.)

Mr. Cruz did not see his assailants nor a gun. (5 RT 1395.) It is possible that he told the police that one of the perpetrators had a .22-caliber pistol. (5 RT 1395.) Mr. Cruz also did not recall telling the police that one of the suspects used his left hand to partially cover Mr. Cruz's eyes. (*Ibid.*)

Mr. Cruz tried to follow one of the men, but one of the two

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[6] Latin American countries, including Mexico, use the metric system for measurement. 1.65 meters is approximately five feet and five inches tall.

[7] "Vamonos is an informal Spanish command meaning," lets go," (University of Chicago Spanish Dictionary, 4th Ed., 1987.)

admonished, "[G]o back or I will shoot you." (5 RT 1399.) Mr. Cruz went to his apartment and told his wife and daughter-in-law about the incident. (5 RT 1399.)

Mr. Cruz identified exhibit 27 as his wallet that had been taken during the robbery. (5 RT 1402-1403.) Police recovered Mr. Cruz's wallet from underneath the driver's seat of a car Laura Espinoza was driving. (4 RT 1038, 1089.) The wallet contained a picture of his son and daughter-in-law. (5 RT 1402.) It had between $120 and $150 that never recovered. (5 RT 1403.)

4. The April 1, 1999 Robbery of Matthew Stukkie and the Fatal Shooting of Jesse Muro

a. Matthew Stukkie and Jesse Muro

On April 1, 1999, shortly after the Cruz robbery occurred, two young men, Matthew Stukkie and Jesse Muro, were walking near the apartment complex where Mr. Cruz lived. (5 RT 1472.) A couple of men approached them with guns pointed toward their heads and said, "[D]on't look back." (5 RT 1575.)

Before they were approached by the men, Mr. Stukkie had commented to Mr. Muro that "there [were] shaved head guys across the street." (5 RT 1476.) Mr. Stukkie did not want any trouble. (*Ibid.*) He may have told Mr. Muro to avoid eye contact with the men. (5 RT 1480.)

One of the men who approached them commanded, "[G]ive me your money and don't look at my face or I will shoot you." (5 RT 1481.) The words were spoken in English. (5 RT 1482.) Mr. Stukkie saw, out of the corner of his eye, that the first man held an object to his head that looked like a small black revolver.[8] (5 RT 1488.) Mr. Stukkie originally saw two people approach and shortly after a third person approached. (5 RT 1483.)

Mr. Stukkie gave his bracelet to the man, who told him not to look. (5 RT 1484-1485.) He later identified exhibit 37 as his bracelet, which had been recovered by the police. (5 RT 1484.) He told the man that he did not have any money; he gave the man his pager. (5 RT 1485.)

Soon thereafter, Mr. Stukkie heard a shot and a scream. (5 RT 1486.) He was pushed down to the ground by a man. (*Ibid.*) Mr. Stukkie testified that his assailant told him, "'keep your head down' or 'don't look back or we'll shoot you,' or something like that." (*Ibid.*) Mr. Stukkie only heard one gunshot. (*Ibid.*)

Mr. Stukkie could not see Mr. Muro. (5 RT 1486.) He did not hear Mr. Muro fall; he just heard a "high-pitched scream." (5 RT 1489.) Mr. Stukkie remained on the ground for less than one minute and then went

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[8] People's exhibit 5, the gun alleged to have killed Muro was a semi-automatic pistol. (5 RT 1512.)

over to the area where Mr. Muro had fallen. (5 RT 1492.) He kept telling Mr. Muro to get up and "lets go," but Mr. Muro was not moving. (5 RT 1493-1494.)

The entire incident lasted two or three minutes. (5 RT 1493.) At first, Mr. Stukkie did not realize that Mr. Muro had been shot. (*Ibid.*) Mr. Stukkie could not see the faces of the assailants well; he only glanced at them out of the corner of his eye because they warned him not to look back. (5 RT 1491.) All that he remembered was one of the assailants was "tall, skinny, and looked Hispanic." (5 RT 1498-1499.)

Mr. Stukkie did not associate with any gangs or gang members. (5 RT 1494.) This did not seem to be a "gang encounter." (5 RT 1496-1497.) He never heard the assailants doing "a gang hit up." (5 RT 1496.) Mr. Muro was not a gang member, nor did he hang out with gang members. (5 RT 1494.)

On cross-examination, Mr. Stukkie recalled that a car that was parked nearby at the time of the shooting that contained three or four people. (5 RT 1500.) There appeared to be one man standing outside the car and at least two more inside, though they could have been females. (5 RT 1502-1503.) He was not sure if the group of men who approached him came from that car or from a group standing near a fire hydrant. (5 RT

1508.) He did recall one of the individuals who was standing near the car and who appeared to be Hispanic wearing a "red Pendleton-style shirt." (5 RT 1510-1511.) Mr. Stukkie did not recall telling the police that the man was about five feet, nine inches tall. (5 RT 1511.) Mr. Stukkie described the second man who approached as "having more meat on him although he wasn't fat." (*Ibid.*) Mr. Stukkie described him as "stocky." (*Ibid.*)

Officer Blair interviewed Matthew Stukkie on the evening of April 1, 1999. (8 RT 2134.) At first, Mr. Stukkie said he saw a group of three to four people with shaved heads. (8 RT 2136.) Mr. Stukkie also told Officer Blair that he also saw two other people standing next to a fire hydrant nearby. (*Ibid.*) Officer Blair testified that Mr. Stukkie did not know which group of people approached and robbed him or whether the people who robbed him were the same people that he saw across the street. (8 RT 2137-2138.)

Mr. Stukkie described one of the people that robbed him was wearing a Pendleton-style jacket that had "a little bit of grey, black and faded red in it." (8 RT 2138.) This individual had a shaved head with a little bit of his hair growing out. (*Ibid.*) The second man was Hispanic, about five feet, nine inches tall, and heavier than the other man. (8 RT 2139.) He did not see any facial hair on the men. (8 RT 2140.)

On April 1, at 8:51 p.m., Tustin Police Officer Robert Wright received a call regarding a shooting near the Santa Ana Zoo. (5 RT 1460-1461.) He arrived three minutes later. (5 RT 1461.) He was flagged down by Matthew Stukkie who seemed "very irrational and scared." (5 RT 1462.)

Officer Wright then examined Mr. Muro. (5 RT 1463.) His feet were pointed toward the street, his head was facing eastward, and there was a pool of blood coming from his head. (*Ibid.*) He put a white compress on Mr. Muro's ear. (5 RT 1466-1467.) Mr. Muro was breathing, but he did not regain consciousness. (5 RT 1468.) Mr. Muro appeared to have suffered a gunshot wound to his head. (*Ibid.*)

Officer Hollingshead found shell casings on the sidewalk. (5 RT 1469.) He sealed off the area so it would not be disturbed and then the body of Mr. Muro was removed. (5 RT 1464-1465,1469.)

Officer Wright drove in the ambulance with Mr. Muro. (5 RT 1469.) He noticed an additional head wound on Mr. Muro when they arrived at the hospital. (*Ibid.*) [9]

Mr. Muro's wallet was found near the scene of the shooting in a grassy area near a fence close to the Santa Ana Zoo. (Exhibit 50; 6 RT

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[9] The exact time of Mr. Muro's death does not appear in the record, but it appears that he either died en route to the hospital or shortly after his arrival. (See 13 RT 2923.)

1550, 2069.)

b. Alexei Sandoval

Mr. Sandoval was living in an apartment complex near the Muro shooting. (6 RT 1559.) He was watching television at 8:40 p.m., and he heard two gunshots. (*Ibid.*) At first, he did not pay much attention to the gunshots. (6 RT 1560.) Then, he "saw lights outside, paramedics, and realized that someone has been shot." (*Ibid.*)

In court, Mr. Sandoval estimated the interval of time between the gunshots by estimating when he heard the first and then the second shot. (6 RT 1561.) It was an interval of approximately three seconds. (*Ibid.*) He told his wife that "the shots were about two to three seconds apart." (6 RT 1566.) He acknowledged that in the past he had said the shots were about five seconds apart. (6 RT 1568.) He did not give the shots, especially the second shot, much attention. (6 RT 1563.)

c. Santiago Martinez

A person driving by in a car witnessed part of the altercation involving Mr. Stukkie and Mr. Muro. (5 RT 1436.) In April 1999, Santiago Martinez lived in an apartment on Main Street near the shooting. (*Ibid.*) A few minutes before 9:00 p.m., he was driving home to his apartment with his wife and child looking for a parking place. (5 RT 1437.)

He was driving about 10-miles-per-hour. (5 RT 1440.) As he looked for parking, he saw four men struggling. (5 RT 1438.) He drove away from the area because he was afraid. (5 RT 1440-1441.) There appeared to be two "one-on-one struggles" occurring. (5 RT 1452.)

One of the men in the street looked like a "cholo" because he was wearing loose clothing. (5 RT 1445.) This man was about five feet, five inches tall. (5 RT 1445.) He did not remember describing the man's weight as 140 pounds. (*Ibid.*) He could not see the faces of the men well because it was dark. (5 RT 1444.) Mr. Martinez did not recall telling the police that one person was about five feet, five inches tall and another person with a shaved head was about six feet tall. (5 RT 1446.)

Mr. Martinez immediately reported the incident to the police by calling 911. (5 RT 1441.)

5. The April 2nd Contact with the Santa Ana Police and the Co-defendants

On April 2, at 12:40 a.m., the morning after the Muro homicide, Orange County Deputy Sheriff Christopher Cejka was on patrol in Stanton, California near Santa Ana. (6 RT 1588.) He noticed a car parked at the Motel 6 on Katella Avenue. (*Ibid.*) There were four people gathered around this vehicle, three inside and one outside. (6 RT 1588-1589.) Sheriff Cejka became suspicious because, in the past, numerous arrests had

been made for narcotics at this motel and stolen vehicles had been left in the parking lot. (6 RT 1589.)

Laura Espinoza was seated in the driver's seat of a grey, four-door Nissan Maxima. (6 RT 1589-1590.) Matthew Miller was seated in the front seat. (6 RT 1890.) Amor Gonzalez was in the backseat, and Eloy Gonzalez was standing outside the vehicle.[10] (6 RT 1590.)

Sheriff Cejka asked Mr. Gonzalez what they were doing. (6 RT 1590.) He said that the group was "staying at the motel and they were getting ready to leave to eat something." (*Ibid.*) Sheriff Cejka noticed some beer bottles in the area. (6 RT 1590-1591.) Mr. Gonzalez said that he and Mr. Miller had been drinking beer in the room earlier. (*Ibid.*) Officer Cejka patted down Mr. Gonzalez and found $950 in his pant's pocket. (6 RT 1591.) Sheriff Cejka called for backup. (6 RT 1591.)

When backup arrived, the police removed the occupants from the car and searched it. (6 RT 1592.) Underneath the front passenger's seat, Sheriff Cejka found a pair of cotton gloves and a wallet containing a driver's license with the name "Simon Cruz." (6 RT 1593-1592; Exhibit 27.) Officer Cejka found marijuana in Mr. Miller's pocket, and a "little" marijuana in Ms. Gonzalez's purse. (6 RT 1596, 1603.) Officer Jeff Blair

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[10] Amor and Eloy Gonzalez are not related by blood or marriage.

was called to the Motel 6, and when he arrived, he searched Mr. Gonzalez and found a bracelet that was later identified as belonging to Mr. Stukkie. (8 RT 2073; Exhibit 37.)

Ms. Espinoza said the Maxima belonged to her brother. (6 RT 1591.) Later, it was determined that the vehicle in fact belonged to Louise Edwards. (6 RT 1600.) Sheriff Cejka was directed by his sergeant to release the car to Joseph Provost, Ms. Edward's husband. (6 RT 1607-1608.) Nobody was arrested for being in possession of a stolen vehicle. (6 RT 1609.)

Sheriff Cejka searched the motel room where the group had been staying for additional suspects; he did not see anything unusual. (6 RT 1604.) He also checked the status of Simon Cruz's driver's license and learned that it was possibly stolen. (6 RT 1594-1595.)

Later, Detective Tarpley went to the Motel 6 in Stanton. (6 RT 1619.) He sealed the room where the group had been and obtained a search warrant. (6 RT 1622.) Detective Tarpley "recognized the driver's license of Simon Cruz as belonging to a man who had been robbed just before the fatal shooting of Jesse Muro." (6 RT 1621.) The key for the hotel room was in Mr. Miller's pocket. (*Ibid.*)

Detective Tarpley found appellant's drivers license, which had the

address 211 West 17th Street, Apartment C3, in the motel room. (Exhibit 75, 6 RT 1627.) The license also indicated that Mr. Vargas was five feet and eleven inches tall and weighed 140 pounds. (6 RT 1627.)

Detective Tarpley also took a phone book from the hotel room because he thought it had gang-related writing and because it had the name "Laura" on it and the date April 1, 1999. (6 RT 1625.) The writing that Detective Tarpley believed was gang related was the name "Scrappy" and "BSSR." (6 RT 1626.) Mr. Tarpley believed there were also initials of the Southside Gang. (*Ibid.*)

The group of four was taken into custody by the Tustin Police Department. (6 RT 1595, 1627.) They were transported separately so that they would not talk to each other. (6 RT 1628.) Their clothing was also collected, separated and placed into a bag with an evidence tag attached. (6 RT 1628-1529.)

Based on information given to them from Laura Espinoza and Amor Gonzalez, Tustin police officers searched the residence where appellant had been living. The search was conducted pursuant to appellant's status as a probationer.[11]

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[11] The search of appellant's residence and the admission of the fruits of the search including the firearm purportedly used in the homicide and gang related graffiti are one of appellant's assignments of error. Therefore,

On April 2, 1999, at approximately 7:30 a.m., Tustin Police Officer Donny Kennedy encountered appellant, who was lying on a couch. (6 RT 1667-1669.) He was not asleep at the time but it appeared he had been sleeping previously. (6 RT 1669.) He found exhibit 87, a handgun, under a cushion on a chair in the room where he found appellant. (*Ibid.*)

Detective Michael Lamoureux, who was employed with the Tustin Police Department Gang Suppression Unit, testified about the gang graffiti he found at the residence where appellant was staying. (7 RT 1749 et seq.) On April 2, he initially took some items from the apartment that he thought were gang related. (7 RT 1752.) He returned to the apartment on April 8, with a search warrant and seized more items. (*Ibid.*)

First, Detective Lamoreux described a newspaper, the Orange County Register, that was lying right next to the fold-out bed where appellant was found the morning of his arrest. (Exhibit 104, 7 RT 1754.) Someone had been "doodling" on the newspaper. (7 RT 1755.) In one corner it contained the letters "SA" which means Santa Ana and it also said "Orange County Sureno." (*Ibid.*) There also appeared to be a drawing of a man with a marijuana cigarette protruding out of his mouth and the letters

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the procedural and factual background pertaining to this search are discussed in much more detail in section I, *post*, of this appeal.

"OC," which signify Orange County, tattooed under the eyes. (*Ibid.*) The metro section of the paper had the word "sureno," which means southerner, a word that is common in gang language. (7 RT 1756.)

The letters "OC" and "X3" were written in the sport's section of the newspaper. (7 RT 1757.) The words "Southsider" and "RIFA" were written in the classified section. (*Ibid.*)

The investigator found a Nike shoe box in a bookshelf on the west wall of the living room where appellant was arrested. (Exhibit 105, 7 RT 1757-1758.) It had the following words and letters written on it: "No Mas Orange County," "X13," "714-B-OY-S," "Mr. Wicked," "El Hefe," "Mr. Pewee," and "El Jefe Wicked." (7 RT 1758.)

When Detective Lamoreux returned on April 8 with a search warrant, he did a more extensive search. (7 RT 1759.) He found a three-ring binder that had the name "Eddie Vargas" inside. (7 RT 1760.) There were various drawing in the notebook and there appeared to be photographs that had been given to appellant by his father. (*Ibid.*) One photograph had the following inscription written on the back: "To my son Eddie with a whole lot of love from dad." (*Ibid.*) This photograph was signed by Jesus Quintana. (7 RT 1760-1761.) Several items from this notebook were admitted, including several drawings depicting gang symbols and the word

"Peewee" written on them. (See Exhibits 106a-g.)

A box labeled "Peewee's tapes" containing musical tapes was found in a storage closet. (Exhibit 106a-g.) The officer also found a small telephone book with the words "Eddie Vargas's phone numbers" written on the cover. (*Ibid.*) The book also had the letters "W S SA" (Santa Ana) and "LS" written on it. (7 RT 1769.)

In a bookshelf in the living room, a letter was found addressed to Eduardo Vargas and it also said, "Southside Peewee and Barrio." (7 RT 1772.) Several drawings and writings similar to exhibits 106a through 106g were also found. (See 7 RT 1771-1775)

Officer Lamoreux seized clothing from appellant's apartment including: pants, tennis shoes, and shirts. (7 RT 1775.) The shirts "could have been Pendleton shirts." (*Ibid.*) Mr. Stukkie did not identify any of the seized clothing as being worn by any of the men who accosted him. (*Ibid.*)

6. <u>The Searches of the Miller and Gonzalez Residences</u>

Tustin Police Officer James Marcotte served a search warrant on a residence at Durant Street in Santa Ana where Mr. Miller lived. (6 RT 1707-1708.) He took various items that he believed to be gang related. (6 RT 1710-1712.) He took a photograph of an air-conditioning unit on the outside of the residence, which had names and the number "187" written

under the names. (6 RT 1708.)

Several other items were obtained from Mr. Miller's house: a photograph of a metal pipe outside the Durant residence with graffiti consistent with gang graffiti (Exhibit 92); a blue folder admitted at trail of Miller and Gonzalez (Exhibit 93); A piece of paper with gang style writing that came out of exhibit 93 (Exhibit 94) and; a day planner found at the Duran residence in the female bedroom containing photographs and other papers. (6 RT 1711-1715.)

Tustin Police Officer Duane Allen Havourd, pursuant to a search warrant, searched Eloy Gonzalez's house located at 1605 West Raymar Street in Santa Ana. (7 RT 1743.) Officer Havourd found a wallet in Mr. Gonzalez's kitchen. (Exhibit 99; 7 RT 1743-1744, 1746.) Office Havourd testified to photographs that were taken of the backyard of Mr. Gonzalez's house. (7 RT 1744-1746.) The first photograph was a picture of the backyard with a "home-made table" next to a pool table. (Exhibit, 100; 7 RT 1744-1745.) The second was a close-up of the "home-made" table with writing on it that said, "scrappy," "stalker," and "V 187's." (Exhibit 101; 7 RT 1745-1746.) Third picture, another close-up, said the name, "Gonzalez." (Exhibit 102; 7 RT 1746.)

7. The Subsequent Investigation

a. Forensics

Orange County Forensic Specialist Kelly Brown examined the area of the Muro shooting. (5 RT 1517.) She found two shell casings and an expended bullet. (Exhibits 1-3; 5 RT 1520-1522.) One shell casing was located in the street and the other was located in the planter bed. (*Ibid.*) The spent bullet was also found in the planter bed. (5 RT 1521-1522.) She saw a black Nissan Sentra that had dust on it that appeared to have been touched, which she impounded and tested for fingerprints. (5 RT 1529-1531.) A latent fingerprint was found on the exterior of the trunk and another latent print was lifted from the hood of the car. (Exhibit 47; 5 RT 1535.)

b. The Autopsy

Forensic Pathologist Anthony Juguilon conducted the autopsy of Mr. Muro. (6 RT 1569-1570.) There were two gunshot wounds to Mr. Muro's body. (6 RT 1571.) The first wound entered behind the left ear, passed through the left jawbone, behind the nose and into the right eye socket. (6 RT 1572.) This wound appeared to be a close range gunshot wound because of the presence of soot and stippling on the skin. (6 RT 1573.) Stippling is unburned gunshot powder particles that burn on the skin after

the close range discharge of a firearm. (*Ibid.*) Soot is completely combusted gun powder. (*Ibid.*)

The second wound entered above and behind the right ear and exited over the right frontal area of the head. (6 RT 1575-1576.) There was no stippling on this wound. (*Ibid.*) The path of the second wound was slightly upward; the first wound had a more extreme upward angle. (6 RT 1577.)

The pathologist then demonstrated the trajectory of the wounds and opined on the damage that would be caused by them. He could not determine which wound occurred first. (6 RT 1577-1578.) Assuming the first wound was inflicted first, he would have expected that the victim would fall quickly. (6 RT 1578.) However, gunshot wounds can be very unpredictable and it is possible that the victim would not have fallen immediately. (*Ibid.*) If the second wound had been inflicted first, Mr. Juguilon would still have expected Mr. Muro to have collapsed quickly. (6 RT 1577-1578.)

The official cause of Mr. Muro's death was cranio-cerebral lacerations, which simply means there was a disruption of the skull due to the wounds. (6 RT 1579.) Mr. Muro could have potentially survived the first wound; however, the second wound was lethal. (*Ibid.*) At the time of his death, Mr. Muro did not have any alcohol or drugs in his blood. (*Ibid.*)

On cross-examination, Mr. Juguilon opined that a person might have been able to move or talk for minutes after receiving the first wound. (6 RT 1580-1581.) The first wound did not penetrate the brain tissue. (6 RT 1582.) The first wound could have been received as far away as 24-inches, because that is the outer range for stippling. (6 RT 1583.)

c. The Handgun and Ballistics

Orange County forensic scientist Laurie Crutchfield worked as a forensic firearms examiner for the Orange Country crime laboratory. (6 RT 1672.) She performed firearm comparisons and analysis which helped determine the approximate distance from the muzzle of the firearm to the target. (6 RT 1674.)

She examined the Lorcin .38-pistol, exhibit 87, that was found in the room where appellant was arrested. (6 RT 1676.) She explained the difference between a revolver and an semi-automatic pistol to the jury and told the jurors that exhibit 87 was a semi-automatic pistol. (6 RT 1674-1675, 1677.) She pulled a small piece of cloth through the barrel of the gun and found debris consisting of metal particles and soot. (6 RT 1676-1677.) This gun would normally have a safety, but it was missing. (6 RT 1678.) The trigger pull of the gun was approximately seven and one half pounds, which was within normal limits. (6 RT 1679.)

Ms. Crutchfield conducted a series of tests on the pistol. First, she test fired six cartridges from the Lorcin .38-caliber gun to determine whether the two bullet casings found at the scene could have been fired from that gun. (Exhibit 5, 6 RT 1680.) The two casings came from two different manufacturers. (6 RT 1680.) She concluded that the two shell casings, exhibit 84A and exhibit 84B, were shot from exhibit 87. (6 RT 1686.) She was able to make this conclusion by comparing the similarities in the markings on the casings found at the scene and the casings from the test fire. (*Ibid.*)

Ms. Crutchfield also test fired an additional 12 cartridges to determine "gun powder patterning." (6 RT 1679.) These test patterns were used to determine the distance between the gun muzzle and the area at question. (6 RT 1687.) Since there were two different wounds on Mr. Muro, two different tests were conducted. (6 RT 1688-1689.) The first wound was shot from a distance "between contact and three inches." (6 RT 1689.) The second wound, which had no soot or stippling, had to be shot from six feet or greater. (6 RT 1690.)

Lawrence Baggett, an expert in ballistics and explosives, reviewed Laurie Crutchfield's testimony and reports before testifying. (9 RT 2227-2230.) He had done muzzle testing with firearms thousands of times. (9

RT 2231.) One of the gunshot wounds, the wound behind the left ear, was made within three inches because of the high concentration of stippling. (9 RT 2235.) The other wound could have been fired from a distance of 24 inches or greater. (9 RT 2232.)

d. Impressions In The Dust On The Car

Sergeant Tarpley went to the area of the Muro shooting at approximately 10:44 p.m., on the evening of the shooting. (6 RT 1613.) He noticed a black Nissan Sentra that was parked in the area that had a layer of dust on the passenger side that appeared to have hand prints or fingerprints. (6 RT 1613-1614.) He instructed Officer Kelly Brown to attempt to lift prints from the car. (6 RT 1614.)

Ms. Brown saw two cars that had dust on them that appeared to have been touched, a black Nissan Sentra and a red Toyota Celica. (5 RT 1529.) She impounded both vehicles and tested them for fingerprints. (5 RT 1530-1531.)

A latent fingerprint was found on the exterior of the trunk of the black Nissan Sentra. (Exhibit 47.) Another latent print was lifted from the hood of the car. (5 RT 1535.)

Kenneth Thompson worked as a lead forensic specialist with the Orange County Sheriff's Department. (7 RT 1909.) He is an expert on

fingerprints. (7 RT 1910.) He explained at length to the jury the concept of a latent fingerprint and the many factors that affect them including the condition of the hands that make them and the texture of the surface where they are left. (7 RT 1910-1911.) The two main principles of fingerprints are that they are "unique" and "permanent." (7 RT 1912.)

On October 29, 1999, he compared the known palm prints of appellant with a latent print lifted from the trunk of the Nissan Sentra and determined with a "100% certainty" that the latent print came from appellant. (7 RT 1916.) When the print was made, appellant's thumbs were facing toward the back of the car and his fingers toward the passenger's side of the car. (7 RT 1916-1917.)

The latent palm print was of high quality; the examination was not difficult. (7 RT 1921.) Appellant was cooperative during the examination and allowed Mr. Thompson to take his palm print. (7 RT 1920.)

e. Further Evidence Regarding The Personal Characteristics of Defendants

Sergeant Thomas Tarpley sat through the separate trial of Mr. Miller and Mr. Gonzalez.[12] (6 RT 1611.) Sergeant Tarpley estimated that both Mr. Miller and Mr. Gonzalez were five feet and seven inches tall. (6 RT

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[12]Eloy Gonzalez and Matthew Miller were both tried and convicted in *People v. Miller et al.*, case number 99CF0834.

1612.) He compared Mr. Miller with appellant and said Mr. Miller appeared heavier than appellant. (*Ibid.*) Sergeant Tarpley also testified that he had observed Mr. Miller and Mr. Gonzalez throughout the trial and both "were writing with their right hand." (*Ibid.*)

Sergeant Tarpley also observed appellant write throughout the trial and said that appellant appeared to be writing with his right hand and thus appeared to be right-handed. (6 RT 1641.)

9. The Testimony of Amor Gonzalez and Laura Espinoza Under Their Plea Bargain

a. Amor Gonzalez

Officer Blair interviewed Amor Gonzalez, who subsequently made a statement against appellant. (8 RT 2143.) Detective Blair stated that "she was not offered a deal or leniency" despite the fact that she was present at the time of the robberies, her drug use, and her being in possession of a stolen car at the time she was arrested. (8 RT 2076.)

Ms. Gonzalez had known Laura Espinoza for about seven years. (7 RT 1785.) Ms. Espinoza, who was staying at her aunt's house, paged Ms. Gonzalez on April 1, 1999, around 5:00 p.m. or 6:00 p.m. to go shopping in the Westminister Mall in Anaheim. (*Ibid.*) Ms. Espinoza picked up Ms. Gonzalez in a blue Maxima vehicle and they went to the shopping mall. (*Ibid.*) There, they smoked methamphetamine together and probably

marijuana. (7 RT 1843-1844.)

Sometime later, Ms. Espinoza received a page from Mr. Miller. (7 RT 1786.) She heard Ms. Espinoza call Mr. Miller. (*Ibid.*) Then, they drove to appellant's house on 17th Street and Fairway. (7 RT 1786.) In this time period, she only knew appellant by the nicknames Peewee and Lalo. (7 RT 1787.) She also knew Eloy Gonzalez. (*Ibid.*)

When she arrived, appellant, Mr. Miller and Mr. Gonzalez were at the apartment. (7 RT 1787.) She knew Anthony[13] and Peewee better and had only recently met Mr. Gonzalez. (7 RT 1788.)

The group all drove to a Jack-in-a-Box restaurant and ordered fast food. (7 RT 1789.) Then they drove to a friend's house, but she was asleep so they left. (*Ibid.*) The women had been "planning to get together with Anthony, Eloy, and Peewee" and to go to a hotel together to "kick back." (7 RT 1789-1790.)

The group returned to Ms. Espinoza's apartment because she was cold and wanted to get a jacket. (7 RT 1790.) Her apartment was near the Santa Ana Zoo. (*Ibid.*) They parked at the zoo parking lot because "Laura's dad would get mad if they parked at the apartments."[14] (7 RT

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[13]"Anthony" is Matthew Miller. (7 RT 1821.)

[14]Laura Espinoza later testified and said the reason she had parked at the zoo was to not run into her cousin, Betty Carpio because she wasn't

1791.)

The men were in the back seat and Ms. Espinoza was in the front driver's seat. (7 RT 1793.) When Ms. Espinoza left to get her jacket, Amor Gonzalez joined Eloy Gonzalez in the back seat and began smoking methamphetamine; "getting high." (7 RT 1793-1794.) Ms. Espinoza and Ms. Gonzalez had smoked methamphetamine together earlier in the day. (7 RT 1794.)

Matthew Miller and appellant were standing outside the car. (7 RT 1793.) They walked across the street together; they were not gone for very long. (7 RT 1795-1796.) She did not recall seeing anything in the hands of either man, nor did she recall telling the police they had a wallet. (7 RT 1797.)

Ms. Gonzalez urinated between two cars. (7 RT 1799.) Laura Espinoza returned, and Ms. Gonzalez heard two gunshots. (7 RT 1799.) Her memory was not exactly clear as to the sequence of events, but she believed that Mr. Miller and appellant said something to some people who were walking across the street. (7 RT 1800.)

After the gunshots, Eloy Gonzalez and "Anthony" came running

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suppose to still have Ms. Carpio's car. (8 RT 1992.)

back across the street saying, "lets go, lets go."[15] (7 RT 1802.) The two men appeared to be in a hurry, they were "serious and not happy." (7 RT 1803.) The two women asked where "Peewee" was and then they saw him on the side of the Saddleback Motel. (7 RT 1803.) One of the two men said, "fucking Peewee, fucking Peewee," and began kicking the back of the front seats. (7 RT 1804, 1808.) They drove over to where appellant was and Mr. Miller and Mr. Gonzalez appeared to be very upset with appellant. (7 RT 1808.) They drove appellant to the apartment where he was staying. (*Ibid.*) The three men left the car and entered the apartment. (*Ibid.*) Ms. Gonzalez told the police that she could hear them yelling. (7 RT 1815.)

After leaving appellant at his apartment, the group drove to a Motel 6 in Stanton. (7 RT 1816.) The group did not have any money before, but after the incident they had money. (*Ibid.*) They "got high again" at the motel. (*Ibid.*) When the police contacted the group, she initially gave a false name because she "did not want her mother to know about this." (7 RT 1813-1814.) She was younger than 18 years at the time. (7 RT 1814.)

On cross-examination, Ms. Gonzalez admitted she never saw any guns, nor any crimes being committed. (7 RT 1818-1819.) When they

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[15] Ms. Gonzalez did not indicate clearly in her testimony when Mr. Gonzalez left the vehicle and crossed the street.

returned to the Motel 6, a lot of money was coming from either Mr. Gonzalez's or Mr. Miller's pocket. (7 RT 1820-1821.) Ms. Gonzalez also admitted that at first she told the police that she had heard only one shot. (7 RT 1821-1822.)

Ms. Gonzalez had been in trouble before. (7 RT 1822.) In February 1999, she and Laura Espinoza were caught driving a stolen car that they had been using for two weeks. (7 RT 1832.) In 1998 she stole a Toyota Camry, using scissors to start the car. (*Ibid.*) In 1996, she and Laura Espinoza were also involved in the beating of a woman and the stealing of her purse. (7 RT 1832-1833.)

When she was interviewed by police, she lied, telling officers that the car they were driving belonged to Ms. Espinoza's cousin. (7 RT 1834.)

Ms. Gonzalez had a "pretty good idea" who were gang members, and of the group, she only knew Eloy Gonzalez to be from Southside. (7 RT 1838.) She did not believe appellant belonged to a gang. (7 RT 1840.) Appellant was "from nowhere." (*Ibid.*) "If you are from somewhere, you are a gang member." (7 RT 1841.) Ms. Gonzalez admitted that at the time of her arrest, she was addicted to methamphetamine; "her body would feel weird when she did not use it, it helped her feel normal." (7 RT 1845.)

Ms. Gonzalez did not like jail and did not want to spend the rest of

her life there. (7 RT 1883-1884.) She would "do anything to avoid spending the rest of her life in jail." (7 RT 1884.) She never wanted to be away from her daughter again. (*Ibid.*)

Ms. Gonzalez signed a deal with the prosecutor giving her credit for time served. (7 RT 1885.) That meant all she had to do was testify. (7 RT 1885.) Afterwards, she would be released with no further time in jail. (*Ibid.*) She declined interviews with the defense because she felt that was part of her deal. (7 RT 1904.)

b. Laura Espinoza

Officer Blair interviewed Laura Espinoza for the first time on April 2, 1999. (8 RT 2140.) Before talking to Detective Blair, she was evasive and defensive for about five minutes, and then she began to talk about what occurred. (8 RT 2078.)

In April 1999, Ms. Espinoza lived on 400 South Elk, in Santa Ana, adjacent to the zoo. (8 RT 1929.) Amor Gonzalez was her friend of six years. (8 RT 1930.) On the afternoon of April 1, she went to pick up Ms. Gonzalez; "it was still daylight." (*Ibid.*)

They arrived at a shopping mall and used speed and marijuana together in the car. (8 RT 1931.) After they left the mall, she received a

page from Eloy Gonzalez[16]–she had "partied with him before." (*Ibid.*) Ms. Espinoza could not recall how she had met Mr. Gonzalez. (8 RT 1932.)

She drove to "Lalo's" house, whom she also knew as "Peewee." (8 RT 1933.) Appellant, Mr. Gonzalez, and Matthew Miller, whom she knew as "Anthony," were present. (8 RT 1934.) She thought "Anthony" and appellant were related because they called each other cousins. (*Ibid.*) She did not know the car she was driving was stolen because she thought her cousin had borrowed it from a friend. (8 RT 1934-1935.) The three men and two women went to a house to pick up a friend of Ms. Gonzalez, but she was not home so they left. (8 RT 1935.)

The window on the driver's side of the car would not roll up, so she returned to her apartment to get a "jacket and some CD's." (8 RT 1935.) She parked the car at the zoo parking lot. (8 RT 1936.)

Her memory was not sharp because she was "high the entire time." (8 RT 1938.) She remembered looking at her pager when she left the car to go to her apartment and it was 8:43 p.m. (8 RT 1939.) She stayed in her room five to ten minutes and retrieved an extra jacket in case Ms. Gonzalez

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[16]There is an inconsistency as to who paged Ms. Gonzalez while they were at the mall. Laura Espinoza said Matthew Miller paged Ms. Gonzalez, whereas Ms. Gonzalez said Eloy Gonzalez paged her. (7 RT 1786; 8 RT 1931.)

was cold. (8 RT 1940.)

When she returned to the car, only Ms. Gonzalez was there. (8 RT 1940.) Ms. Espinoza was talking to Ms. Gonzalez and using the CD player of the car. (*Ibid.*) She wanted to leave "because the guys were taking too long." (*Ibid.*)

Shortly thereafter, Mr. Miller and Mr. Gonzalez ran toward the car. (8 RT 1942.) They were "kind of pumped up." (8 RT 1943.) She pulled in the parking lot of the Saddleback Motel, a short distance away, and saw appellant and flashed the car lights at him. (8 RT 1948.)

Mr. Miller was upset with appellant and said "he should kick his ass for this." (8 RT 1949.) The two men were telling appellant that he was going to "regret this for the rest of his life" and that he was going to get "taxed for that." (8 RT 1950.) Ms. Espinoza explained that "getting taxed" meant he was "going to get his ass kicked." (8 RT 1951.) Appellant said that the guy was fighting back and coming at him. (*Ibid.*) He also said one of the reasons' he shot him was "he got up." (*Ibid.*)

The group drove appellant back to the apartment where he was staying and then everyone left together, except appellant who remained in the apartment. (8 RT 1954.) They drove to a motel in Stanton, and she drank a beer. (*Ibid.*) Shortly thereafter, she was taken into custody by the

sheriff. (*Ibid.*)

Ms. Espinoza never saw a gun or heard gunshots. (8 RT 1955.) She did not see appellant use any drugs, nor did he appear to be under the influence of drugs. (8 RT 1956.) At the time when she first talked to police, she was not offered any deals. (8 RT 1956-1957.)

On cross-examination, Ms. Espinoza testified that she never saw appellant with a gun, a wallet or any money. (8 RT 1960-1961.) She characterized her relationship with Matthew Miller as "boyfriend-girlfriend." (8 RT 1963.)

When she returned to the Motel 6, she used more drugs with Ms. Gonzalez; she did not know if the men used drugs. (8 RT 1962.) She also used methamphetamine before she picked up Ms. Gonzalez. (8 RT 1972.)

Ms. Gonzalez gave Ms. Espinoza methamphetamine, or "speed," at the mall. (8 RT 1977.) She smoked "maybe about $20 worth" of speed, which is a "pretty good amount." (8 RT 1977-1978.) Speed affected both her mental and physical state and made her "get up a little." (8 RT 1968-1970.) When she used speed, her thoughts could become "unfocused and racing." (8 RT 1968.) She could become "disorganized and scrambled." (8 RT 1969.) Speed had affected her ability to relate events at different points in time and it hurt her memory. (8 RT 1970-1971.) She was under

the influence of drugs throughout the entire evening. (8 RT 2014.)

In the past, she had told people that she was going to tell them the truth, and then lied to them. (8 RT 2026.) Initially, she was uncooperative with the police. (8 RT 2035.) At first, she told the police that she had not been driving the car the entire night. (8 RT 2024.) However, Ms. Espinoza had borrowed the Maxima from her cousin, Betty Carpio, and had been driving it for a couple days. (8 RT 1991.) Ms. Carpio said she borrowed the car from a friend. (8 RT 1990.) Ms. Espinoza did not ask her cousin if the car was stolen. (8 RT 1993.)

Ms. Espinoza had been in trouble with the police in the past. (8 RT 1997.) In February 1999, she drove a stolen vehicle and lied to the police. (8 RT 1994.) That time, she told them the car she was driving belonged to her sister-in-law. (*Ibid.*) She also lied to the police when she had told them she had a valid driver's license. (8 RT 1994-1995.)

In March 1997, Ms. Espinoza was caught in a stolen black Camaro. (8 RT 1992.) She gave a false name. (*Ibid.*) In June 1998, she was caught in a stolen black Honda and tried to conceal that the ignition had been punched out by placing a bandana over it. (8 RT 1995-1996.) In 1996, she was with Amor Gonzalez when they were in a stolen car and beat up Vanessa Hernandez. (8 RT 1997.) Ms. Espinoza was aware that Mr.

Gonzalez had ties to Southside, but she did not believe appellant was a gang member. (8 RT 1965.) She denied having gang ties of her own, but admitted that she has the nickname "Bashful," a tattoo that says "100% Chicana," and a tattoo that says "RIP Rudy." (8 RT 1966-1967.) She admitted that gang members have these kinds of tattoos and that she had knowledge of gangs and gang members. (8 RT 1967.)

She described Amor Gonzalez as "a truthful person, but she can lie." (8 RT 2028.) For the last year and one half, she has been facing a life sentence for murder. (8 RT 2029.) She would "do anything" to avoid spending her life in prison. (8 RT 2030.) She was going to plead to two counts of robbery and get credit for time served under a deal reached with the prosecutor in exchange for her testimony. (8 RT 2027, 2031.)

9. Southside Gang Related Evidence

a. The Expert Testimony of Jeff Blair

Tustin Police Officer Jeff Blair testified as a "police gang expert." (8 RT 2069 et. seq.) He opined that Southside Gang was a criminal street gang and that Mr. Miller, Mr. Gonzalez, and appellant were members of it, and that all the charged crimes were committed for the benefit of the gang. (8 RT 2129.)

Officer Blair discussed, in detail, his experiences with gangs. He

started working with them in 1990 or 1991 while on patrol. (8 RT 2080.) He was Tustin's "first and only gang investigator." Officer Blair had worked on more than 500 gang-related cases, arrested more than 500 gang members, and has spoken to more than 1,000 gang members. (8 RT 2081.)

Officer Blair was trained in prison gangs. (8 RT 2112-2113.) "X13" stands for the letter "M" meaning that the southern half of California is controlled by the Mexican Mafia inside the prison system, and the northern half by Nuestra Familia, which is identified by the numbers "14" or "X4." (8 RT 2113.)

According to Officer Blair, section 186.22 defines a gang as "three or more individuals who are in an ongoing organization with a common name, sign, symbol or other identifier and who engage in a pattern of criminal activity." (8 RT 2083.) Gangs are usually formed around race, but now there are mixed gangs that might include a white guy or an Asian guy in a Hispanic gang. (*Ibid.*)

The concept of respect is a central value of gangs. (8 RT 2084.) A gang member maintains respect through fear, which is accomplished by acts of violence, including murder and shootings. (8 RT 2085.) Gang members earn respect through fear. (*Ibid.*) "The greater the crime, the greater the respect." (8 RT 2086.) The ultimate act of respect is to kill an enemy.

(*Ibid.*) Guns are very important to gang members. (*Ibid.*) If a gang member "snitches" on another, all members of the gang are considered rats. (8 RT 2086-2087.)

Anytime there is disrespect, there have to be "pay-backs." (8 RT 2087.) Gang members back each other up. (8 RT 2090.) "Even if you disagree with what your own gang member is doing, you are expected to back him up." (*Ibid.*)

"Claiming" is when people indicate what gang they are from. (8 RT 2091.) This is changing because gang members are becoming wiser and they realize that a jury might hear about their gang affiliation at a later date. (*Ibid.*) In some cases you can get in gangs "by tradition" –if for instance you have a family member who was an important gang member. (*Ibid.*)

Graffiti is used as a from of communication; it is referred to as "the newspaper of the streets." (8 RT 2092.) To determine if a person is a gang member, you look at monikers, graffiti and tattoos. (8 RT 2093.) Tattoos are not as common as they used to be; gang members are getting smarter and they realize a tattoo may be seen by a jury later. (8 RT 2093.) Common tattoos are "smile now, cry later," which means "worry about the consequences of an act later." (8 RT 2094.) The "live for today" mentality is very common with gangs. (*Ibid.*) Also, three dots in a triangle shape are

very common, which means, "mi vida loca" or "my crazy life." (*Ibid.*)

"Surenos" or "Sur" is an abbreviation indicating that an individual is from Southern California. (8 RT 2095.) "714" identifies someone as being from Orange County. (*Ibid.*) If a person is from Los Angeles, they will have an L.A. Dodgers symbol. (*Ibid.*)

Rosters are lists of people in the gang, but they may not include everyone. (8 RT 2096.) Sometimes you see at the bottom of the roster the words "y mas," which means that there are more individuals in the gang. (*Ibid.*) Only those in the gang appear on the roster. (*Ibid.*) A gang member would never allow a non-gang member to be on a roster because the gang members are "representatives of that gang." (*Ibid.*)

Regarding the Southside Gang, in April 1999, it had between 20 and 40 members. (8 RT 2097.) Southside Gang began in Santa Ana and is "the granddad of all Southside gangs." (*Ibid.*) If you hear the name "Southside," you are talking about Southside Santa Ana. (8 RT 2098.) The gang has a nickname, "187 click" or "clique," which means murder. (*Ibid.*) "Southsiders" take particular pride in killing people. (8 RT 2089-2099.) They have crimes such as murder and intimidation of witnesses as their primary activities. (*Ibid.*)

Matthew Miller's nickname was "Wicked." (8 RT 2100.) He wrote

a letter to Alex Hernandez stating, "[B]ig dog, how have you been?" (8 RT 2100-2101.) Gang members use the term "dog" to greet each other. (8 RT 2101.) He also signed the letter with the moniker "Wicked." (*Ibid.*) There was a folder that was found in his house with the name "Lady Slick," which was his girlfriend, Erika Guerra. (8 RT 2102.) People's exhibit 94, which was removed from Mr. Miller's residence, had gang style writing and the phrase "Mr. Wicked, Orange County Santana" (Santa Ana combined into one word) and also has the word "payback" written on it. (8 RT 2102-2103.)

Eloy Gonzalez's nickname was "Scrappy." (8 RT 2104.) The officer was able to conclude this based on police documents, material recovered from his residence, and his conversations with Mr. Gonzalez. (*Ibid.*) Exhibits 100, 101, and 102 were material that was taken from Mr. Gonzalez's residence and had the words "Scrappy" and "Stalker" written on it. (8 RT 2104.) It also had "187" on it, which was the nickname of the members of Southside Gang. (8 RT 2104.)

Mr. Gonzalez had been involved in a previous robbery. (8 RT 2165.) Mr. Gonzalez had been involved in several other gang related incidents. (9 RT 2171-2172.) At that time, he claimed gang membership and was served with a notice pursuant to Penal Code section 186.22, which informed him

that the government knew he was a gang member and that if he committed any crimes that were listed, he would face additional consequences for his actions. (8 RT 2167.)

"BSSR," which means Barrio Southside, and "RIFA," which means "he who controls the rules," were written in the phonebook found in the Motel 6 with the name "Scrappy" underneath. (8 RT 2105.) "Laura" with the date "4.1.99" was written on the back of the phone book." (*Ibid.*)

Officer Blair indicted that "X" is the universal gang sign for a period. (8 RT 2106.) Exhibit 91 and an enlargement of it, exhibit 92, are gang rosters. (*Ibid.*) The gang roster was found at Matthew Miller's address on Durant street. (8 RT 2106.) The "B" stands for Barrio the "So" and "O" stands for Southside, and then the words "Scrappy," "Wicked" and "Peewee" appeared on the roster. (8 RT 2107-2108.) There was an "X" for the period after "P." (8 RT 2108.) Next to the "P," the word "wee" appeared, and "187" was written underneath. (*Ibid.*) According to Officer Blair, this document signified that these individuals are in the gang and that their nickname is "the murderers." (*Ibid.*) If they were not gang members, you would not see their names on there. (*Ibid.*) When another gang sees gang graffiti from another gang in their territory, they will cross out the graffiti. (8 RT 2109.)

Appellant's nickname was "Peewee." (8 RT 2110.) Exhibit 106, which was seized from the apartment where appellant was staying, had drawings and doodles, which contained the gang mentality that showed that the author was thinking about respect, pay backs, crime, enemies, allies. (8 RT 2111.)

Exhibit 106A, a notebook taken from appellant's home, contained a drawing on a sheet of notebook paper that said "brown pride Mexicano," and had a caricature of a "cholo" who was dressed like a gang member with a stocking cap, sunglasses, a mustache, holding a revolver pointed at the viewer and other gang writing. (8 RT 2111.) The presence of the number "13" was significant because in Southern California, prison gangs are controlled by the Mexican Mafia and "M" is the thirteenth letter of the alphabet. (8 RT 2112.) The words "Mr. Pewee" appear in the trigger guard of exhibit 106A. (8 RT 2114.) Gang members talk as if shooting someone is a good thing. (8 RT 2114-2115.) There is also "LS3" written, which means "Sureno Locos," and the number "13" standing for "Southern California Locos." (8 RT 2115.) Exhibit 106 is similar to the other drawing but contains "CWNX3," which means "Calles Malditas"[17] or

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[17] "Calles malditas" literally translates as "damned streets." (University of Chicago Spanish Dictionary, 4th Ed., 1987,)

"trouble makers." (*Ibid.*) Officer Blair then discussed some of the other drawing seized from appellant's apartment including a drawing with sunglasses that contain the number "13" and the letters "OC" for Orange County and the letters "SA" for Santa Ana. (8 RT 2120.) These drawings are consistent with the gang mentality which includes committing murder, robbery, and the commission of other crimes. (*Ibid.*) These kinds of drawings are often found in a gang member's residence. (*Ibid.*)

Gang members have a fatalistic attitude; if they kill someone, then it was their time to die, and if they had not been killed, someone else would have killed them anyway. (8 RT 2121.) Officer Blair then went through all of the other exhibits seized at appellant's residence and said they were gang-related. (8 RT 2122-2125.)

Officer Blair discussed three letters written by appellant to Matthew Miller that were admitted at trial. (Exhibits 119, 120, and 121.) Exhibit 119 is significant because appellant referred to Matthew Miller as his dog; "what's up dog?" (8 RT 2127.) The letter referred to Eloy Gonzalez and says "truchas," which means, "watch your back." (8 RT 2128.) Exhibit 121 began with the word "dog," and was signed, "your perro," which means "dog" in Spanish. (*Ibid.*) It also said "See U al rato in 13 days," which means, "see you later in 13 days." (*Ibid.*) The number 13 being code for

"Surenos," or Southern California. (*Ibid.*) Based on the previous factors, Officer Blair opined that appellant, Mr. Miller, and Mr. Gonzalez, were all active members of the Southside Gang. (8 RT 2129.)

When gang members commit crimes with other gang members, they do it for the benefit of the gang. (8 RT 2129.) If it is an economic crime, the gang is benefitted by gaining money or property. (8 RT 2129-2130.) If it is a crime of violence, the reputation of the gang is enhanced through fear. (8 RT 2130.)

Officer Blair is familiar with the Santa Ana robberies and opined that they were done to enhance the reputation of the gang. (8 RT 2132-2133.) The robbery of Simon Cruz, and the robbery and murder of Jesse Muro would benefit the Southside Gang. (8 RT 2133.) By robbing individuals, the group was able to get money, which gang members need to support their lifestyle, which is drinking, obtaining drugs, and getting hotel rooms. (8 RT 2134.) The gang itself is called the "187 gang." (*Ibid.*)

Officer Blair had been gathering information about gangs for a long time. (8 RT 2145.) Mr. Vargas's name had never been mentioned as being a gang member. (8 RT 2146.) This was the first time he had known of Mr. Vargas as a Southside Gang member. (*Ibid.*) Laura Espinoza, Amor Gonzales, Matthew Miller, and Eloy Gonzalez also said that Mr. Vargas

was not a gang member. (8 RT 2147.) Mr. Vargas lived a few miles outside the territory of the Southside Gang. (8 RT 2148.) A couple other gangs claimed the area near the Santa Ana zoo. (8 RT 2148.)

On cross-examination, Officer Blair testified that appellant did not have any felony convictions. (9 RT 2173.) Appellant ran away from home on August 17,1994 when he was a juvenile, and at that time, his mother referred to him as "Eddie or Pewee." (9 RT 2174.) Mr. Vargas was a victim and suspect in a couple minor crimes, but these incidents did not have much bearing in Officer Blair's opinion on his gang membership. (9 RT 2175-2176.)

Officer Blair did not have any idea whether Mr. Vargas was either "jumped or crimed into a gang." (9 RT 2180-2181.) He was not aware of making any mistakes regarding whether someone was a gang member, but "it is possible." (9 RT 2181-2182.)

C. Overview of Defense Case

Appellant did not testify. The defense presented witnesses that appellant was at a birthday party for his grandmother on the evening of the robbery of Mr. Hill and attempted robbery of Mr. Wilson, suggesting that it would have been difficult for appellant to have participated in the crimes.

The defense also presented evidence regarding his whereabouts the

evening of the Muro homicide. Appellant's mother saw appellant speaking on the telephone at her residence around the time of the homicide. Nereida Hermosa, a young woman whom appellant had met shortly before the crimes, indicated that appellant was talking to her on the telephone at the time of the commission of the Muro shooting.

Appellant's mother testified that appellant remained at home most of the evening. Defense counsel argued that it would have been very difficult for him to leave, shoot Mr. Muro, and return to his house to prepare for a job interview the next morning.

Additionally, the defense argued that the robberies were perpetrated by a third party based on the testimony of Simon Cruz, a victim of a robbery, who said that he was robbed by a man with a red Pendleton-type shirt; and the testimony of Nan Marshall, who testified to seeing a stocky man, much unlike the appellant, close to the time and place of the robbery of Simon Cruz.

D. The Defense Case

1. The Night Of The Hill-Wilson Robberies

Hugo Vargas, an older brother of appellant who worked for the Santa Ana Unified School District, testified that on March 30, 1999, he attended a birthday celebration for his maternal grandmother, Bertha

Westrop Barocio, at 2111 West 17th Street, apt C2 in Santa Ana, California. (9 RT 2273-2274.) Hugo Vargas' mother, his grandmother, and appellant, who all lived at the residence, were there when Hugo Vargas arrived. (9 RT 2274.) On the date of the shooting, Hugo Vargas worked until about 5:00 p.m. (9 RT 2273.) He arrived at the apartment about 6:00 p.m. and left at 9:00 p.m. (9 RT 2274.) When Hugo Vargas left, his brother, appellant, was watching television. (9 RT 2275.) Appellant stayed in the residence the entire time Hugo Vargas was there. (9 RT 2274-2275.) Hugo Vargas, who called his brother "Eddie," has heard his brother referred to as "Lalo" but never "Pee-wee." (9 RT 2275.)

Nylda[18] Anaya, appellant's sister, who lived in an apartment next door to him, also attended the party and confirmed the attendance of her brothers, Hugo Vargas and appellant. (9 RT 2278.) Like Hugo, Ms. Anaya testified appellant was present throughout the entire party. (*Ibid.*) Ms. Anaya also left the party at about 9:00 p.m. (*Ibid.*) Ms. Anaya also said appellant's nickname was "Lalo" and she had never heard him be referred to as "Pee-wee." (9 RT 2279.)

Appellant's mother, Nilda Quintana, also testified and confirmed that

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[18]Appellant's mother and sister have the same name but spell it differently. Nylda is appellant's sister and Nilda is his mother. (9 RT 2278, 2302.)

the birthday party lasted until about 9:15 p.m. to 9:30 p.m. (9 RT 2307.) Then, Ms. Quintana went to bed about 10:00 p.m. or 10:30 p.m.. (9 RT 2308.) She said her son, appellant, was watching television at that time in his normal place on the couch in the living room. (*Ibid.*)

2. The Night of the Muro Homicide

a. Nilda Quintana

Appellant's mother, Nilda Quintana, arrived in the United States from Mexico, with her son Eduardo Vargas (also known as Eddie), after her divorce in 1987. (9 RT 2310.) Ms. Quintana worked as a teacher's aide. (9 RT 2321.)

On April 1, Ms. Quintana came home from work at about 3:30 p.m. (9 RT 2309.) Eloy Gonzalez and Matthew Miller were in her apartment with appellant. (*Ibid.*) Ms. Quintana was acquainted with both men. (9 RT 2309-2310.) Matthew Miller and appellant had been friends since 1987. (9 RT 2309.) Ms. Quintana did not like Mr. Gonzalez so she went into her bedroom to watch a video alone. (9 RT 2310.)

She stayed in her bedroom, in the back of the house, for about three hours and came out around 7:00 p.m. or 7:30 p.m. (9 RT 2311.) Mr. Gonzalez and Mr. Miller had left. (9 RT 2311-2312.) Ms. Quintana returned to her bedroom after making herself dinner. (9 RT 2312.) This

time she kept her bedroom door open because "the un-wanted visitors were not there any more." (9 RT 2313.)

Between 7:00 p.m. and 10:00 p.m., Ms. Quintana could not see her son, appellant, but she heard him talking on the telephone. (9 RT 2314.) There is only one entry door to the residence. (9 RT 2320.) At about 8:30 p.m., Ms. Quintana heard a sound as if someone was leaving the apartment. (9 RT 2315.) She did not come out and look because she assumed it was her son leaving. (*Ibid.*)

About 15 minutes later, she heard the sound of a key as if someone were re-entering the apartment. (9 RT 2315-2316.) When she walked outside at about 10:00 p.m., she saw appellant on the deck of the patio. (9 RT 2316.) She talked with her son, who was smoking a cigarette, for about 20 minutes about finding a job. (9 RT 2317.) She did not see Matthew Miller or Eloy Gonzalez that entire evening. (9 RT 2321.)

Ms. Quintana saw her son in the morning at about 6:00 a.m. as she was preparing to leave for work. (9 RT 2320.) Later in the afternoon, she received a call saying that her "son had been taken" and that the apartment had flooded. (9 RT 2321.) When she arrived back at the apartment, she saw that it had been ransacked and there was about two inches of standing water on her kitchen floor. (9 RT 2322.) She called the Tustin Police

Department because her 10-year-old granddaughter saw the Tustin Police arrest appellant. (9 RT 2323.)

Eduardo Vargas is the youngest of her children. Ms. Quintana did not believe that her son used the nickname "Pee-wee," though one time when he was in elementary school, she said someone called and asked for "Pee-wee." (9 RT 2325.) Ms. Quintana said appellant used the Spanish nickname "Lalo", which means Eduardo. (9 RT 2325.) He also used the nickname "Eddie." (*Ibid.*)

b. Nereida Hermosa

Nereida Hermosa, an 18-year-old student at Santa Ana High School, testified that she had met appellant at a Carl's Junior restaurant in Santa Ana the Sunday before he was arrested. (9 RT 2352.) Ms. Hermosa and appellant exchanged phone numbers and talked on the telephone on Tuesday, Wednesday, and Thursday evening of that week. (9 RT 2354.) The calls would take place after 7:00 p.m. (*Ibid.*)

There was a very long series of calls on Thursday, April 1, 1999. (9 RT 2355-2356.) The first call began between 7:00 p.m. and 7:30 p.m. and ended between 8:00 p.m. and 8:30 p.m. (9 RT 2356.) After the first call, she prepared food for herself. (*Ibid.*) Appellant and Ms. Hermosa spoke again on the telephone about a half an hour after the first call. (9 RT 2357.)

They discussed their new relationship during both phone calls. (*Ibid.*) The second call ended at about 10:00 p.m. (9 RT 2358.)

Appellant and Ms. Hermosa spoke a third time for several hours. (9 RT 2358) The call could have lasted until as late as 3:00 a.m. (9 RT 2358-2359.) Their conversations dealt with their likes and dislikes and she described the conversations as "calm, relaxed conversations." (9 RT 2364.)

Ms. Hermosa noted that it sounded as if appellant had been drinking. (9 RT 2359.) During the second call, "he slurred his words a little bit," and during the third call, he was slurring his words much more. (*Ibid.*)

Ms. Hermosa arose from bed around 6:30 a.m. the next morning but skipped school because she wanted to meet "Eddie" somewhere. (9 RT 2360-2361.) She knew Eduardo Vargas as "Eddie" or "Lalo" and never as "Pee-Wee." (9 RT 2361.) She telephoned Mr. Vargas's home about 9:00 a.m. and was told by "a lady" that Eduardo was not there because he had been in trouble with a police officer. (9 RT 2362.)

On cross-examination, Ms. Hermosa testified that she did not hear a party during any of the conversations on April 1 because the birthday party occurred on March 30, the day before; it was just the two of them talking on the telephone. (9 RT 2364-2365.) During the phone call, she was not aware that Jesse Muro had been killed. (9 RT 2367.) Ms. Hermosa wrote

to appellant in jail and signed a few of her letters, "the future Mrs. Vargas." (*Ibid.*)

c. Guadalupe Tinoco

On April 1, 1999, Guadalupe Tinoco was living in apartment C1 adjacent to appellant. (10 RT 2446.) Ms. Tinoco became acquainted with appellant since she had been living there since October of 1998. (10 RT 2446.) She also knew Eloy Gonzalez and his wife who lived in the apartment complex for some time. (*Ibid.*) Ms. Tinoco described Mr. Gonzalez as "obnoxious." (*Ibid.*)

During the week of April 1, 1999, she was working and arrived home between 5:30 p.m. and 6:00 p.m. (10 RT 2448.) On April 1, 1999 she saw Mr. Vargas briefly and then went into her apartment with her children. (*Ibid.*) Then, she left and came home "rather late." (10 RT 2449.) Ms. Tinoco said she came home past her children's bedtime, which is 9:30 p.m., but not much past that time. (10 RT 2460.) She went to the laundry room between 9:30 p.m. and 10:00 p.m that evening and saw Mr. Vargas on the patio. (10 RT 2449-2450) She went back and forth to the laundry room at least three times and saw Mr. Vargas at least twice talking on the telephone. (10 RT 2450-2451.)

The next day, at about 7:30 a.m. or 7:45 a.m., she asked appellant to

give her a ride to work. (10 RT 2451.) He agreed even though he was sleeping. (*Ibid.*) A few minutes later, she pushed open appellant's door and told him that she did not need a ride because her original ride had arrived, and she thanked appellant. (10 RT 2452.) Later that day her kids called to tell her someone "pounded on the door." (10 RT 2453.) Ms. Tinoco went home for lunch. (*Ibid.*) She later learned about the homicide from the media. (10 RT 2454.)

3. Other Defense Evidence

a. Evidence Of Another Possible Perpetrator Of The Homicide

1. Three People See Another Possible Perpetrator of the Homicide

A. Mr. Robert Phillips

On April 1, 1999, Mr. Phillips was living in the Park Place Apartments across from the Santa Ana Zoo. (10 RT 2535.) He also worked at the apartment complex. (*Ibid.*) Between 5:30 p.m. and 6:00 p.m. some Hispanic males caught his attention. (*Ibid.*) They were by the front gate of the apartment complex. (*Ibid.*) Mr. Phillips agreed that a lot of people hang out in front of the apartment complex. (10 RT 2549.)

Mr. Phillips recognized one Hispanic male because of the distinct clothes he was wearing. (10 RT 2537.) The Hispanic man was wearing a

red, button-down flannel shirt with a red bandana. (20 RT 2537.) The shirt stood out in his mind because he owned a shirt that was very similar. (10 RT 2538.) The red bandana was on the individuals forehead and the individual had a ponytail. (10 RT 2539.) He was about eight feet away from Mr. Phillips. (10 RT 2565.)

The police arrived about an hour after Mr. Phillips made the observation of the Hispanic male, at which point he gave them a statement. (10 RT 2540.) The officers returned about one week later with some photographic displays. (10 RT 2544.) In one of the photograph lineups, Mr. Phillips recognized the person in photograph five (appellant) from a photograph he saw previously in The Orange County Register newspaper. (10 RT 2544.) In another set of photographs, Mr. Phillips said the man in photograph five looked similar to the guy he noticed on April 1, 1999. (10 RT 2545-2546.) The individual in the number five position was not identified and was not appellant nor any of the codefendants in this case. (Exhibit U.)

B. Nannie Marshall and Simon Cruz

On April 1, 1999, Nannie Marshall lived and worked as the apartment manager at the Park Place Apartments in Tustin, California. (10 RT 2550.) Ms. Marshall worked from 9:00 a.m. to 6:00 p.m. (10 RT

2551.) On April 1, a little after she left for work, Ms. Marshall attempted to leave the gate of her apartment but there were three men blocking the exit. (10 RT 2552-2553.) One of them had a red plaid shirt, a pony tail, and a red bandana. (10 RT 2554-2556.) He was about five feet, ten inches tall, twenty-five years old, and muscular. (*Ibid.*) There was a second man with a blue jacket and a third man who was bald. (10 RT 2557.)

When Nannie Marshall arrived back home, Mr. Cruz and Ms. Cruz contacted her, telling her that they had just been robbed. (10 RT 2559-25560.) Mr. Cruz said that the robber had worn a red bandana over his face. (10 RT 2560.)

Ms. Marshall, Mr. Cruz and Ms. Cruz were talking in the open doorway of Ms. Marshall's apartment. (10 RT 2561.) After about 15 more minutes passed, Ms. Marshall heard two shots fired close together. (*Ibid.*) She told Mr. Cruz he should speak with the police. (*Ibid.*)

Ms. Marshall called the police. (10 RT 2562.) Later in the evening, she gave the police a statement telling them what she observed. (*Ibid.*) The police provided Ms. Marshall with three photographic lineups, "six packs." (10 RT 2563.) She said number five of the third "six pack" looked similar to the male she observed earlier who was wearing the red flannel and bandana. (10 RT 2564.) Specifically, the eyes of photo number five looked

similar. (*Ibid.*) The individual in the number five position was not identified and was not appellant or any of the codefendants in this case. (Exhibit U.)

b. Matthew Stukkie Did Not Identify Appellant's Clothing

At the time appellant was arrested, Detective Lamourex took several items of clothing from appellant's residence, including a pair of black jeans, a white t-shirt, and a black jacket. (10 RT 2281-2282.) He showed these clothes previously to Matthew Stukkie. (10 RT 2282-2283.) He did not identify them as clothing worn by one of his assailants. (*Ibid.*)

c. The Fight Witnessed by Santiago Martinez

Police Officer Charles Celano interviewed Santiago Martinez. (9 RT 2289-2991.) Mr. Martinez told Officer Celano that he saw a fight with four men at the time of the Muro shooting. (9 RT 2291.) All four of the men appeared to be fighting together. (*Ibid.*) Mr. Martinez identified two of the men in the fight as Mr. Muro and Matthew Stukkie. (9 RT 2292.) Mr. Martinez observed one of the men, who appeared to be approximately 5 feet and 5 inches tall, dragging Mr. Muro by the back of the neck for about 10 feet. (9 RT 2293.) He did not hear any gunshots. (9 RT 2293.)

d. The Nissan Sentra parked near the Santa Ana Zoo

Marlon Aguirre, who lived in Tustin, was the owner of a Nissan

Sentra that was parked near the Santa Ana Zoo at the time of the homicide and had appellant's fingerprints on them. (Exhibits 44-47;10 RT 2439-2440; 5 RT 1539-1541, 7 RT 1916.) He owned the car at the time of the homicide and had owned it for about three and one half to four years. (*Ibid.*)

Around the time of the shooting, Mr. Aguirre was not driving the car very regularly, so the car would be parked in a single area for extended periods of time. (10 RT 2440.) He was driving the car only about once or twice a month. (*Ibid.*) Mr. Aguirre lived about two blocks from the Park Street Apartments. (10 RT 2441.) When he could find parking where he lived, he would park his car on Chestnut Street or Elk Lane. (10 RT 2441.) There was only one parking space where he lived, so when he couldn't find parking, he would park his car at the Park Street Apartments or the zoo parking lot. (10 RT 2441-2442.) He would never park it as far away as the Saddleback Motel on Elk Street. (10 RT 2442.) Mr. Aguirre's car was impounded on April 1, 1999. (10 RT 2444.) He could not remember the last time he washed his car before it was impounded. (10 RT 2441.)

e. Dr. Scott Fraser Casts Doubts On The Witness Identifications

Dr. Fraser, a neurophysiologist and an expert on eyewitness identification, testified for the defense. (10 RT 2464.) He has testified

many times in California and around the world. (10 RT 2466.) He is familiar with simulations that have been performed regarding staged crimes and "weapons fixation." (10 RT 2468.) Dr. Frazer explained that a subject always focuses on a weapon. (10 RT 2470.) The eye cannot focus on two things at the same time. (*Ibid.*) A victim of a robbery that has a weapon pointed at him is generally not accurate at identifying an individual because of this weapons fixation. (10 RT 2472.)

Dr. Fraser also testified that individuals have problems identifying members of other races. (10 RT 2493.) This is true even when people are raised in an integrated environment. (10 RT 2474.) If, for example, the victim of a robbery is Korean and the perpetrators are white or Hispanic, the victim will be more likely to make an error. (10 RT 2475.)

Distinct cues such as large tattoos or scars make identifications more accurate. (10 RT 2476-2477.) There is almost no chance that a person will make a mistake regarding facial hair or the length of hair. (10 RT 2478.) For instance, people do not omit shaved heads as a detail of an identification. (*Ibid.*) An odd item of clothing, such as a Pendleton shirt, would have a high probability of being recalled correctly. (10 RT 2510.)

Dr. Fraser testified that memories are constantly shifting and changing. (10 RT 2479.) Post-event information can dramatically affect

memory. (10 RT 2480.) For instance, there was a color photo of Mr. Vargas appearing in the Los Angeles Times on April 3, 1999. (10 RT 2482.) If this were seen by a victim, it would have a "carry-over effect." (10 RT 2483.) The victim might not even be aware of the effect of the photo. (*Ibid.*)

In lineups, individuals tend to focus on an odd picture. (10 RT 2506.) For instance, if one person is wearing jewelry, the subject may focus on this photograph. (*Ibid.*) Dr. Fraser calls these "irrelevant cues." (10 RT 2506.)

Dr. Fraser examined the three photographic lineups used in the case. (10 RT 2507.) He noted that the male in the number five position in the first lineup was not wearing any clothing and there was a circle around it with a signature and a date. (*Ibid.*) The second photo lineup did not appear to have any irrelevant cues. (*Ibid.*) In the third photographic lineup, two men, one in photo number two and one in photo number five, had larger heads than the rest. (10 RT 2508.) Out of the three photo lineups, the first one, in the number five position, had the most prominent irrelevant cues. (10 RT 2508.) Appellant was the individual depicted in this photo.

On cross-examination, Dr. Fraser discussed Yerkes-Dobson Law, which states that the greater stress we are under, the better we process

information. (10 RT 2487.) When we are not paying attention or are not excited, we do not make as accurate an identification. (10 RT 2486.)

In Orange County, there are at least 12 types of street lights. (10 RT 2490.) Some street lights can distort color. (*Ibid.*)

Dr. Fraser also said, photographic lineups are more accurate than showing single photos. (10 RT 2492.) However, when you start showing more than nine photographs, the identifications are not as accurate. (10 RT 2492.) An individual cannot process so many photos. (*Ibid.*) Live lineups are much more accurate than photo lineups, but a live lineup may cause bias in future photographic lineups. (10 RT 2514.)

The most accurate way for photographic identification is a sequential presentation. (10 RT 2493.) During a sequential presentation, an individual is shown photographs one at a time from a stack. (*Ibid.*)

Dr. Fraser also testified that height is not processed well unless there is a standard. (10 RT 2496.) For example, in certain 7-Eleven stores, clerks are trained to look where the head of the person is when they leave and compare it with a marker. (*Ibid.*)

The passage of time affects accuracy. (10 RT 2513.) The longer the time, the more the memory fades. (*Ibid.*)

f. Recall of Amor Gonzalez

Ms. Gonzalez kept a diary of the events going on in her life in March and the first part of April 1999. (10 RT 2525.) If she wrote something in her diary, then it would have been true. (10 RT 2527.) She wrote that Laura and "Lalo" came over around 2:00 a.m.. However, she could not recall whether it occurred on March 29 or March 30, 1999. (10 RT 2528-2529.) She did not know how they arrived. (10 RT 2529.) The diary entry says she went with Laura Ezpinoza to get a car. (10 RT 2532.)

g. Appellant's Possible Alcohol Intoxication at the Time of the Muro Homicide

Michelle Stevens , a forensic scientist for Orange County Coroner Division, testified regarding the effects of alcohol. (10 RT 2251.) She ran blood tests on the vials obtained from appellant at the time of his arrest. (10 RT 2256.) The results of both tests were a .045 BAC level. (10 RT 2258.) Discussing the burn-off rate of alcohol, she opined that Mr. Vargas's alcohol content could have been as high as .26 or .27 at 9:00 p.m. the previous evening. (10 RT 2262.) At those levels, he would definitely have been "under the influence of alcohol" to the degree that he could not have safely operated a motor vehicle. (10 RT 2263.)

On cross-examination, Ms. Stevens indicated that she could not predict the exact blood alcohol level of appellant the evening before. (10 RT 2271.) To make that determination she would need to know the

drinking pattern of appellant that night, particularly how much he consumed. (*Ibid.*)

h. Stipulations and Other Defense Evidence

According to a jail booking slip, Eloy Gonzalez is approximately five feet and seven inches tall. (10 RT 2582.) Appellant is five feet and eleven inches tall. (4 CT 1201.)

The records of the live lineup conducted on October 27 could not be found and produced for trial with the exception of a photograph marked as Exhibit 10, a photo of the live line-up. (10 RT 2589.) Neither party received a copy of the missing documents. (10 RT 2591.)

E. Government Rebuttal

Sergeant Thomas Tarpley talked with appellant's mother, Nilda Quintana, shortly after the killing of Mr. Muro. (10 RT 2603.) Mr. Tarpley told her that appellant was a suspect in the murder and so were Matthew Miller and Eloy Gonzalez. (*Ibid.*)

Sergeant Tarpley asked Ms. Quintana where her son was on April 1 between 8:30 p.m. and 9:30 p.m. (10 RT 2603.) She replied that she did not know because he had been "in and out of the house throughout the evening" and she couldn't say that he was at home at that specific time period. (10 RT 2604.) Ms. Quintana said appellant had been with Eloy

Gonzalez and Matthew Miller that evening. (*Ibid.*) Upon advice from appellant's previous defense attorneys, Ms. Quintana declined to be interviewed again by the police. (*Ibid.*)

II

PENALTY PHASE FACTS

A. Prosecution Evidence

1. Overview

The penalty phase began on February 20, 2001 and ended three days later on February 23, 2001. (3 CT 861-912.) The prosecution presented its entire penalty phase case in one day. The prosecution's penalty phase testimony consisted only of victim impact testimony. Three of Mr. Muro's cousins, Leticia Orosco, Gloria Cervantes, and Art Jiminez, as well as Mr. Muro's father, Jesse Muro Sr., testified for the prosecution.

2. The Prosecution Penalty Phase Witnesses

The four prosecution witnesses testified that Mr. Muro was a good, moral, an individual who was "good with children" and "animals." (12 RT 2902, 2910, 2918.) They also experienced grief when they discovered that Mr. Muro, a close family member and son, had died. (12 RT 2904, 2909, 2917, 2918, 2926.)

All four of the prosecution's penalty phase witnesses described Mr. Muro's personal characteristics while he was alive. (12 RT 2902-2927.) When he was younger, Mr. Jimenez coached him on a little league baseball team and later developed a love of baseball. (2 RT 2913, 2910.) Mr. Muro

also attended karate classes and accompanied Mr. Jiminez to high school sports game as a photographer's assistant. (*Ibid.*) They testified that Mr. Muro "loved children" and was "good with animals." (12 RT 2902, 2910, 2918.) Mr. Jimenez encouraged Mr. Muro to become a veterinarian. (12 RT 2919.)

The four witnesses were asked how had Mr. Muro's death affected them. Ms. Orosco said that it is now "very scary" for her when she sees a car full of gang members on the street. (12 RT 2905.) Ms. Cervantes "couldn't believe" and was "in a daze" when she discovered Mr. Muro had died. (12 RT 2909.) Mr. Jimenez stated that he has images of how Mr. Muro died flash in his mind "out of nowhere." (12 RT 2917.) Holiday gatherings, like Christmas, for the Muro family are more somber since the passing of Mr. Muro. (12 RT 2918.)

Mr. Muro Sr. was asked by the prosecutor about the painful process of identifying his dead son in the hospital. (12 RT 2925.) He stated that his "life hasn't been the same" after he lost his son. (12 RT 2926.) The prosecutor showed him photographs of his son when he was alive without showing these photographs to the jury so that the jurors could observe first-hand his tears and grief. (12 RT 2928.) Mr. Muro Sr. also testified extensively regarding how difficult it was for him as a father to cope with

the loss of his son. (12 RT 2926-2930.)

B. Defense Evidence

1. Appellant's Family Members

Appellant's mother, Nilda Quintana, and three siblings, Cesar Vargas, Hugo Vargas, and Nylda Anaya, testified on appellant's behalf. Appellant was the last of four children born from Ms. Quintana's first marriage. (12 RT 3079.)

Appellant suffered several health challenges when he was young. When appellant was one year and eight months old, appellant suffered from pneumonia. (12 RT 3085.) Appellant, after staying in the hospital for one month, had to learn how to walk again. (*Ibid.*) He got his finger accidentally cut by his older brother, Hugo, and was also hit in the head with a bottle, which required stitches. (12 RT 3084-3085.)

Appellant's mother testified that he was "daddy's little boy." (12 RT 3081.) Cesar, Hugo and Ms. Anaya all testified that he was treated differently for being the youngest of the four. (12 RT 2937, 2952, 3011.) Cesar Vargas testified that their father, Jorge Vargas, was a strict disciplinarian; "it was customary to be belted for discipline." (12 RT 2937.) However, appellant was never "belted" because he was the favorite child. (*Ibid.*)

Eventually, Nilda Quintana divorced appellant's father and moved to the United States with appellant, Cesar, Hugo and Nylda. (12 RT 2939-2940.) Nilda worked in elder care, cleaning houses, and as an instructional assistant for Santa Ana School District. (12 RT 3087.) Appellant's sister and mother testified that when they first moved, appellant was a nice boy, earned good grades, attended school regularly, and played with the other children in the neighborhood. (12 RT 3014, 3088.) During that time, appellant met Matthew Miller and they became close friends. (12 RT 3015, 3089.)

Appellant's family moved to Santa Ana, and his behavior started to change according to Hugo Vargas. (12 RT 2955.) Hugo testified that appellant began disrespecting Ms. Quintana , their mother, and began to wear "baggy clothing and mingle with people with whom he did not belong." (12 RT 2956.)

Ms. Quintana testified that appellant was expelled from Garden Grove High School for smoking marijuana and did not finish continuation school. (12 RT 3091-3092.) Ms. Quintana said that during that time, appellant met Eloy Gonzalez and began to drink heavily. (12 RT 3102.) Ms. Quintana and Hugo Vargas stated that Eloy Gonzalez dressed and acted like a gangster (12 RT 3104, 2965.) Although appellant was good with

Nylda's children, she would not leave them with appellant if Eloy Gonzalez was around. (12 RT 3025.)

Ms. Anaya testified that the whole family felt that appellant needed discipline and guidance from his father, so she and other family members tried to convince him to go to Mexico, but appellant refused. (12 RT 3022-3023, 3099.) Ms. Anaya explained that appellant was nineteen years old at the time so they could not force him to go. (12 RT 3023.)

Although Ms. Quintana, admitted that appellant dressed and walked like a gangster, Hugo and Cesar did not believe him to be a member of a gang. (12 RT 2948, 2968.)

Ms. Anaya was very sad and shocked to hear of the homicide charges. (12 RT 3028.) On cross-examination, Ms. Anaya admitted that brother had written her letters expressing his sorrow. (12 RT 3031.) She said he expressed sorrow some time before he was convicted. (*Ibid.*)

2. Appellant's Friends

a. Chris Miller

Chris Miller, Matthew Miller's father, was a painting contractor in Orange County. (12 RT 3055.) Matthew met Eddie when Eddie was about 10 or 12 years old. (12 RT 3057.) Chris Miller would see appellant four or five times a week. (*Ibid.*) Mr. Miller would take appellant on family

picnics. (12 RT 3058.) He believed that appellant's mother was a highly religious woman. (*Ibid.*) He did not think there were adult male figures in appellant's house. (*Ibid.*)

Appellant helped Mr. Miller paint on two or three crew jobs and "he did fine." (12 RT 3059.) Eddie did "helper work." (*Ibid.*) After the Miller family moved to Portola Hills, appellant continued to come to the house. (12 RT 3059.) Between 1997 and 1998, appellant began visiting only a couple of times a month. (12 RT 3060.) Appellant would spend the night. (*Ibid.*)

His son, Matthew Miller moved out of the house in October 1998 because he wanted to live with his girlfriend. (12 RT 3061.) Mr. Vargas and Matthew Miller would come back to the house together to visit. (*Ibid.*)

Mr. Miller never met or knew Eloy Gonzalez until this case. (12 RT 3062.) Both his son and appellant began to wear short hair cuts and baggy clothes, and he did not like it. (*Ibid.*) Mr. Miller was aware of gangs in the Santa Ana area and he counseled the two boys that they could be the victims of a drive-by shooting just by the way they looked. (12 RT 3063.) Around Christmas, he noticed "a harder edge to both Eddie and his son;" they seemed "more serious, not so happy-go-lucky." (*Ibid.*) Mr. Miller was not aware of anything that could have caused this offense. (12 RT 3065.)

On cross-examination, Mr. Miller denied knowing that his son was a gang member with the name "Wicked." (12 RT 3065.) He also denied knowing that his son's girlfriend, Erica Guerra, was a gang member named "Slickster" and that she had several gang members in her family. (*Ibid.*)

b. Mark Kent

Mr. Kent was appellant's youth pastor from 1991 to 1993. (12 RT 3072.) He would see appellant about twice a month. (*Ibid.*) Appellant would go on trips with him to the local mountains twice a year for a weekend. (12 RT 3073.) Mr. Vargas was "a regular kid," "nothing stuck out," he was peaceful, did not make trouble, and was respectful by nature. (12 RT 3074.)

Mr. Kent acknowledged on cross-examination that appellant changed his appearance in 1995 and started wearing gang member style clothing; however, he was still respectful and nothing else about him appeared to have changed. (12 RT 3074-3075.)

3. <u>Testimony From Health Care Practitioners</u>

a. Dr. Ted Greenzang

Dr. Greenzang, a practicing psychiatrist, interviewed appellant four times. (12 RT 2977.) He also interviewed members of his family including his mother, one of his brothers, and his sister. (*Ibid.*) In researching

information on Mr. Vargas, he reviewed police and school reports and the reports of Dr. Jody Ward, who also had interviewed Mr. Vargas. (12 RT 2979.)

Mr. Vargas was born from an unwanted pregnancy while his mother used an IUD. (12 RT 2982.) Dr. Greenzang discussed "risk factors" in Mr. Vargas's life including being born into a low socio-economic status and in an environment where illicit drugs were present. (12 RT 2980.) Other risk factors were crimes in the neighborhood and the presence of street gangs. (*Ibid.*)

Appellant only saw his father one time after the family disintegrated. (12 RT 2983.) His stepfather was incarcerated. (12 RT 2983.) Mr. Vargas began to recieve low grades in high school, which is consistent with gang involvement. (12 RT 2984.) Mr. Vargas was expelled from high school and enrolled in continuation school. (12 RT 2985.) He is of "low-average intelligence" and is an "underachiever." (*Ibid.*) The doctor opined that appellant's problems were caused by peer risk including drugs, exposure to gang involvement, lack of self esteem, use of alcohol and drugs, his personality traits, and his originating from an unplanned pregnancy. (12 RT 2987.)

Mr. Vargas's older brothers and sisters have done well in the United

States due to their being older than appellant. (12 RT 2988.) The older children were at a different developmental phase when the family broke up. (*Ibid.*) The older siblings had a "more established identity" than appellant and therefore "would not have been subjected to the same negative peer group influence." (12 RT 2989.)

Dr. Greenzang is not aware of any prior aggressive behavior by appellant in the past. (12 RT 2989.) The crime was unusual because appellant tended to be passive and a follower. (12 RT 2992.) Alcohol played a significant role in the crime. (12 RT 2993.) Marijuana, amphetamines, and cocaine can bring about paranoia and impaired judgment. (*Ibid.*)

On cross-examination, Dr. Greenzang indicated that a person with a problem including "low impulsivity or low frustration tolerance" might gravitate toward a gang. (12 RT 3130.) The majority of individuals from one parent families do not join gangs. (12 RT 3132.)

Appellant had the ability to make choices. (12 RT 3133.) He possessed the intelligence to understand the difference between right and wrong. (12 RT 3134.)

According to the Minnesota Multiphasic Personality Inventory (MMPI), the examination indicated that appellant could be quite aggressive

with others and he "tend[ed] to be impulsive." (12 RT 3138.) He also rationalized his difficulties, denies responsibility, and has anti-social attitudes. (*Ibid.*) "He may [have] a personality disorder such as an anti-social or paranoid personality." (12 RT 3139.)

b. Dr. Inez Colisun

Dr. Colisun tested blood that was obtained from appellant at approximately 11:50 a.m. (12 RT 3040.) It tested positive for "methamphetamine or a related substance," such as amphetamine or ecstacy. (12 RT 3042.) Appellant's drug concentration in his blood was low. (12 RT 3044.) The minimum amount to get a positive result in the Orange County lab is 25-nanograms per milliliter and appellant's level was 33-nanograms per millilliter. (*Ibid.*) Dr. Colisun explained that a "half-life" is the time it takes for the body to "get rid of the drug, to make it half of the original concentration." (*Ibid.*) The half life for methamphetamine is seven to 15 hours, depending on the individual. (*Ibid.*)

c. Defense Investigator David Carpenter

David Carpenter, a licensed investigator for more than 30 years, was hired to help appellant. (12 RT 3150.) He visited Mr. Vargas face-to-face 15 to 22 times. (12 RT 3151.)

Appellant expressed remorse before his conviction, including before

Eloy Gonzalez's trial. (12 RT 3152.) "He made his remorse for what [the Muro family] was going through." (12 RT 3153.) Appellant wanted to talk to the Muro family, but the investigator told him that the judge probably would not allow it. (12 RT 3155.) Mr. Carpenter made several efforts to meet with the Muro family, but they did not want to meet with him. (12 RT 3164.)

One time, appellant told Mr. Carpenter that he hoped the Muro family could find it in his heart to forgive him. (12 RT 3155.) Appellant did not finish his sentence because he began to cry. (*Ibid.*)

ISSUES RELATING PRIMARILY TO GUILT PHASE ERROR

I

THE COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE THAT WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE

A. Introduction

During the guilt phase, the prosecutor introduced into evidence a .38 caliber Lorcin pistol and numerous items containing alleged gang-related graffiti. These items were seized from appellant's residence without a search warrant. The prosecution argued that the warrantless search constituted a valid probation search because appellant had waived his Fourth Amendment rights as a condition of probation on an unrelated misdemeanor case.

Appellant contended at trial, and still contends, that it was error to admit these items against him at trial because he did not validly waive his Fourth Amendment rights at the time he was placed on probation in the misdemeanor case. Finally, appellant contends that the admission of the Lorcin pistol, the alleged murder weapon, as well as the gang graffiti, was highly prejudicial because it constituted some of the most incriminating evidence used against him at trial.

Appellant requests that his convictions and sentence of death be

reversed because the denial of appellant's motion to suppress violated his right to due process of law, right against unreasonable searches and seizures, heightened reliability required in death penalty cases and appellant's right against cruel and unusual punishment under both the United States and California Constitutions. (U.S. Const., 4th, 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17, 24.)

B. Procedural And Factual Background

1. Factual Circumstances Surrounding The Search Of Appellant's Home

On April 2, 1999, at around 8:29 a.m., the police entered appellant's residence without a search or arrest warrant. (1 RT 68, 71.) One of the co-defendants had shown the detectives the apartment where they claimed they had left appellant the previous night, the evening of the shooting. (1 RT 95.)

Upon arriving at the apartment, Detective Lamoureux knocked on the door and announced his intention to conduct a probation search. (1 RT 87-89.) The door was not closed, but ajar. (1 RT 97-98, 100.) The knocking caused the door to slide open two or three feet, revealing appellant lying face down on a couch. (*Ibid.*)

According to Detective Lamoureux, appellant began to "stir" and "appeared to raise his right hand." (1 RT 101.) Detective Lamoureux then

entered the apartment and climbed on appellant's back to restrain him. (1 RT 89.)

After appellant was restrained, the police found a .38-caliber Lorcin pistol, which was the gun that allegedly killed Jesse Muro, located under a seat cushion near where appellant had been sleeping. (1 RT 210.) Police also found a replica AK-47 rifle and various papers with alleged gang graffiti. (1 RT 211.)

2. Appellant's Alleged Probation Condition

On April 1, 1998, appellant, in a negotiated plea, pled guilty to two misdemeanor violations in an unrelated case[19] and received three years probation with conditions. (1 RT 113; 2 CT 453-454.) According to the docket, appellant was verbally told during the change of plea hearing that one of those conditions was that he would to "SUBMIT [his] PERSON and PROPERTY including any residence, premises, container, or vehicle under [his] control to SEARCH and SEIZURE at anytime of the day or night by a police or probation officer with or without a warrant or probable cause. (2 CT 443, emphasis in original.)

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[19]Appellant pled guilty in Orange County Superior Court, Case # UI98CF0138, to two misdemeanor offenses, possession of a deadly weapon in violation of section 12020, subdivision (a) and possession of 28.5 grams or less of marijuana in violation of California Health and Safety Code section 11357, subdivision (b). (1 CT 453-454.)

Although it appears from the minute order and the docket that the judge said in court that appellant was subject to a Fourth Amendment waiver as a condition of probation, the change of plea form that he initialed and signed did not contain a Fourth Amendment waiver. (2 CT 443, 453-454.) Nor did appellant sign the summary probation order which outlined, in writing, all the terms of appellant's probation.[20] (1 RT 114-115.)

3. Defense Motion To Suppress

On October 31, 2000, defense counsel contested the legality of the probation search by filing a "Notice of Motion to Suppress Evidence under Penal Code Section 1538.5 and Memorandum of Points and Authorities in Support of Motion." (1 CT 379-389.) Defense counsel's primary argument was that appellant did not waive his Fourth Amendment rights as a condition of probation because the probation officer in his previous case did not comply with section 1203.12[21] by not furnishing the probation report to appellant, which outlined all the terms of appellant's probation. (1 CT 385-

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[20]It is unclear from the record why appellant did not sign the summary probation order.

[21]Section 1203.12 provides: "The probation officer shall furnish each person who has been released on probation, and committed to his case, a written statement of the terms and conditions of his probation unless such a statement has been furnished by the court, and shall report to the court, or judge releasing such person on probation, any violation or breach of the terms and conditions empowered by such court on the person placed in his care."

386.)

The motion was argued on November 21, 2000. (1 RT 68-122.) The court denied appellant's motion, reasoning that the "practice and history" of plea agreements was that the defendant be advised of the consequences of a plea, which included a Fourth Amendment waiver as a condition of probation. (1 RT 118.) The court further reasoned, "that there is no question in this court's mind that [appellant] was aware" of the search and seizure condition. (*Ibid.*) The court based its ruling on the minute order at the time of the change of plea, and not on a court transcript or what actually occurred. (*Ibid.*)

Defense counsel argued that the court could not deny appellant's motion solely based on the minute order, but from actual evidence of the previous court's hearing, such as the transcript, to prove that appellant knowingly and voluntarily waived his Fourth Amendment rights. (1 RT 118.) The court then suggested that appellant testify to what actually happened during the hearing, but defense counsel elected not to call his client. (*Ibid.*) Defense counsel attempted to make an additional argument, but was interrupted by the court, stating that it was "not inviting more argument." (*Ibid.*)

C. Standard of Review

On review of a ruling on a motion to suppress evidence, the reviewing court reviews the trial court's resolution of the factual inquiry under the deferential substantial evidence standard. (*People v. Hoyos* (2007) 41 Cal.4th 872.) This Court defers to the trial court's factual findings, upholding them if they are supported by substantial evidence, but the court then independently reviews the lower court's determination that the search did not violate the Fourth Amendment. (*People v. Memro* (1995) 11 Cal.4th 786.)

D. Legal Argument

1. Appellant's Purported Waiver Of His Fourth Amendment Was Invalid Because There Was Insufficient Evidence To Prove That Appellant Consented Knowingly, Freely And Voluntarily

Fourth Amendment protections are among the sacrosanct of individual rights. Under the Fourth Amendment of the United States Constitution, "[P]eople have the right to be secure in their persons, houses, automobiles, papers and effects against unreasonable searches and seizures." (*Mapp v. Ohio* (1961) 367 U.S. 643, 655.) A warrantless search of a home is presumptively unlawful. (*People v. Fein* (1971) 4 Cal.3d 747, 752.) If there is a prima facie showing that the police acted without a warrant, the prosecution then has the burden of proving some justification for the warrantless search or seizure, after which the defendant can respond

by pointing out any inadequacies in that justification. (*People v. Williams* (1999) 20 Cal.4th 119.)

There are several exceptions to the warrant requirement. Most of these exceptions require police to justify the lack of a warrant. (See "immediate need of aid exception," *Thompson v. Louisiana* (1984) 469 U.S. 17, 21 [Police may make warrantless entries on premises where "they reasonably believe a person is in need of immediate aid."]; "hot pursuit," *Rodian v. Kentucky* (1973) 413 U.S. 496, 505 [where there are exigent circumstances in which police action literally must be "now or never" to prevent the destruction of evidence.]) Also, a Fourth Amendment prohibition against warrantless entry of a person's home will not apply to situations where voluntary consent has been obtained. (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 179.)

Under California law, the validity of searches and seizures must be reviewed under federal standards. (*People v. Robles* (2000) 23 Cal.4th 789, 794.) A person may validly consent in advance to warrantless searches and seizures in exchange for the opportunity to avoid serving a state prison term. (*People v. Bravo* (1987) 43 Cal.3d 600, 608; *People v. Mason* (1971) 5 Cal.3d 759, 764-766.) Warrantless searches are justified in the probation context because they aid in deterring further offenses by the probationer and

in monitoring compliance with the terms of probation. (*People v. Mason*, *supra*, 5 Cal.3d at pp. 763-764; see also *People v. Bravo*, *supra*, 43 Cal.3d at p. 610.)

"The question of the voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process, 'the power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal, all presumptions favor proper exercise of that power, and the trial court's findings - - whether express or implied - - must be upheld if supported by substantial evidence." (*People v. Siripongs* (1988) 45 Cal.3d 548, 566-567.)

Freytes v. Superior Court (1976) 60 Cal.App.3d 958, 962 is instructive on whether there was valid consent. The appellate court explained that a failure of a trial court to comply with section 1203.12 and deliver a copy of a written statement of the terms and conditions of probation to the defendant is not prejudicial and the defendant's consent to search without a warrant was valid, if the terms and conditions of probation were read to the defendant by the judge and discussed with him in open court; and if the defendant stated he understood them and agreed to abide by them, and if defendant unquestionably freely, voluntarily, and knowingly

consented to the search conditions. (*Ibid.*)

In this case, the trial court erred in denying appellant's motion because there was not substantial evidence to show that appellant waived his Fourth Amendment rights as a condition of probation. Although appellant initialed the change of plea form and according to the docket, was orally advised that he would be waiving his Fourth Amendment right as a condition of probation, the waiver was ineffective because the probation officer violated section 1203.12 by not furnishing appellant with the probation conditions in written form and because there was no direct evidence, through transcript or witness testimony, that appellant knowingly, freely, and voluntarily waived his Fourth Amendment rights when he changed his plea in his previous case. (1 RT 113-115.) The trial court, in denying appellant's motion to suppress, based its decision on the "history and practice of the courts in this building" rather than what actually transpired during appellant's previous probation hearing. (1 RT 117.)

Additionally, when defense counsel suggested that there should be evidence presented regarding the way the specific judge that heard appellant's change of plea conducts his hearings, the court interrupted defense counsel and stated that was "not inviting more argument." (1 RT 118.)

Thus, the facts are insufficient to show a valid waiver of appellant's Fourth Amendment rights as a condition of his probation. Therefore, the court erred in denying appellant's motion to suppress.

2. The Lower Court Committed Reversible Error When It Erroneously Denied Appellant's Motion

a. Standard Of Prejudice

In order for a judgment to be affirmed despite the error, the error must be "harmless beyond a reasonable doubt" if the error violates the federal constitution. (*Chapman v. California* (1967) 386 U.S. 18.) Such errors will be found to be prejudicial, and thus, require reversal, unless the prosecution can show beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Siripongs*, *supra*, 45 Cal.3d at p. 567.) The *Chapman* standard of error applies because the trial court's denial of appellant's motion to suppress violated his Fourth Amendment rights.

b. Prejudice

The unlawful search of appellant's residence was certainly not harmless error. There is substantial evidence that appellant did not commit the crime.

First, absent the unlawfully seized evidence, there was insufficient evidence that appellant committed the homicide or was the shooter. When the police unlawfully searched appellant's residence, they recovered a 38-

caliber Lorcin pistol and alleged gang graffiti, which was used to convict appellant. The wrongfully seized evidence undeniably influenced the jury in its decision of convicting appellant of the homicide and sentencing him to death.

The prosecution argued that merely because a handgun was in his possession, that appellant had to have been the shooter, despite evidence showing that Eloy Gonzalez and Matthew Miller accompanied appellant to his apartment to drop him off and the fact that there were at least five other people that were present at the time of the Muro homicide. (7 RT 1808; 10 RT 2675.) But for the fact that the police found the handgun in appellant's possession at the time of the unlawful search, appellant most probably would not have been convicted of the Muro homicide, or at least the jury would not have found true the enhancement that he was the shooter. (3 CT 787; 12 RT 2818.)

With the alleged gang graffiti, the prosecution introduced the illegally seized documents as evidence that appellant was a member of Southside street gang despite the fact that their own witnesses, Amor Gonzalez and Laura Espinoza, testified that appellant was not a member. (7 RT 1841, 1964.) The documents seized by the police during the wrongful search was not evidence that appellant was a member of a criminal street

gang, but merely evidence that appellant was a "gang wannabe." However, the drawings found in appellant's residence, although entirely legal, were more graphic than the mere writings that were found in the motel room where the other co-defendants were arrested. The alleged graffiti in the motel room merely had scribbles of gang monikers in the motel's telephone book. (8 RT 2105.) One of the drawings found in appellant's residence had a drawing of a "cholo," or Mexican gangster, aiming a gun towards the viewer of the drawing. (8 RT 2112, People's Exhibit 106-A.) The name "Peewee," appellant's alleged gang moniker, was inscribed on the trigger guard of the gun. (8 RT 2114.) Had appellant's motion been properly granted, the jury would probably not have convicted appellant of the criminal street gang enhancements.

Second, appellant's mother testified that appellant was at their residence, celebrating his grandmother's birthday, around the time of the robberies. (9 RT 2307.) Nannie Marshall testified to another possible perpetrator (10 RT 2554-2556); and Matthew Stukkie, the prosecution's witness of the homicide, testified that he did not clearly see his own assailant, much less Mr. Muro's shooter. (5 RT 1491.)

Therefore, without the illegally seized evidence, appellant would most probably not have been convicted of the homicide or the discharge of

the firearm. Thus, the court's erroneous denial of appellant's motion to suppress did not constitute harmless error beyond a reasonable doubt.

E. Conclusion

For the previous reasons, the trial court erred when it denied appellant's motion to suppress. The .38-caliber Lorcin pistol and the gang-related graffiti all evidence found in appellant's apartment and were the fruits of an unlawful search. The search was unlawful because it was conducted without a warrant and there was insufficient evidence that appellant knowingly waived his Fourth Amendment rights as a condition of probation in his previous unrelated misdemeanor case.

Furthermore, the trial court's erroneous denial of appellant's motion was not harmless beyond a reasonable doubt because the items that were unlawfully seized constituted extremely prejudicial evidence against appellant. But for the police's unlawful search of appellant's residence and the trial court's erroneous denial of appellant's motion to suppress, the pistol and alleged gang graffiti found in appellant's possession would not have been admitted into evidence and appellant would not have been convicted of murder with a special circumstance of robbery. Naturally, since appellant would not have been convicted of the murder with special

circumstance but for the error of the trial court, he would also not have been subject to a penalty phase and would not have been sentenced to death.

This error violated appellant's right to due process of law, right against unreasonable searches and seizures, heightened scrutiny in death penalty cases and right against cruel and unusual punishment under both U.S. and California Constitutions. (U.S. Const., 4th, 5th, 8th & 14th Amends.; Cal. Const. art. I, §§ 7, 15, 17, 24.)

Appellant's convictions must and sentence of death must be dismissed.

II

APPELLANT'S CONVICTION IN COUNT XI, PARTICIPATION IN A STREET GANG (PENAL CODE § 186.22(a)), MUST BE REVERSED BECAUSE THERE IS INSUFFICIENT EVIDENCE THAT APPELLANT WAS AN ACTIVE PARTICIPANT IN A CRIMINAL STREET GANG

A. Introduction

Appellant was charged in count XI for violating section 186.22, subdivision (a), which punishes the violator for "actively participating in a criminal street gang . . . and who willfully promotes, furthers, assists in any felonious criminal conduct by members of that gang." (Pen. Code, §186.22(a); 1 CT 15-18.) The jury found appellant guilty on this count. (1 CT 785-813.) However, the prosecution did not present sufficient evidence that appellant was an "active participant" as required by the statute. At most, the evidence merely showed that appellant associated with gang members. Finally, appellant requests that this Court revisit its holding in *People v. Castenada* (2000) 23 Cal.4th 743, upholding the constitutionality of section 186.22, subdivision (a).

Appellant's erroneous conviction in count XI contributed to his death sentence, thereby violating his right to due process of law, and right against cruel and unusual punishment guaranteed by both U.S. and

California constitutions. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 17, 24.) Appellant requests this Court to reverse appellant's conviction in count XI and reverse his sentence of death.

Appellant incorporates pages 55-64, *ante*, regarding the factual background behind count XI.

B. Standard of Review

The law regarding appellate review of claims challenging the sufficiency of the evidence in the context of gang sentence enhancements is the same as that governing review of sufficiency claims generally. (*People v. Leon* (2008) 161 Cal.App.4th 149, 161.)

The standard of review governing the sufficiency of evidence to support a conviction is well-established under California law. The appellate court must review the record in the light most favorable to the judgment drawing all inferences and presuming every fact in support of the judgment that a trier of fact could reasonably deduce or draw from the evidence. (*People v. Miranda* (1987) 44 Cal.3d 57, 87.)

> The court does not, however, limit its review to the evidence favorable to the respondent. (*People v. Johnson* (1980) 26 Cal.3d 567, 577.) The Court of Appeal has a two-fold task: 'First we must resolve the issue in the light of the whole record. . . Second, we must judge whether the evidence of each of the essential elements is substantial.'

(*People v. Brown* (1989) 216 Cal.App.3d 596, 600 quoting *People v. Barnes* (1986) 42 Cal.3d 284, 303.)

The term "substantial" has been further defined by California case law. Substantial evidence must be reasonable in nature, credible and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case. (*The Estate of Teed* (1952) 112 Cal.App.2d 638, 644 (emphasis supplied).) Substantial evidence must "reasonably inspire confidence." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.) It is axiomatic that "an inference may not be based on suspicion alone or imagination, speculation, supposition, surmise, conjecture or guess work." (*People v. Tatage* (1963) 219 Cal.App.2d 430.) "An inference is a deduction which the reason of the jury makes from the facts proved. It is not a mere conjecture or an arbitrary dixit without reason and without factual support." (*Brautigam v. Brooks* (1967) 227 Cal.App.2d 547, 557 quoting *Sweeney v. Metropolitan Life Insurance Company* (1937) 30 Cal.App.2d Supp. 767, 772.)

A conviction that is sustained on insufficient evidence to meet the statute violates federal due process as well. (*Fiore v. White* (2001) 531 U.S. 225 [granting federal habeas corpus relief because prosecution failed to

present sufficient evidence to prove element of crime and therefore petitioner's "conviction is not consistent with the demands of the [f]ederal [d]ue [p]rocess [c]lause"].)

C. Legal Argument

1. Appellant Was Not An Active Participant In A Criminal Street Gang

Section 186.22, subdivision (a) reads in pertinent part:

> Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.

(*Ibid.*)

Courts have established that a violation of this statute requires proof of three elements:

> (1) the defendant is more than a nominal member, or "active participant" of a criminal street gang, (2) the perpetrator had knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and (3) that the perpetrator willfully promoted, furthered, or assisted in felonious criminal conduct by members of that gang.

(*People v. Lamas* (2007) 42 Cal.4th 516, 524; CALJIC No. 6.50.) A person "actively participates in any criminal street gang," by involvement with a criminal street gang that is more than "nominal" or "passive." (*People v.*

Martinez (2008) 158 Cal.App.4th 1324, 1329.)

a. Appellant Did Not Have Any History Of Documented Gang Affiliation

In *People v. Castaneda*, *supra*, 23 Cal.4th at pp. 752-753, this Court held that bragging about being associated with a known street gang and receiving written notice by the police that the defendant associated with a known street gang may constitute sufficient evidence to show "active participation" in a street gang in violation of section 186.22, subdivision (a).

In contrast to *Castaneda*, no evidence was introduced that appellant had any prior criminal record for gang related crimes. Nor were there any documents stating that he was a criminal street gang member or that he associated with known gang members. In fact, as appellant's presentence report makes clear, appellant did not have any prior record of being a member of a criminal street gang or actively participating in one. (4 CT 1224.)

Laura Espinosa and Amor Gonzalez, who testified against appellant and were actual members of the Southside gang, indicated that appellant was from "nowhere," meaning that he did not belong to any criminal street gang, much less Southside. (7 RT 1841, 1964.) Also, none of the alleged victims heard appellant say anything regarding gang affiliation, nor did they

see him throw any gang hand gestures. On cross-examination, Mr. Stukkie, the prosecution's only witness to the fatal shooting, testified that he did not believe his assailants were doing a "gang hit-up." (4 RT 1496.)

b. Appellant Did Not Have Personal Knowledge Of Any Information That Was Exclusive To A Gang Member

Expert testimony that the alleged gang member had personal knowledge of information that could only have been available to a gang member has been held to be sufficient to sustain a conviction under section 186.22, subdivision (a). (*People v. Garcia* (2007) 163 Cal.App.4th 1499, 1508-1509.) In *Garcia*, the defendant knew where gang members were living, where they were keeping their guns, and who was selling drugs. (*Id.* at p. 1509.) The gang expert in *Garcia* testified that the defendant's knowledge could have only be obtained by an active gang member. (*Ibid.*) Because of the expert's testimony and the fact that the defendant admitted to knowing these intimate facts about the gang, the court held that there was substantial evidence that the defendant was an active participant in a criminal street gang. (*Ibid.*)

However, appellant did not make any statements showing that he possessed intimate facts about Southside or any criminal street gang. Nor did Officer Blair, the prosecution's gang expert, testify that appellant had knowledge of any facts that would only be privy to another gang member.

Additionally, although appellant probably knew where Matthew Miller and Eloy Gonzalez lived, given their relationship with each other, there was no evidence that appellant knew any gang members who were selling drugs, where they kept their guns.

c. Appellant Did Not Have Any Tattoos Linking Him To Any Criminal Street Gang

Appellate courts have also held that an admission of gang affiliation and having gang affiliated tattoos is substantial evidence that one is an active participant in a criminal street gang. (*People v. Martinez*, *supra*, 158 Cal.App.4th at p. 1331.) In *Martinez*, the defendant admitted that he was part of the "King Kobras" street gang and also had visible tattoos on his eyebrow and the back of his head, which were clearly visible when he was arrested. (*Ibid.*)

Here, appellant did not have specific tattoos linking him to Southside. (8 RT 2122.) Although appellant does have a tattoo of a star on his arm and three dots shaped in a triangle, which signifies, "my crazy life," on one of his hands, which Officer Blair attributed to the "gang mentality" (8 RT 2095), the tattoos do not link him to any specific criminal street gang. (8 RT 2122.)

d. Appellant's "Graffiti" Did Not Show That He Was An Active Participant In A Street Gang, But A "Gang Wannabe," Enamored With The Gang Lifestyle

At most, the prosecution only presented evidence that appellant was a "gang wannabe." Officer Blair, the prosecution's expert witness on the Southside gang, admitted that he had never heard of appellant or his nickname, "Peewee," until he was assigned appellant's case for trial. (8 RT 2194.) At the time Officer Blair testified, he had been following the activities and members of gangs, including Southside, for over ten years. (8 RT 2080.) Officer Blair conducted at least 40 investigations on the Southside criminal street gang. (8 RT 2145.) But in all those investigations, Officer Blair never heard appellant's name or saw his alleged gang moniker on any gang roster. (8 RT 2146.) In short, Officer Blair did not know that appellant was a gang member. (8 RT 2146.)

Appellant's association with Eloy Gonzalez and Matthew Miller also does not prove he was an active participant because merely having associations with a gang or being a gang member is not a crime. (*Millender v. County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1020-1021.)

The primary reason why Officer Blair believed appellant was an active participant of Southside were the numerous "graffiti" drawings that were found at appellant's and Mr. Miller's residences and the hotel room where the co-defendants were staying at the time of the arrest. (8 RT 2100-2128.) At most, these drawings only showed that appellant was enamored

with the gang lifestyle and that he was a "gang wannabe." This certainly does not constitute substantial evidence that appellant was an "active participant" in a gang.

Appellant's behavior is akin to a teenager doodling swastikas and burning crucifixes on his notepad. Although the behavior is looked down upon by society, it does not mean that the teenager in this hypothetical is a member of the Aryan Brotherhood or the Ku Klux Klan. Similarly, just because appellant drew "graffiti" on his own personal property, does not mean that he was an active member of Southside or any other criminal street gang.

For the reasons stated above, appellant was convicted in count XI based on insufficient evidence in violation of his due process rights and his right against cruel and unusual punishment. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 17, 24.) Therefore, his conviction and sentence must be reversed.

2. Appellant Asks This Court to Revisit Its Holding In *People v. Castenada* (2000) 23 Cal.4th 743

This Court has previously held that the term "active participation" in section 186.22, subdivision (a) was not unconstitutionally vague. (*People v. Castenada*, *supra*, 23 Cal.4th at pp. 751-752.) However, appellant requests that this Court revisit the holding of *Castenada* and find that the statute

violates due process because it does not give fair warning of what conduct is prohibited and encourages arbitrary and capricious enforcement.

In *Castenada*, this Court held that the phrase "active participation" in section 186.22, subdivision (a) was not overly vague, that it only restricts gang participation that is "more than nominal or passive" and that the legislature "has made it reasonably clear what conduct is prohibited." (*People v. Castenada*, *supra*, 23 Cal.4th at p. 752.)

a. The Due Process Standard

Under the due process concept of "fair warning," a statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. 1, §7; *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1373-1374.)

To satisfy due process, a penal statute must define the criminal offense "(1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement. (U.S. Const., 5th & 14th Amends.; *Skilling v. U.S.* (2010) ___U.S. ___, ___[130 S.CT 2896, 2927-2928].)

Here, section 186.22, subdivision (a) fails to satisfy either prong of the analysis.

b. The Statute Does Not Specifically State What Conduct Is Prohibited

First, the statute is not written with sufficient definiteness that ordinary people can understand what conduct is prohibited. The statute itself does not elaborate what is considered "active participation" in a criminal street gang whereas terms in the statute like "criminal street gang" and "criminal gang activity" are carefully defined in other subdivisions. (Cal. Pen. Code, §§186.22(a), (e), (f).) Also, *Castaneda* is not helpful in fleshing out what is considered "active participation." (*People v. Castaneda*, *supra*, 23 Cal.4th at pp. 746-747.) It merely rewords the definition of "active participation," defining it as more than just "nominal" or "passive" participation, without really elaborating what specific actions are proscribed. (*Ibid.*) In effect, "more than nominal or passive" is merely just a synonym for "active participation" without giving further explanation of what constitutes active participation.

Additionally, the words "nominal" and "passive" are also vague regarding what conduct is proscribed under the statute. How would an ordinary person determine when his association with a group of people would be more than nominal or passive to constitute "active participation"

under section 186.22, subdivision (a)? What could be considered "nominal" in one instance, can be considered "active participation" in another case. For instance, in *Castenada,* the accused need not be a leader in the criminal street gang to be "actively participating" (*People v. Castenada*, *surpa*, 23 Cal.4th at pp. 746-747), but it is not against the law to be a member of a gang. (*Millender v. County of Los Angeles*, *supra*, 620 F.3d at pp. 1020-1021.)

Appellant was unfairly harmed by the vagueness of this statute. The prosecution used drawings found in appellant's apartment as "graffiti" to show that he violated Penal Code section 186.22, subdivision (a). (8 RT 2100-2128.) However, these drawings themselves were certainly not illegal, nor was his association with Eloy Gonzalez and Matthew Miller. (Cal. Pen. Code, § 594; *Millender v. County of Los Angeles*, *supra*, 620 F.3d at pp. 1020-1021.) Appellant was wrongfully charged and convicted under the statute because no ordinary person would have fair warning to know what constituted "active participation."

c. The Statute Encourages Arbitrary And Capricious Enforcement

The statute also does not pass the second prong of the fair warning test outlined in *Skilling*, "in a manner that does not encourage arbitrary and discriminatory enforcement." (U.S. Const., 5th & 14th Amends.; *Skilling v.*

U.S., *supra*, 130 S.Ct at p. 2933.) There is a real danger for arbitrary and discriminatory enforcement because there is no real explanation of what is considered "active participation" besides participation that is more than "nominal" or "passive."

Misapplied, this overbroad statute gives the police unfettered discretion to infringe on people's rights as long as they believe that the person is an "active participant" in a criminal street gang no matter how tenuous the evidence is linking that person to a criminal street gang. For example, the police may stop any car containing a person wearing a red or blue bandana because that is what is commonly worn by the "Bloods" and "Crips" street gangs despite the fact that bandannas have other purposes other than gang affiliation like using a bandanna when at the gym or an outdoorsman using it is a headband.

In this case, the government presented evidence of drawings, made by appellant on his own personal property, as "graffiti" to show that he was an active participant in a gang. Such drawings are not against the law. However, this legal activity was used against appellant and led to his erroneous conviction.

For the reasons mentioned above, the vagueness of what constitutes "active participation" in section 186.22, subdivision (a) violates due

process. As a result, appellant was wrongfully convicted in violation of this right and his right against cruel and unusual punishment. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 17, 24.)

D. The Trial Court's Error In Failing To Instruct The Jury To Not Consider Any Potential Gang Evidence As An Aggravating Factor Prejudiced Appellant's Penalty Phase

Here, because appellant was charged and ultimately convicted under section 186.22, subdivision (a), it is likely that the jury sentenced appellant to death because of its disdain for him because of his "gang graffiti" and because of his friendship with gang members. This probability is heightened because of the presence of only one special circumstance, the presence of several mitigating factors, including appellant's lack of criminal record, and the absence of other compelling aggravating factors.

E. Conclusion

Accordingly, appellant's conviction in count XI for participation in a criminal street gang should be reversed and because his erroneous conviction infected the penalty phase deliberations, appellant's sentence of death must also be reversed.

III

THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION FOR THE ROBBERY OF SIMON CRUZ (COUNT IV) BECAUSE THERE IS INSUFFICIENT EVIDENCE THAT APPELLANT WAS ONE OF THE PERPETRATORS OR THAT HE WAS OTHERWISE INVOLVED IN THIS ROBBERY

A. Summary

Appellant was charged in count IV of the information with the robbery of Simon Cruz. The evidence introduced against appellant during trial was insufficient to convict appellant of count IV. However, the jury nevertheless convicted appellant, violating appellant's right to due process of law and right against cruel and unusual punishment guaranteed by both the U.S. and California Constitutions. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 17, 24.) Appellant requests that this Court reverse as to count IV, and reverse the penalty phase and his sentence of death as a result of this error.

B. Standard of Review

Appellant incorporates pages 109-111, *ante*, regarding the general standard of the sufficiency of evidence.

As discussed before, although this Court reviews the evidence in the light most favorable to the judgment, the evidence must be reasonable in nature, credible and of solid value. (*The Estate of Teed*, *supra*, 112

Cal.App.2d at p. 644.) It must "reasonably inspire confidence" and "an inference may not be based on suspicion alone or imagination, speculation, supposition, surmise, conjecture, or guesswork." (*People v. Basset*, *supra*, 69 Cal.2d at p. 139; *People v. Tatage*, *supra*, 219 Cal.App.2d at p. 430.)

Additionally, as previously discussed, a conviction that is sustained on sufficient evidence to meet the statute also violates due process as well. (*Fiore v. White*, *supra*, 531 U.S. at p. 225.)

C. Legal Argument

1. Simon Cruz Did Not Identify Appellant As The Perpetrator

There is insufficient evidence to sustain the conviction in count IV because the evidence was insufficient to show that appellant committed the robbery of Simon Cruz. The day of the robbery, Mr. Cruz gave a vague description of his perpetrator. (5 RT 1404-1405.) Mr. Cruz stated that he was Hispanic, six feet tall, and wearing a red Pendleton-type shirt and bandana. (*Ibid.*) The only reason that Mr. Cruz believed that the perpetrators were Hispanic was because he thought one of them said, "vamanos" during the robbery. (*Ibid.*)

Although a Pendelton-type shirt was seized from appellant's residence, it was not the shirt that Simon Cruz described. (7 RT 1775.) The police seized a gray Pendleton shirt from appellant's apartment but not a red

Pendleton-type shirt like Mr. Cruz described. (*Ibid.*) Additionally, the shirt was not shown to Mr. Cruz for identification.[22]

Also, there was no evidence that appellant was in possession of similar clothing near the time of the robbery. Between the date of the robbery and trial, no photo array was conducted. At trial, Mr. Cruz did not identify appellant, nor did he describe appellant as similar in appearance to his robber. (5 RT 1388-1415.)

2. Nannie Marshall Describes Another Possible Perpetrator Of The Simon Cruz Robbery

Nannie Marshall, the manager of Mr. Cruz's apartment complex, testified to seeing an individual other than appellant, wearing a red Pendleton-style shirt and red bandana, close in time and place to Simon Cruz's robbery. (10 RT 2553-2554.) That individual had a ponytail. (*Ibid.*) Appellant had a shaved head. (12 RT 3019.) Moreover, Ms. Marshall testified that the man in the Pendleton-style shirt had been wearing a red bandana, and that Mr. Cruz said that the man who robbed him placed a red bandana on his face so that he could not see the perpetrator's face. (10 RT 2560.)

Additionally, Nannie Marshall was shown a photographic array to

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[22] The police seized appellant's clothing during the arrest and subsequently showed them to Matthew Stukkie for indentification. (7 RT 1775.) Mr. Stukkie did not identify any of this clothing as the clothes worn by his assailant. (*Ibid.*)

identify the person in the red Pendleton-style jacket, but she did not make a positive identification, only a "similar identification." (10 RT 2563-2564.) In a photographic array, Exhibit U, she identified the person whom she thought she saw, who was not the appellant, but a person unconnected to the crimes. (*Ibid.*)

3. Robert Phillips Identifies Another Person As A Possible Perpetrator

Similarly, Mr. Phillips also testified that he saw someone very similar to the person Ms. Marshall saw. (10 RT 2537-2539.) This person was wearing the same red Pendleton-style shirt, red bandana, ponytail and was hanging out in front of the same apartment complex as the person described by Ms. Marshall. (*Ibid.*) Also, like Ms. Marshall, Mr. Phillips identified the same person in Exhibit U as Ms. Marshall, who was not connected in any way to appellant's case. (*Ibid.*)

4. The Discovery Of Mr. Cruz's Wallet In A Car Used by Appellant Is Not Sufficient Enough To Prove That Appellant Perpetrated The Robbery In Count IV

Mr. Cruz's wallet was found under the driver's seat of the Nissan Maxima used by Eloy Gonzalez, Matthew Miller, Laura Espinoza, and appellant. (6 RT 1593-1594.) This area was accessible by all four co-defendants. (*Ibid.*)

Additionally, Mr. Cruz testified that he had approximately $150-

$200 in cash in his wallet that he never recovered. (5 RT 1403.) At the time of appellant's arrest, the police did not seize any money from him. (2 RT 177.) In contrast, Eloy Gonzalez had $952 in his pockets at the time of his arrest. (*Ibid.*) Additionally, Amor Gonzalez testified that Eloy Gonzalez and Matthew Miller had "a lot of money" in their pockets. (7 RT 1820.) Given these facts, it is more probable that Eloy Gonzalez or Matthew Miller, and not appellant, were the two men who participated in the Cruz robbery.

D. Conclusion

For the reasons mentioned above, there was insufficient evidence to sustain appellant's conviction for the robbery of Simon Cruz.

Therefore this court should reverse and dismiss appellant's conviction in count IV. Additionally, the court should also reverse appellant's death sentence as a result of this wrongful conviction because it would have influenced the jury's decision during the penalty phase.

IV

THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN A FINDING THAT APPELLANT PERSONALLY DISCHARGED A FIREARM IN COUNTS I AND II PURSUANT TO PENAL CODE SECTION 12022.53(d) BECAUSE THERE IS INSUFFICIENT EVIDENCE THAT APPELLANT DISCHARGED A FIREARM

A. Introduction

The prosecution amended the information, adding section 12022.53, subdivision (d) enhancements, personally discharging a firearm, to counts I and II. However, the prosecution failed to prove with sufficient evidence that the enhancement were true. Despite the insufficient evidence, the jury nevertheless found true that appellant personally discharged a firearm, violating appellant's right to due process of law and right against cruel and unusual punishment under both U.S. and California constitutions. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 17, 24.) Appellant requests that this Court dismiss these enhancements against appellant and reverse his sentence of death because of this error.

B. Procedural History

Appellant incorporates pages 25-30, *ante*, regarding the facts relating to the Muro shooting.

Toward the end of the prosecution's case, the prosecutor filed an amended information as to count I (murder) and count II (second degree

robbery), adding section 12022.53, subdivision (d) enhancements to each count. (9 RT 2216.) The enhancements charged appellant with the personal use and discharge of a firearm that caused the death of Mr. Muro. (Penal Code, § 12022.53, subd. (d).)[23] The prosecution also stated, outside the presence of the jury, that if the jury did not find the enhancement to be true, that the government would not pursue the death penalty. (9 RT 2217.)

Despite the dearth of evidence that appellant was the actual shooter, the jury erroneously found the enhancements to be true, violating appellant's right to due process of law, heightened reliability in death penalty cases, and right against cruel and unusual punishment, guaranteed by both U.S. and California Constitutions. (11 RT 2818; U.S. Const., 5th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 17, 24.)

C. Standard of Review

Appellant set forth the standard of review for the sufficiency of the evidence in pages 109-111, *ante*, and incorporates that section by reference. As discussed before, although this court reviews the evidence in the light

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[23]Section 12022.53, subdivision (d) states "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision(a), Section 246, or subdivision (c) or (d) of Section 12034, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

most favorable to the judgment, the evidence must be reasonable in nature, credible and of solid value. (*The Estate of Teed*, *supra*, 112 Cal.App.2d at p. 644.) It must "reasonably inspire confidence" and "an inference may not be based on suspicion alone or imagination, speculation, supposition, surmise, conjecture, or guesswork." (*People v. Basset*, *supra*, 69 Cal.2d at p. 139; *People v. Tatage*, *supra*, 219 Cal.App.2d at p. 430.)

Additionally, as previously discussed, a conviction that is sustained on insufficient evidence to meet the statute also violates due process as well. (*Fiore v. White*, *supra*, 531 U.S. at p. 225.)

D. Legal Argument

There was insufficient evidence to prove that appellant personally discharged a firearm pursuant to section 12022.53, subdivision (d) because the government did not present sufficient evidence to prove his identify as the shooter.

1. Matthew Stukkie Did Not Identify Appellant As The Shooter

The prosecution presented Matthew Stukkie, who was with Mr. Muro at the time of the robbery, as its primary witness to try to prove that appellant was guilty of the firearm enhancement. (5 RT 1471-1516.) However, at trial, Mr. Stukkie did not identify, nor did he describe in detail the person who discharged the firearm. (*Ibid.*) When asked whether Mr.

Stukkie saw his assailants' faces, Mr. Stukkie admitted, "not really. Not that good." (5 RT 1490.) He did not see what was happening to Jesse Muro while he was being robbed. (5 RT 1492.) Although he heard a gunshot, it occurred behind him, where he could not see. (*Ibid.*)

Additionally, Mr. Stukkie testified that one of his assailants was wearing a red Pendleton-type shirt. (5 RT 1509.) The police seized appellant's clothing and presented them to Mr. Stukkie individually. (7 RT 1775.) He took time to inspect each item of clothing individually and did not identify any of the clothes as the ones worn by any of the assailants. (7 RT 1775-1776.) He did not identify any of the co-defendants as the assailants during an identification procedure. (5 RT 1513.)

Additionally, Nannie Marshall and Robert Phillips testified to seeing someone, near the time and location of the shooting, wearing a red Pendleton-style shirt, who could have been the shooter. (10 RT 2553-2554; 10 RT 2537-2539.) That person was not appellant. (*Ibid.*)

2. Amor Gonzalez And Laura Espinoza Did Not See Appellant Fire the Pistol, And Their Testimony Is Highly Suspect As They Cooperated With The Government Against Appellant In Order To Receive Leniency

The prosecution called co-defendants Amor Gonzalez and Laura Espinoza as witnesses in an attempt to prove that appellant was guilty of the section 12022.53, subdivision (d) enhancement. (7 RT 1784-1906; 8 RT

1929-2059.) However, they both testified that they did not see appellant with the gun or see him fire a weapon. (*Ibid.*)

Their testimony was highly suspect, and ultimately unreliable, because they both had a bias in testifying for the prosecution. (7 RT 1890; 8 RT 2029.) Amor Gonzalez and Laura Espinoza were both facing murder charges and life in prison. (*Ibid.*) Both admitted that "they would do anything" to get out of jail. (7 RT 1884; 8 RT 2030) To avoid such heavy sentences, both of them entered into plea bargains with the prosecution, agreeing to testify against appellant in exchange for no further jail time for the murder and robbery charges. (7 RT 1892; 8 RT 2031.)

3. The Latent Palm Print Did Not Place Appellant At The Scene Of The Crime Because The Print Probably Came From A Much Earlier Time

Finally, the prosecution relied on a latent palm print, of an unknown age, taken from a Nissan Sentra near the fatal shooting, to try to prove that appellant committed the robbery and murder. (7 RT 1915-1918.) Even if the latent palm print had been made by appellant, he lived close to the scene of the Muro shooting, and the print could have been made at a much earlier time when appellant was passing through the area instead of at the time of the crime as prosecution suggested. (7 RT 1750.) Furthermore, even if the palm print was appellant's and had been placed on the car around the time

of the crime, it does not prove that appellant personally used the firearm.

Marlon Aguirre, the owner of the Nissan Sentra, testified that near the time of the shooting, he did not drive the car regularly and parked the car in a single place for extended periods of time. (10 RT 2440.) He also admitted that he did not remember when he last washed the car before it was impounded and the prints were taken. (*Ibid.*)

E. Conclusion

In light of all these facts, and applying the standard of review for the sufficiency of evidence, a reasonable jury, viewing the facts in the light most favorable to the judgment, could not find that appellant personally discharged the firearm pursuant to section 12022.53, subdivision (d). This erroneous finding and appellant's subsequent death sentence as a result of this finding also amounted to a denial of due process, a reliable guilt and penalty verdict, and cruel and unusual punishment pursuant to both U.S. and California Constitutions. (U.S. Const., 5th, 8th & 14th Amends., U.S. Const.; Cal. Const., art. I, §§ 7, 17, 24.) Thus, the finding should be dismissed.

Additionally, the prosecutor stated that the government would not seek the death penalty if the 12022.53, subdivision (d), enhancement was found not to be true, and for this reason, too, appellant's death penalty

sentence should be set aside. (9 RT 2217.) Had the jury not improperly found true the personal use enhancement, appellant would not have been subjected to a penalty phase trial and the death penalty.

V

APPELLANT'S CONVICTIONS AND SENTENCE MUST BE REVERSED BECAUSE THE COURT ABUSED ITS DISCRETION IN FAILING TO SEVER THE NON-CAPITAL CHARGES

A. Introduction

Appellant moved to sever counts I, II, III, and V from his remaining charges to avoid the undue prejudice that would likely result from such a joinder. (2 CT 391-407.) The court nevertheless denied appellant's motion. (2 RT 267.) As a result, appellant was convicted on all counts and was subsequently given the death penalty, in violation of his right to due process of law, right to a reliable guilt and penalty trial, and right against cruel and unusual punishment under both U.S. and California constitutions. (U.S. Const., 5th, 8th & 14th Amends., Cal. Const., art. I, §§ 7, 17, 24.)

Appellant requests that this Court reverse appellant's convictions and sentence as a result of this error.

B. Procedural and Factual History

On October 31, 2000, appellant filed a motion to sever counts I, II, III and V, his capital charges, from his remaining charges. Appellant's primary argument for severance was that he would receive an unfair trial if the charges were joined. (2 CT 391-407.) The facts surrounding the robbery of Matthew Stukkie, the homicide of Jesse Muro, and appellant's

alleged gang ties, would inflame the emotions of the jury, convicting appellant based on their personal emotional reactions and not on the evidence presented at trial. (*Ibid.*)

The motion was heard on January 9, 2001. (2 RT 267.) Despite the high likelihood that appellant would be unduly prejudiced by the joinder, the court erroneously denied appellant's motion. (*Ibid.*) Appellant was subsequently convicted on all counts and sentenced to death, violating his right to due process of law and right against cruel and unusual punishment guaranteed by both U.S. and California Constitutions. (11 RT 2817; 13 RT 3254; U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 17, 24.)

Appellant incorporates pages 9-82, *ante*, regarding the factual history behind all the counts.

C. Standard of Review and Assessment of Prejudice

In reviewing appellant's denial of his motion to sever trial of multiple charges, the reviewing court examines whether the denial of severance was an abuse of discretion. (*People v. Geier* (2007) 41 Cal.4th 555, 574-575.) "A trial court's denial of a motion for severance of charged offenses amounts to a prejudicial abuse of discretion if the trial court's ruling 'falls outside the bounds of reason.'" (*Alcala v. Superior Court*

(2008) 43 Cal.4th 1205, 1220.)

The purpose of joint trials is to prevent repetition of evidence and save time and expense to the state as well as to the defendant. (*People v. Scott* (1944) 24 Cal.2d 774, 778-779.) At the same time, the state and federal constitutions guarantee criminal defendants the right to a fair trial. (U.S. Const., 5th & 14th Amends.; Cal. Const., Art. I, §§ 15 & 16.) "The pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court, supra*, 20 Cal.4th at pp. 451-452; accord, *People v. Bean* (1988) 46 Cal.3d 919, 935 [severance "may be necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure defendants a fair trial"].) Therefore, in exercising its discretion on a motion to sever, the trial court must balance the potential prejudice against the state's interest in joinder and whether any actual and substantial benefits will be gained from a joint trial. (See, e.g. *People v. Bean, supra*, 46 Cal.3d at pp. 935-936; *People v. Smallwood* (1986) 42 Cal.3d 415, 425, 430; *People v. Balderas* (1985) 41 Cal.3d 144, 173; *Williams v. Superior Court, supra*, 36 Cal 3d. at pp. 448, 451.)

Of course, the death penalty is a different kind of punishment from any other. (See, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305;

Gardner v. Florida (1977) 430 U.S. 349, 357.) In light of this qualitative difference, the Supreme Court has repeatedly recognized that the Eighth Amendment demands a "heightened 'need for reliability' " in all phases of a capital trial. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; accord *Lockett v. Ohio* (1978) 438 U.S. 586, 604 ["the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [guilt phase verdicts in capital cases require heightened reliability].)

For these reasons, "[s]everance motions in capital cases should receive heightened scrutiny for potential prejudice." (*People v. Keenan* (1988) 46 Cal.3d 478, 500; accord, *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454; *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 430-431.) This is particularly so where it is the joinder itself which renders the defendant potentially death eligible. (See, e.g., *Williams v. Superior Court*, *supra*, at p. 454 [refusal to sever subject to "great scrutiny" where joinder permitted allegation of "multiple murder" special circumstance allegation, whereas if cases severed, possibility of death penalty would only arise if first trial resulted in murder conviction]; accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1318; *People v. Smallwood*, *supra*, 42 Cal.3d at p. 425.)

Whether the trial court abused its discretion in denying a motion to sever is determined on the record before the court at the time of its ruling. (See, e.g., *People v. Davis* (1995) 10 Cal.4th 463, 508.)

Even if a severance motion was properly denied at the time it was made, if the effect of the joinder was so prejudicial as to deprive that it deprived the defendant of a fair trial or due process of law, reversal is required. (See, e.g., *People v. Harrison* (2005) 32 Cal.4th 73, 120; *People v. Mendoza* (2000) 24 Cal.4th 130, 162; *People v. Arias* (1996) 13 Cal.4th 92, 127; *People v. Johnson* (1988) 47 Cal.3d 576, 590; *People v. Grant* (2003) 113 Cal.App.4th 579.) "[E]rror involving misjoinder 'affects substantial rights' and requires reversal... [if it] results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.' " (*United States v. Lane* (1986) 474 U.S. 438, 449; see also *Sandoval v. Calderon* (9th Cir.2000) 241 F.3d 765, 771-772; *Featherstone v. Estelle* (9th Cir. 1991) 948 F.2d 1497, 1503.) In this regard, " '[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.' " (*United States v. Lane*, *supra*, 474 U.S. at p. 449.) In other words, the defendant must demonstrate a reasonable probability that the joinder affected the jury's

verdicts. (*People v. Bean, supra*, 46 Cal.3d at pp. 938-940.)" (*People v. Grant, supra*, 113 Cal.App.4th at p. 588; accord, *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083-1086, cert. denied, 528 U.S. 922 [prejudicial effect of state court's denial of severance motion violated defendant's due process right to fair trial]; *Panzavecchia v. United States* (5th Cir. Unit B 1981) 658 F.2d 337, 338, 341.)

D. Legal Discussion

Section 954 provides in its entirety:

> An accusatory pleading may charge two or more different offenses connected together in the commission, or different statements of the same offense or two or more different offenses if the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal or any other count.

In determining both potential and actual prejudice from joinder, the trial and reviewing courts should be guided by several well-established criteria, including whether: "(1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or the joinder of them turns the matter into a capital case." (*People v. Sandoval* (1992) 4 Cal.4th 155, 173; accord, *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120; *People v. Kraft* (2000) 23 Cal.4th 978, 1030; *People v. Bradford, supra*, 15 Cal.4th at p. 1315; *People v. Marshall* (1997) 15 Cal.4th 1, 27-28.)

1. The Evidence Underlying The Charges Are Not Cross-Admissible Because The Crimes Are Not Sufficiently Similar To Prove Identity, Common Design, Or Plan

In assessing the cross-admissibility of evidence for severance purposes, the question is "whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others." (*People v. Balderas, supra*, 41 Cal.3d at pp. 171-172; accord, *People v. Bradford, supra*, 15 Cal.4th at pp. 1315-1316.) "Cross-

admissibility is the crucial factor affecting prejudice." (*People v. Stitely* (2005) 35 Cal.4th 514, 531.) If the evidence is cross-admissible, prejudice is generally dispelled. (*People v. Bradford, supra,* 15 Cal.4th at pp. 1315-1316.) While lack of cross-admissibility alone is not sufficient to prohibit joinder and demand severance, that factor nevertheless weighs heavily in favor of potential prejudice and, therefore, severance. (See, e.g., *People v. Smallwood, supra,* 42 Cal.3d at pp. 425-426; *Williams v. Superior Court, supra,* 36 Cal.3d at pp. 448-451 & fn. 9; *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.)

This Court has long and consistently recognized that "[t]he admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314, disapproved on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260; accord, *People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v. Smallwood, supra,* 42 Cal.3d at p. 428; *People v. Alcala* (1984) 36 Cal.3d 604, 631; *Williams v. Superior Court, supra,* 36 Cal.3d at pp. 448-450 & fn. 5.) The admission of such evidence "creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Thompson, supra,* 27 Cal.3d at p. 317;

Williams v. Superior Court, *supra*, 36 Cal.3d at pp. 448-450 & fn. 5.) Of course, "[a] concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (*United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044; *People v. Garceau* (1993) 6 Cal.4th 140, 186 [use of such evidence may dilute presumption of innocence].) Thus, "joinder under circumstances where the joined offenses are not otherwise cross-admissible has the effect of admitting the most prejudicial evidence imaginable against an accused." (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 429 [citing and discussing supporting authorities].)

Even when the evidence has some bearing on a disputed, material issue, its admission is not guaranteed. Given the extremely inflammatory nature of other crimes evidence, its admission under section 1101, subdivision (b), is sharply circumscribed. It is to be received with "extreme caution," and only when its probative value is *substantial* and *necessary* to prove a *disputed* issue. (*People v. Williams* (1988) 44 Cal.3d 883, 907; accord *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405; *People v. Alcala*, *supra*, 36 Cal.3d at p. 631; *People v. Smallwood*, *supra*, 42 Cal.3d at p. 429; *People v. Thompson*, *supra*, 27 Cal.3d at pp. 315, 318.) While a plea of not guilty technically places all elements in issue, the element must genuinely

be in dispute in order to be proved with other crimes evidence. (See, e.g., *People v. Balcom* (1994) 7 Cal.4th 414, 426; *People v. Ewoldt, supra*, 7 Cal.4th at p. 406; *People v. Bonin* (1988) 47 Cal.3d 808, 848-849; *People v. Alcala, supra*, at pp. 631-632; *People v. Thompson, supra*, 27 Cal.3d at pp. 315, 318, & fn. 20.) Moreover, to be admissible, such evidence "'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404) under which "the probative value of the evidence must not be substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Harrison, supra*, 34 Cal.4th at p. 229; accord, *People v. Alcala, supra*, 36 Cal.3d at pp. 631-632.)

Applying these principles, this Court has held that "[e]vidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. [Citation.] . . . .' (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)" (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the

charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403.) "The highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense." (*People v. Balcom*, *supra*, 7 Cal.4th at p. 425.)

Here, as the trial court recognized, the critical issue genuinely was the identity of the perpetrators of the robberies and murder. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2 ["Evidence of identity is admissible where it is conceded or assumed that the charged crime was committed by someone, in order to prove that the defendant was the perpetrator"].) Hence, in order to be cross-admissible to prove identity, "'[t]he pattern and characteristics of the crimes'" had to "'be so unusual and distinctive as to be like a signature.' [Citation.]" (*People v. Ewoldt*, *supra*, at p. 403.)

However, the only common features among the crimes in this case was that: 1) a firearm was used, 2) the perpetrators were male, and 3) they all occurred in the same geographical and temporal area. These features are arguably almost always present in a great majority of robberies, which are

committed by many different people, and not just by appellant.

Additionally, this Court has consistently found offenses that are far more similar than appellant's alleged robberies to be insufficient to support an inference of identity. For instance, in *People v. Rivera* (1985) 41 Cal.3d 388, the trial court admitted a prior armed robbery based upon the prosecutor's contention that the prior crime was sufficiently similar to the charged crime to support an inference of identity because:

> 1) both crimes occurred on a Friday night; 2) both occurred at approximately 11:30 p.m.; 3) both involved convenience markets; 4) both markets were in Rialto; 5) both markets were located on street corners; 6) both crimes involved three perpetrators; 7) both involved getaway vehicles; 8) prior to both crimes, two or three people were observed standing outside the store; and 9) the defendant used a [similar] alibi defense in both cases . . . .

(*Id.* at pp. 392-393.)

The Court held that the trial court erred:

> [t]aken alone or together, however, these characteristics are not sufficiently unique or distinctive so as to demonstrate a "signature" or other indication that defendant perpetrated both crimes. Convenience stores are often on street corners and are prime targets for crimes; undoubtedly many of these offenses occur late on Friday evenings and involve a getaway car and more than one perpetrator; finally, alibi is a common defense.

(*Id.* at p. 393.)

Similarly, in *People v. Bean*, *supra*, 46 Cal.3d 919, this Court held that two murders were insufficiently similar to support an inference of identity where they: 1) occurred three days apart; 2) occurred in close proximity; 3) were both accomplished by blows to head; 4) involved older women victims; 5) occurred in the commission of burglaries/robberies; and 6) involved taking victims' cars and abandoning them in the same area. The Court held that "these factors are not unique . . . and [therefore] do not establish a unique modus operandi." (*Id.* at p. 937; see also *Williams v. Superior Court* (1984) 36 Cal.3d 441, 450 [two murders insufficiently similar when both committed by shooting, but different in location, time, date, and number of people involved].)

The appellate courts are in accord. For instance, in *In re Anthony T.* (1980) 112 Cal.App.3d 92, Division Four of the Court of Appeal for the Second Appellate District held that two crimes were insufficiently similar to prove identity despite the facts that: 1) both were robberies; 2) both were committed by two perpetrators; 3) both were committed with guns; 4) both occurred in take-out chicken stands where the perpetrators forced employees to remove money from store safes; and 5) both were committed within two months of each other. (*Id.* at pp. 100-101; see also *People v.*

Felix (1993) 14 Cal.App.4th 997, 1005-1006 [prior robbery committed by the two codefendants was insufficiently similar to prove that they were the perpetrators of the charged robbery despite the facts that: 1) both crimes were committed by two perpetrators; 2) both crimes involved multiple victims in business establishments; and 3) the two codefendants were known to have committed the prior crime together].)

The evidence in this case fell far short of demonstrating that "[t]he highly unusual and distinctive nature of both . . . offenses virtually eliminate[d] the possibility that anyone other than the defendant committed" them. (*People v. Balcom*, *supra*, 7 Cal.4th at p. 425.) What occurred here were typical armed robberies, without any distinctive characteristics to prove that anyone other than appellant could have committed them. As discussed above, there were offenses that were far more similar in nature than appellant's alleged crimes that were held not to be cross-admissible. To find that appellant's charges are cross-admissible would go against over two decades worth of case law and a denial of appellant's fundamental rights.

2. The Gang Evidence And Murder Charges Were Unusually Likely To Inflame The Jury Against Appellant

Where the evidence relating to one charge is more inflammatory than that relating to the other, that is a factor weighing in favor of severance.

(See, e.g., *People v. Sandoval*, *supra*, 4 Cal.4th at p. 173). Gang membership evidence is well recognized as being extraordinarily prejudicial and inflammatory. (See, e.g. *People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Cox* (1991) 53 Cal.3d 618, 660; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-194; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 344.) Like other violent crimes evidence, it carries a grave risk "that the jury [will] view appellant as more likely to have committed the violent offenses charged against him because of his membership in the gang." (*People v. Cardenas*, *supra*, at pp. 904-905; accord, *People v. Avitia*, *supra*, at p. 194; *People v. Bojorquez*, *supra*, at p. 344.) It breeds an equal tendency to condemn, not because the defendant is guilty of the present charge, but because the jury fears he will commit a similar crime in the future or, conversely, because it believes that the gang member defendant likely committed previous crimes for which he has escaped unpunished. (See, e.g., *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1230 [despite absence of "formal convictions," it is "reasonable to infer" prior criminality from gang membership]; *People v. Thompson*, *supra*, 27 Cal.3d at p. 317 [prior criminality breeds tendency to condemn because defendant has previously escaped punishment]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 624

[gang involvement suggests future criminality]; *In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1501 [same]; *Simmons v. South Carolina* (1994) 512 U.S. 154, 163 [evidence relating to defendant's future criminality irrelevant and inadmissible in trial on guilt or innocence because "jury is not free to convict a defendant simply because he poses a future danger"].)

Here, appellant was facing a total of 11 felony counts, only one of which carried the death penalty. (1 CT 55-57.) Additionally, appellant was being charged as being an active participant in a criminal street gang. Considering the number of multiple robbery counts against appellant and the charge in count XI that he was an active participant in the Southside street gang, this is exactly the kind of situation that demands severance. The jury, hearing that appellant had alleged gang ties, would convict appellant based on their feeling that appellant was an active participant of a member of a gang, and not based on the evidence presented in trial. (*People v. Cardenas, supra,* 31 Cal.3d at pp. 904-905.)

Additionally, appellant's murder charges were also unusually likely to inflame the jury such that the charges required severance. At the time appellant's motion to sever the charges was filed, defense counsel stated that the prosecution's theory was that "the robbery murder of Muro was a cold-blooded chilling execution of a robbery victim which was committed

for no other reason than to eliminate a vulnerable and defenseless victim." (2 CT 406.) In contrast, appellant's other alleged robberies seemed to be more akin to textbook-style armed robberies. There was no evidence of any intent on "executing" defenseless victims in his other charges. Thus, there was a very high likelihood that appellant's charges in counts I and II did inflame the jury and the court should have granted appellant's motion to sever.

3. Appellant's Count IV (Robbery Of Simon Cruz) And Counts I And II Enhancements (Personal Discharge Of A Firearm) Were Factually Weak

This Court has unequivocally stated that the assessment of potential prejudice from joinder:

> should not be limited to situations where the relative strengths of the case are unequal. Indeed, our principal concern lies in the danger that the jury [hearing two relatively weak cases] would aggregate all of the evidence, though presented separately in relation to each charge, and convict on both charges in a joint trial; whereas, at least arguably, in separate trials there would not be convictions on both charges. Joinder in such cases will make it difficult not to view the evidence cumulatively. The result might very well be that the two cases would become, in the jurors' minds, one case which would be considerably stronger than either viewed separately.

(*Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 453-454.)

"[J]oinder should never be a vehicle for bolstering either one or two weak cases against one defendant, particularly where conviction in both will give rise to a possible death sentence." (*Id.* at p. 454, italics added.)

As explained in sections II through IV, *ante*, there is insufficient evidence to show that appellant personally discharged the firearm that caused the death of Mr. Muro, that he committed the robbery of Simon Cruz, or that he was an active participant in a criminal gang and therefore were factually "weak" cases against appellant. On the other hand, appellant's other counts, charging him with the Baek, Kim, Wilson and Hill robberies, were arguably stronger against appellant.

By the joinder of the "weak" cases with the "strong" cases, appellant was vulnerable to prejudice because the jury would convict appellant on the weak cases merely be association with the factually stronger cases. There was a very real risk that the jury looked at the evidence cumulatively, instead of separately, for each charge and unfairly convict appellant. Thus, these factors also weigh in favor of severance under *People v. Sandoval*, *supra*, 4 Cal.4th at p. 173.

4. Appellant's Charges In Counts I And II Carry The Death Penalty

Counts I and II, the killing and robbery of Jesse Muro, were appellant's capital charges. Thus, this fits squarely under the fourth factor

in favor of severance, "if any of the charges carries the death penalty." (*People v. Sandoval, supra*, 4 Cal.4th at p. 173.) Thus, the fact that these charges were joined with appellant's non-capital charges heavily favors severance.

5. The Misjoinder Of Charges Denied Appellant Of His Right To A Fair Trial And Requires Reversal Of Appellant's Convictions

It was beyond the bounds of reason to deny appellant's motion. All four of the factors were in favor of severance: 1) the charges were not cross-admissible at trial, 2) the charges were likely to inflame the jury, 3) weak cases were joined with stronger ones, and 4) one of the charges carried the death penalty. (*People v. Sandoval, supra*, 4 Cal.4th at p. 173.) All of the factors were present, and each factor alone should have compelled severance because of the high likelihood that appellant would be unduly prejudiced at trial and because of the fact that this was a capital case. Thus, it was beyond the bounds of reason to deny appellant's motion and join all the charges against appellant in the same trial. As a result of this miscarriage of justice, the jury wrongfully convicted and the court wrongfully sentenced appellant to death, violating his right to due process of law and right against cruel and unusual punishment. (13 RT 3254; U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 17, 24.)

D. Conclusion

Accordingly, appellant's convictions on all counts and his sentence of death must be reversed.

VI

THE TRIAL COURT BREACHED ITS SUA SPONTE DUTY TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER

A. Introduction

The prosecution presented substantial evidence through Santiago Martinez's testimony that the killing of Jesse Muro occurred during a sudden quarrel or heat of passion. (5 RT 1436-1440.) Despite substantial evidence that the killing of Muro occurred during a street fight, the jury was not instructed sua sponte on the lesser included offense of voluntary manslaughter as required by law.

B. Procedural Background

Appellant was charged in count I with the murder of Jesse Muro. (1 CT 55-57.) Although there was substantial evidence that the fatal shooting arose out of a sudden quarrel or heat of passion, the jury was only instructed on first and second degree murder, denying appellant's right to due process, jury trial, and right against cruel and unusual punishment under both U.S. and California constitutions. (1 CT 683-690; U.S. Const., 5th, 6th, 8th & 14th Amends., Cal. Const., art. I, §§7, 17, 24.) Appellant was convicted on count I and sentenced to death. (11 RT 2817.) Appellant's conviction and sentence of death must be reversed because the trial court failed to instruct,

sua sponte on the lesser included offense of voluntary manslaughter.

C. Standard of Review

On appeal, this Court employs a de novo standard of review and independently determine whether an instruction on the lesser included offense of manslaughter should be given. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

D. Legal Argument

1. The Trial Court Had A Sua Sponte Duty To Instruct On The Lesser-Included Offense Of Voluntary Manslaughter With Respect To Count I

The trial judge must fully instruct the jury on the applicable law. (*People v. Wickersham* (1982) 32 Cal.3d 307, 323.) The trial court has a sua sponte duty to instruct on the principles of law relevant to the issues raised by the evidence. (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) "The most rational interpretation of the phrase 'general principles of law governing the case' would seem to be as those principles of law commonly or closely and openly connected with the facts of the case before the court." (*People v. Flannel* (1979) 25 Cal.3d 668, 681.) During the giving of jury instructions, the trial judge is both neutral arbitrator and the jury's guide to the law. (*People v. Wickersham, supra*, 32 Cal.3d at p. 323.) The imposition of sua sponte obligations upon the trial court ensures that the

jury will consider the full range of possible verdicts not limited by strategy, ignorance, or mistake of the parties. (*Id.* at p. 324.)

Intentional killings, such as murder, can be manslaughters. (*People v. Breverman* (1998) 19 Cal.4th 142, 163.) To justify a manslaughter instruction sua sponte, there must be substantial evidence from which a jury composed of reasonable persons can conclude that a defendant accused of murder acted intentionally, but without malice. (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 323.) Before a court must instruct sua sponte on voluntary manslaughter as a lesser-included offense of murder, there must be either some evidence that heat of passion was present at the time of the killing or that the defendant killed in unreasonable self-defense. (*People v. Hoyos*, *supra*, 41 Cal.4th at pp. 913-914.)

Voluntary manslaughter has both subjective and objective components. First, the defendant must actually have killed in the heat of a reason-obscuring passion. Second, the provocation must be of a nature that, under the circumstances, would provoke a reasonable person to a state of passion. (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1044; *People v. Steele* (2002) 27 Cal.4th 1230, 1252; *People v. Wickersham*, *supra*, 32 Cal.3d at pp. 326-327.) The first element is viewed subjectively and the second is viewed objectively. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.)

Whether the two prongs of this test have been met is a question for the jury. (See *People v. Valentine* (1946) 28 Cal.2d 121, 132.) As to the objective component, no specific type of provocation is required to meet the test. (*People v. Berry* (1976) 18 Cal.3d 509, 515; *People v. Valentine*, *supra*, 28 Cal.2d at pp. 141-144; *People v. Lasko* (2000) 23 Cal.4th 101, 108.) As to the subjective component, evidence of provocation itself can be circumstantial evidence from which the jury can infer that the defendant killed in an intense emotion, or a heat of passion. (*People v. Wickersham*, *supra*, 32 Cal.3d at pp. 323, 329.)

Thus, a voluntary manslaughter occurs if the killer's reason was actually obscured as the result of a strong passion aroused by provocation sufficient to cause an ordinary person of average disposition to act from this passion rather than judgment; that is, to act rashly or without due deliberation and reflection. Intentional killings can be voluntary manslaughters. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163.)

In this case, there was sufficient evidence to require the trial court to instruct sua sponte on the lesser included offense of manslaughter.

a. Santiago Martinez Witnessed A Struggle Between Matthew Stukkie, Jesse Muro And Their Assailants, Which Is Substantial Evidence That The Fatal Shooting Was Caused By A Sudden Heat Of Passion

Heat of passion arises, supporting instruction on voluntary

manslaughter, when at the time of the killing, an accused's reason was obscured or disturbed by passion to such extent that it would cause an ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment. (*People v. Barton* (1995) 12 Cal.4th 186, 201-202.) For a homicide to be voluntary manslaughter, the passion aroused need not be anger or rage, but can be any violent, intense, high-wrought, or enthusiastic emotion. (*People v. Breverman* (1998) 19 Cal.4th 142, 163.)

In this case, Santiago Martinez, the prosecution's own witness, testified to observing a part of the street fight. (5 RT 1436.) He was driving slowly through the area and looking for a parking spot when he saw four people "struggling" and drove away because he was afraid. (5 RT 1438.) Mr. Santiago then went to the nearby 7-Eleven and called 911. (5 RT 1442.) Each person was "struggling" with another so that there were two different "struggles." (5 RT 1445.) When Mr. Santiago returned to the area, he saw that Mr. Muro was shot and lying in the area where the struggle took place. (*Ibid.*)

Mr. Martinez did not stop the vehicle because he was afraid and went to the nearby 7-Eleven to call the police. (5 RT 1445.) When he returned and spoke with the police, he saw that one of the individuals who

had been involved in the struggle had been shot and was laying on the street. (5 RT 1443-1444.)

Appellant has previously argued in section IV, *ante*, that there is insufficient evidence that he was the shooter of Mr. Muro. However, even assuming that appellant was involved in a struggle with Mr. Muro and shot him, there is substantial evidence that appellant acted in the heat of passion, triggering the trial court's sua sponte duty to instruct on the lesser included offense of voluntary manslaughter. The fact that Mr. Martinez witnessed a "struggle" between appellant and Mr. Muro show that the two were probably engaged in a fight. During this fight, it is entirely possible that appellant was provoked and that he committed the homicide in the throws of passion, rather than with malice aforethought.

It is a well-established law that the testimony one witness, if believed, is sufficient to prove any fact. (Evid. Code § 411; *People v. Hunter* (1989) 49 Cal.3d 957, 977.) Thus, if the jury had found Mr. Santiago's testimony credible and was given the voluntary manslaughter instruction as the trial court was supposed to, the jury could have found appellant guilty of only voluntary manslaughter instead of murder.

2. The Trial Court's Failure To Instruct Sua Sponte On The Lesser Included Offense Was Reversible Error

The requirement that the jury receive comprehensive instructions on

every supportable theory of a lesser included offense is particularly critical in capital cases. In *Beck v. Alabama, supra*, 447 U.S. at p. 632, the United States Supreme Court established that every capital defendant is entitled to a reliable lesser included noncapital offense instruction if the offense exists under state law and the evidence supports the instruction. (*Id.* at p. 627; *Everette v. Roth* (7th Cir. 1994) 37 F.3d 257, 261 [omission of lesser included voluntary manslaughter instructions violates federal due process where it results in "fundamental miscarriage of justice"]; *Vujosevic v. Rafferty* (3d Cir. 1988) 844 F.2d 1023, 1028 [failure to instruct on lesser included offense supported by the evidence violates federal due process].) Thus, in a capital case, where the evidence warrants a lesser included offense instruction, due process requires that the court give the instruction sua sponte. (*Vickers v. Ricketts* (9th Cir.1986) 798 F.2d 369, 374.)

In *Beck*, the United States Supreme Court performed a no prejudice analysis when the trial court failed to instruct on a lesser included offense, and instead reversed based on its conclusions that there had been sufficient evidence of the lesser offense and that the Constitution required that such instructions be given when warranted by the evidence. (*Beck v. Alabama, supra*, 447 U.S. at p. 638.)

Even if this court does not follow the mandate under *Beck,* under the

standard of *Chapman v. California, supra*, 386 U.S. at p. 24, it is clear that reversal is warranted because appellant was clearly prejudiced by the trial court's failure to instruct on the lesser included offense. If the jury had been instructed on voluntary manslaughter, considering the testimony of Mr. Santiago who stated that he saw four people in a "struggle," then appellant would not have been convicted of felony murder.

The jury was not given that choice. Instead they were given a choice between two extremes, either have a man that may have committed voluntary manslaughter go free, or convict him of a more serious crime so that he would be punished. Had the trial court correctly instructed the jury on the lesser included offense of voluntary manslaughter, it is likely that appellant would have been convicted of voluntary manslaughter as opposed to murder.

Additionally, even if the *Watson* standard of error applies here, the trial court's error in failing to instruct on the lesser included offense of compels reversal. (*People v. Breverman, supra*, 19 Cal.4th at p. 178 [error in failing sua sponte to instruct, or instruct fully on all lesser included offenses and theories thereof in a non-capital case which are supported by the evidence must be reviewed for prejudiced under *Watson*].)

The jury was not given the opportunity to convict appellant of the

full range of offenses supported by the evidence. The trial court's refusal to give the instruction therefore deprived appellant of his rights to due process, a fair jury trial, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *People v. Geiger* (1984) 35 Cal.3d 510, 518-519; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.)

E. Conclusion

Accordingly, reversal of the convictions, special circumstances findings, and penalty must be reversed.

VII

APPELLANT'S CONVICTIONS MUST BE REVERSED BECAUSE CALJIC NO. 2.51 IS UNCONSTITUTIONAL

A. Procedural and Factual Background

The trial court instructed the jury on CALJIC No. 2.51 during the guilt phase of the trial:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(1 CT 738.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. Thus, the instruction violated constitutional guarantees of a fair jury trial, due process, and a reliable verdict in a capital case under the Fifth, Sixth, Eighth and Fourteenth Amendments and California's constitutional analogs.

B. Legal Argument

1. The Instruction Allowed the Jury to Determine Guilty Based On Motive Alone

CALJIC 2.51 states that "motive may tend to establish that a defendant is guilty." As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

CALJIC 2.51 undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction would obviously say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

This court has recognized that differing standards in instructions

create erroneous implications:

> The failure of a trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 577; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error.])

Here, the jury would have understood that motive alone could establish guilt. Accordingly, the instruction violated appellant's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case.

2. The Instruction Shifted The Burden Of Proof To Imply That Appellant Had To Prove Innocence

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish the defendant's guilt and that the absence of motive could be used to show the defendant was not guilty. This instruction effectively placed the burden of proof on appellant to show an alternative to

that advanced by the prosecutor.

Here, the prosecution merely had to show a financial interest as a motive for the robberies. Given the language of CALJIC No. 2.51, the burden of proof was unfairly shifted from the prosecution to appellant, who had to subsequently prove his innocence, contrary to law. This prejudice was further aggravated when appellant properly exercised his right not to testify because it did not give him the opportunity to respond to prosecutions implications.

Not only did the prosecution show a financial interest as a motive for the robberies, it also suggested that appellant committed the robberies and homicide to gain gang recognition. (11 RT 2662.) As discussed in section II, *ante*, appellant was convicted in count XI, active participation in a street gang, based on insufficient evidence. Certainly, the fact that CALJIC No. 2.51 was given helped the jury convict appellant in count XI as well as the other counts.

As used in this case, CALJIC No. 2.51 deprived appellant of his federal constitutional rights to due process and fundamental fairness. (*In re Winship* (1970) 397 U.S. 358, 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the Eighth Amendment's requirement for reliability in a capital case by allowing appellant to be

convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase].)

C. Conclusion

CALJIC No. 2.51 erroneously encouraged the jury to find appellant guilty merely because of the presence of a motive to commit the crimes. Accordingly, this error was not harmless beyond a reasonable doubt and appellant's convictions must be reversed.

VIII

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THEY MUST AGREE UNANIMOUSLY WHETHER APPELLANT HAD COMMITTED MALICE MURDER OR FELONY-MURDER

A. Introduction

Appellant was charged in count I of the information with murder with malice aforethought in violation of section 187, subdivision (a), with the special circumstance or robbery. (1 CT 41-43.) To determine whether the murder charge had been proven, the jury received instructions on two theories of first degree murder: a theory of deliberate and premeditated murder, and a theory of felony murder (2 CT 758-759.) The jury was not instructed it must reach a unanimous verdict, beyond a reasonable doubt, as to which of these theories it accepted.

Thus, appellant was found guilty of first-degree murder by a jury that failed to unanimously find each and every element of the charges against him to be true beyond a reasonable doubt. The instructions erroneously denied appellant his rights to have the state establish proof of the crime beyond a reasonable doubt, to due process and to a reliable determination on allegations that he committed a capital offense. (U.S. Const., 6th, 8th & 14th Amends., Cal. Const., art. I, §§ 7, 17, 24.)

B. This Court Should Reconsider Its Case Law Regarding the Relationship Between Premeditated Malice Murder and Felony Murder

Appellant recognizes that this Court has rejected several arguments pertaining to the relationship between malice murder and felony-murder. (See e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 394; *People v. Pride* (1992) 3 Cal.4th 195, 249-250; *People v. McPeters* (1992) 2 Cal.4th 1148, 1185.) In light of *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, appellant presents an abbreviated argument in order to preserve this issue for further review.

Murder is explicitly defined only in section 187, which states that "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." Malice aforethought is defined in section 188, and contrary to common law, does not include within its definition the commission of a felony.[24] Section 189 lists various factors which will elevate a murder to murder of the first degree.[25]

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[24]Section 188 provides in pertinent part that:

> Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

[25]Section 189 provided, in pertinent part at the relevant time, that:

The plain language of these statutes leads to the conclusion, as this Court has stated that, "To prove first degree murder *of any kind*, the prosecution must first establish a murder within section 187 – that is, an unlawful killing with malice aforethought. [Citations.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 794, emphasis added.) Section 189 then provides guidance for fixing the degree of murder once murder with malice has been proven.

In accordance with this understanding, this Court has held that all types of murder, including felony-murder, were defined by section 187 and therefore included the element of malice aforethought (*People v. Milton* (1904) 145 Cal. 169, 170-172), though in the case of first-degree felony-murder the necessary malice was presumed from commission of a felony listed in section 189 (*People v. Ketchel* (1969) 71 Cal.2d 635, 641-642;

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle with the intent to inflict death, is murder of the first degree; and all other kinds of murders are of the second degree.

People v. Milton, *supra*, 145 Cal. at p. 172.).

However, in *People v. Dillon* (1983) 34 Cal.3d 441, the Court re-examined its earlier cases and concluded that first-degree felony-murder was not merely an aggravated form of the malice murder defined by section 187, but was instead a separate and distinct crime, with different actus reus and mens rea elements, and defined exclusively by section 189. (*Id.* At p.465, 471-472.) Under this construction, malice aforethought is *not* an element of first-degree felony murder. (*Id.* at p. 465, 475, 477, fn. 24.)

Notwithstanding *Dillon*, however, this Court has continued to occasionally assert that, "There is still only a 'single, statutory offense of first degree murder.'" (*People v. Carpenter*, *supra*, 3 Cal.4th at p. 249.) In light of these seeming contradictions, and the continuing uncertainty regarding the elements of certain kinds of first degree murder, counsel respectfully requests that this Court reconsider whether the jury may convict a defendant of first degree murder without being unanimous as to whether the killing was a felony-murder or premeditated and deliberate murder.

C. The Trial Court Should Have Instructed The Jurors That To Convict Appellant Of First Degree Murder, They Had To Be Unanimous As To Whether The Murder Was Premeditated And Deliberate Murder Or Felony-Murder

Due process requires that the state prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant has

been charged. (*In re Winship*, *supra*, 397 U.S. at p. 364.) Although states have great latitude in defining what constitutes a crime, once the elements of a crime have been established, the state may not relieve the prosecution's burden of proving every element of that offense. (See *Sandstorm v. Montana* (1979) 442 U.S. 510; *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

Appellant submits that in California, under *People v. Dillon*, *supra*, 34 Cal.3d at p. 441, malice murder and felony-murder have different elements which need to be proved beyond a reasonable doubt in order to convict. (See *id.* at p. 465, 471-472, 477 fn. 24.)

The United States Supreme court addressed the due process implications of convicting a defendant of both premeditated murder and felony-murder in *Schad v. Arizona* (1991) 501 U.S. 624. The defendant in *Schad* challenged his Arizona murder conviction where the jury was permitted to render its verdict based on either felony-murder or premeditated and deliberate murder. The Court reaffirmed the general principle that there is no requirement that the jury reach agreement on the preliminary factural issues which underlie the verdict. (*Id.* at p. 632, citing *McKoy v. North Carolina* (1990) 494 U.S. 433, 439.)

Schad acknowledged, however, that due process does limit a state's capacity to define different courses of conducts or states of mind as merely

alternative means of committing a single offense. In finding that the defendant was not deprived of due process the court gave deference to Arizona's determination that, under its statutory scheme, "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element." (*Schad v. Arizona*, *supra*, 501 U.S. at p. 637.) "If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." (*Id.* at p. 636.) Thus, while Arizona determined not to treat premeditation and the commission of a felony as an independent element of the crime, *Schad*'s language implies that when a state has determined that the statutory alternatives are independent elements of the crime, it is a due process violation if the jury unanimity does not apply to all the elements.

California has followed a different course than Arizona. Under *Dillon*, premeditated malice murder and felony-murder have different elements. Even if it is assumed there is one crime of murder (*People v. Davis*, *supra*, 10 Cal.4th at p. 515, *cf. People v. Dillon*, *supra*, 34 Cal.3d at p. 476, fn. 23), and malice murder and felony-murder may be described as

two theories of that one crime (*People v. Pride*, *supra*, 3 Cal.4th at p. 249), they are crimes and/or theories with different elements and one of those elements cannot be removed by the state without violating due process under *Winship*.

In *Dillon*, the Court addressed the contention that the first degree felony-murder rule operated as an unconstitutional presumption of malice because malice is an element of murder as defined by section 187. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472.) The resolution of that issue depended on the Court's conclusion that there are two distinct crimes of "murder," each with different elements:

> We do not question defendant's major premise, i.e., that due process requires proof beyond a reasonable doubt of each element of the crime charged. [Citations.] Defendant's minor premise, however, is flawed by an incorrect view of the law of felony-murder in California. To be sure, numerous opinions of this Court recite that malice is 'presumed' (or a cognate phrase) by operation of the felony-murder rule. But none of those opinions speaks to the constitutional issues now raised, and their language therefore is not controlling. [Citation.]

(*People v. Dillon*, *supra*, 34 Cal.3d at pp. 473-474, fn. omitted.)

The Court conceded that, if the felony-murder rule did operate as a presumption of malice, the presumption was a conclusive one. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 474.) The Court also conceded that malice is

an essential element of the crime of murder defined in section 187. "In every case of murder other than felony-murder the prosecution undoubtedly has the burden of proving malice as an element of the crime. [Citations.] (*Id.* at p. 475.) However, the Court concluded that what appeared to be a conclusive presumption of malice in the felony-murder rule was not a true presumption but rather a rule of substantive law, and thus: "[A]s a matter of law malice is not an element of felony-murder." (*Ibid.*)

If there were any doubt that the Court was distinguishing between two crimes with distinctly different statutory elements, it was laid to rest by the Court's response to the equal protection claim raised in *Dillon*:

> There is likewise no merit in a narrow equal protection argument made by defendant. He reasons that the "presumption" of malice discriminates against him because persons charged with the 'same crime,' i.e., murder other than felony-murder, are allowed to reduce their degree of guilt by evidence negating the element of malice. As shown above, in this state the two kinds of murder are not the "same" crimes and malice is not an element of felony-murder.

(*People v. Dillon*, *supra*, at p. 476, fn. 23; see also p. 476-477, fn. 24.)

After *Dillon*, this Court appears to have regressed somewhat from the description of felony-murder and malice murder as "separate crimes." (See e.g., *People v. Pride*, *supra*, 3 Cal.4th at p. 249.) Nonetheless, the

Court has continued to reaffirm that "the *elements* of the two types of murder are not the same." *People v. Carpenter, supra*, 15 Cal.4th at p. 394, emphasis in original.) The Court's continuing treatment of felony murder as a separate crime with separate elements brings the *Schad* analysis into play. In that case, appellant's right to due process was violated when the court failed to require jury unanimity on each element of the crimes charged.

The same result applies if the elements of malice murder and felony-murder are the same. Malice would then be an element of felony-murder, and the California felony-murder rule violates *Sandstrom* and *Mullaney* in that the required element of malice is unconstitutionally presumed. Also, if that is the case, the trial court failed to instruct that the jurors must find malice in order to convict of felony-murder. This instructional failure amounts to an unconstitutional conclusive presumption. (See *Carella v. California* (1989) 491 U.S. 263; *People v. Figueroa* (1986) 41 Cal.3d 714, 723-741.)

In the face of this conundrum, the instructions given violated the bedrock principle that all elements of an offense must be found beyond a reasonable doubt by the trier of fact, (*Sandstrom v. Montana, supra,* 442 U.S. at p. 510), by a unanimous jury. (See e.g., *Burch v. Louisiana* (1979)

441 U.S. 130, 139.) Moreover, in California, a criminal defendant has a constitutional right to trial by a unainimous twelve person jury that has found every element of the crime alleged to be true beyond a reasonable doubt. (See Cal. Const., art. I § 16; see also *People v. Wheeler* (1978) 22 Cal.3d 258, 265; *People v. Collins* (1976) 17 Cal.3d 687, 693.) This state created right is protected under the due process and equal protection clauses of the Fourteenth Amendment. (See generally *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Bush v. Gore* (2000) 531 U.S. 98; *Fetterly v. Peskett* (9th Cir. 1993) 997 F. 2d 1295.)

Thus, by failing to properly instruct the jury on the elements of murder, the trial court denied appellant his rights to due process and to have a properly instructed jury find that the elements of all the charged crimes had been proven beyond a reasonable doubt. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. 1 §§ 7, 16.) Also, by reducing the reliability of the jury's determinations and creating the risk that the jury would make erroneous factual determinations, the trial court violated appellant's right to a fair and reliable capital trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17.)

A unanimity instruction is required where, "The jurors could otherwise disagree which act a defendant committed and yet convict him of

the crime charged." (*People v. Gonzalez* (1983) 141 Cal.App.3d 786, 791; see *People v. Dellinger* (1984) 163 Cal.App.3d 284, 300-302.) Nonetheless, this Court has held that a unanimity instruction is not required where a singled charged offense is submitted to the jury on alternative "legal theories" of culpability, i.e. first degree murder based on alternate theories of felony murder. (*People v. Milan* (1973) 9 Cal.3d 185, 195.) However, if two theories have different elements, they are, by definition, different crimes. As the United States Supreme Court has observed, "[c]alling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.)

As shown above, this Court has determined that malice murder and felony-murder are different crimes and have different elements. Having instructed on both malice murder and on felony-murder, the State may not remove the burden of proving one of those elements from the prosecution without violating appellant's constitutional rights. Nonetheless, each juror in the instant case was allowed to find different factual elements to be true under the different theories presented by the State, yet vote guilty for the first degree murder charge. Because the jury was not instructed to set forth

the theory under which they convicted,[26] the jury was never required to unanimously find beyond a reasonable doubt each element of the crime for which it found appellant guilty. The Constitution requires more. (*In re Winship*, *supra*, 397 U.S. at p. 364.)

Because this is a capital case, there are additional foundations for a requirement of a unanimous verdict on the murder count. The purpose of the unanimity requirement is to insure the accuracy and reliability of the verdict. (*Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352.) There is a heightened need for reliability in the procedures leading to the conviction of a capital offense. (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.) As the U.S. Supreme Court has explained: "The Framers would not have thought it too much to demand that, before depriving a man of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals

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[26] This Court has noted that, "in an appropriate case," the trial court may protect the record by requiring the jury to explain, in special findings, which of several alternate theories was accepted in support of a general verdict, but only where the defense requests such special findings. (*People v. Carter* (2003) 30 Cal.4th 1166, 1200-1201.) The federal Supreme Court's holding in the *Apprendi* and *Blakely* opinions dictate that where alternate theories of an offense are based on different elements, the trial court must sua sponte instruct the jury to return special verdicts indicating it has found all elements of one theory to be true beyond a reasonable doubt.

and neighbors.'" (*Blakely v. Washington* (2004) 542 U.S. 296, 307, quoting 4 Blackstone, Commentaries, at 343; see also *United States v. Booker* (2005) 543 U.S. 220, 230.) Appellant did not receive the required "unanimous suffrage" before he was deprived of his liberty.

The trial court, by failing to instruct the jury that it had to agree unanimously whether appellant committed malice murder or felony-murder, incurred constitutional error. Because the jurors were not required to reach a unanimous agreement on every element of first degree murder, there is no valid jury verdict on which a harmless error analysis can be applied. Appellant's conviction and death sentence must be reversed.

ISSUES RELATING PRIMARILY TO PENALTY PHASE ERROR

IX

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO PROPERLY RE-WEIGH THE EVIDENCE AND FAILED TO STATE ITS REASONS FOR DENYING APPELLANT'S MODIFICATION MOTION AS REQUIRED BY PENAL CODE SECTION 190.4, SUBDIVISION (e).

A. Introduction

Appellant was sentenced to death for the homicide with the special circumstance of robbery of Jesse Muro. (13 RT 3254.) Appellant moved to modify his sentence to life without parole pursuant to section 190.4, subdivision (e). (3 CT 951-952.) The trial court denied appellant's motion, giving inappropriate deference to the jury's findings, and failing to re-weigh all the aggravating and mitigating factors as required by section 190.4, subdivision (e), thereby violating his right to due process of law and right against cruel and unusual punishment under both U.S. and California Constitutions. (U.S. Const., 5th, 8th, & 14th Amends.; Cal. Const., art. I, § 7, 17, 24.) As a remedy for this error, appellant requests that this Court reduce his sentence to life without parole or in the alternative, remand for a new modification hearing.

B. Procedural History

On February 23, 2001, appellant was sentenced to death. (13 RT 3254.) On June 7, 2011, appellant moved to modify his sentence to life without parole pursuant to section 190.4, subdivision (e). (3 CT 951-956.) On October 4, 2011, the trial court heard appellant's motion. (13 RT 3430-3441.) Instead of engaging in the required re-weighing of the aggravating and mitigating factors, the trial merely reiterated the factors in perfunctory manner, thereby violating his constitutional rights. (*Ibid.*)

C. Factual History

Appellant emphasized in his motion that a death sentence was not appropriate after considering the weight of the mitigating factors. (1 CT 953-955.) Appellant had substantial mitigating factors in favor of life without parole, especially his lack of any prior felony criminal record and his young age when the robberies were committed. (13 RT 3437.) Appellant was also kind to children and elders; his socioeconomic status and his location made him at risk to gang activity; and he possessed decreased cognitive ability due to his previous marijuana and methamphetamine use. (13 RT 3438.)

The only arguably aggravating factors that were presented by the prosecution were "that two bullets hit the back of the victim's head," and

the victim impact testimony. (*Ibid.*) The trial court focused almost exclusively upon the two aggravating factors: its opinion that the homicide was "senseless" and the fact that there were two shots fired. (13 RT 3431-3432.)

Despite the presence of several compelling mitigating factors, tipping the balance strongly in favor of life without parole, against the dearth of evidence in favor of the death penalty, the trial court nevertheless denied the modification motion and affirmed the jury's recommendation of death. (13 RT 3441.)

Additionally, the court was required to state the reasons for denying appellant's motion to be entered into the clerk's minutes. (*People v. Gamache* (2010) 48 Cal.4th 347, 403.) However, the minutes do not state the reasons for denying appellant's motion. (4 CT 1268-1270.)

D. Standard of Review

The trial court is obligated to review the evidence, independently re-weigh any aggravating and mitigating circumstances, and determine whether the weight of the evidence supports the verdict. (Cal. Pen. Code §190.4(e); *People v. Gamache* (2010) 48 Cal.4th 347, 403.) In ruling on the application, the trial court must set forth reasons on the record and direct that they be entered in the clerk's minutes. (*People v. Gamache, supra*, 48

Cal.4th at p. 403.) On appeal, this Court reviews the trial court's ruling independently, but it is not this Court's role to redetermine the penalty in the first instance. (*Ibid.*)

E. Legal Discussion

Section 190.4, subdivision (e) was enacted in 1977 and modified slightly in 1978 as a response to this Court's ruling in *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, which held that the state's death penalty system at the time was in violation of the Eighth and Fourteenth Amendments because it allowed for the arbitrary imposition of the death penalty by not allowing the sentencing authority to consider mitigating evidence. (*Id.* at pp. 437-438, 445.) In response to the holding in *Rockwell*, California enacted section 190.4, subdivision (e), so that its death penalty scheme would be in accordance with *Rockwell.* (See, Poulos, *Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California,* 23 U.C. Davis L.Rev. 157, 176-179.)

Section 190.4, subdivision (e) requires the trial court on its own motion to consider modifying a sentence of death to life without the possibility of parole:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such

> verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

(*Ibid.*)

The trial court is not required to make a de novo penalty determination, but it must independently re-weigh the evidence, then determine whether the weight of the evidence supports the jury verdict. (*People v. Mickey* (1991) 54 Cal.3d 612, 704.) In ruling on a motion to modify, the trial judge is required to:

> [M]ake an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence in the case law. That is to say, he must determine whether the jury's decision that death is appropriate under all circumstances is adequately supported. He must make that determination independently, i.e., in accordance with the weight he himself believes the evidence deserves.

(*People v. Mickey, supra*, 54 Cal.3d at pp. 704-705, citing *People v. Clair* (1992) 2 Cal.4th 629, 689.) Further, *People v. Mickey* states that the trial

court must decide if the weight of the aggravating evidence supports a death verdict:

> The 'trial judge's function,' it must be emphasized, 'is not to make an independent and de novo penalty determination, but rather to independently [re-weigh] the evidence of aggravating and mitigating circumstances then determine whether in the judge's independent judgment, *the weight of the evidence supports the jury verdict.*'

(*People v. Mickey*, *supra*, 54 Cal.3d at p. 704, citing *People v. Lang* (1989) 49 Cal.3d 991, italics in original.)

Most importantly, the trial judge must enumerate its reasons for upholding a death sentence:

> Further in deciding the question, the trial judge must specify reasons. . . sufficient to 'assure thoughtful and effective appellate review.' (*People v. Clair*, *supra,* 2 Cal.4th at 689.)
>
> On appeal, [the appellate court] subject[s] a ruling on a verdict. . . modification application to independent review. Of course, when [the appellate court] conducts such scrutiny, [it] simply review[s] the trial court's determination after independently considering the records; [the appellate court] do[es] not make a de novo determination of penalty.

(*People v. Mickey*, *supra*, 54 Cal.3d at p. 704.)

Thus, the purpose of the statute is a "stop-gap" to insure that the jury did appropriately weigh the mitigating and aggravating factors, and that

the jury's sentence recommendation was supported by the weight of the evidence.

Taking into account the legislative history of section 190.4, subdivision (e), the statute is specifically designed for cases like appellant's, where there were several compelling mitigating factors, and only two weak aggravating factors, so the court can properly re-weigh the evidence to protect appellant's Eighth and Fourteenth Amendment rights.

1. The Trial Court Did Not Properly Reweigh The Evidence In Accordance With Section 190.4, Subdivision (e)

Instead of correctly re-weighing all the aggravating and mitigating factors, the trial court simply concluded that the two bullets "says it all," and did not explain why two shots that were fired during a street robbery was so substantial when weighed against the compelling mitigating factors. (13 RT 3431-3432.) The court failed to explain why the manner in which Mr. Muro was killed outweighed appellant's immaturity, his inability to appreciate the criminality of his conduct because of his youth; his lack of any prior felonies; his kindness to elders and children, and his susceptibility to the gang culture because of his low socioeconomic status and poor education, and his impaired judgment because of chronic alcohol, marijuana and methamphetamine abuse. (13 RT 3430-3441.)

Finally, the court described the homicide as "senseless." (13 RT

3431-3432.) However, all murders, by definition, and not just capital cases, are "senseless." To follow the trial court's reasoning to its logical conclusion would mean that any defendant facing a felony murder charge when two bullets were used instead of one would automatically be put to death despite compelling mitigating factors.

If the trial court had properly re-weighed the aggravating and mitigating factors, the only reasonable conclusion would have been that the mitigating factors substantially outweighed the aggravating factors, and therefore, the judge should have modified the death sentence to life without the possibility of parole.

2. The Trial Court's Failure To Properly Re-Weigh Appellant's Aggravating And Mitigating Factors Was Reversible Error

The trial court's erroneous denial of a modification motion is subject to the harmless error doctrine, and the ruling will only be set aside only when prejudice has resulted. (*People v. Benson* (1990) 52 Cal.3d 754, 812; *People v. Burgener* (1990) 223 Cal.App.3d 427, 435.) The question of prejudice is resolved under the so-called "reasonable possibility test" – i.e, is there a reasonable possibility that the error affected the decision? (*People v. Benson*, *supra*, 52 Cal.3d at p. 812; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1202.)

Here, appellant certainly suffered prejudice. The only reasonable

result after properly re-weighing appellant's factors in mitigation and aggravation is to grant the motion to modify and reduce appellant's sentence to life without parole because the death penalty is not appropriate in this case. Therefore, this court should set aside the trial court's ruling on the motion, vacate the penalty judgment, and remand for reconsideration of the automatic motion to modify.

3. The Trial Court Committed Reversible Error For Failing To Set Forth The Reasons For Its Denial Of Appellant's Motion To Modify His Death Sentence In The Clerk's Minutes As Required By Section 190.4, Subdivision (e)

Section 190.4, subdivision (e) states in pertinent part, that after the trial makes it ruling on a defendant's automatic motion to modify, "[t]he judge shall state on the record the reason for his findings . . . . [¶] [And] [] shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes." While, the court stated that it would explain its reasons for denying appellant's motion in the court's minutes, it never did so. (4 CT 1268-1270.) The minutes only reiterated appellant's factors in aggravation and mitigation, but failed to state why the aggravating factors substantially outweighed the factors in mitigation. (*Ibid.*)

This Court previously vacated a defendant's judgment of death because the trial court failed to comply with section 190.4, subdivision (e).

(*People v. Sheldon* (1989) 48 Cal.3d 935, 962- 963.) In *Sheldon*, the trial court denied the defendant's modification motion without stating its ruling. (*Id.* at p. 962.)

This Court vacated the death judgment and remanded it to the trial court for a rehearing on the modification motion due to the trial court's failure to follow section 190.4, subdivision (e). (*People v. Sheldon, supra*, 48 Cal.3d at p. 962.)

Similarly, the trial court here failed to fully explain the reasons for denying appellant's motion by not stating the reasons for denying appellant's motion in the clerk's minutes as required by section 190.4, subdivision (e). (4 CT 1268-1270.) Appellant requests that this Court vacate appellant's death sentence and remand for a proper hearing pursuant to section 190.4, subdivision (e).

F. Conclusion

Because the trial court did not properly re-weigh appellant's aggravating and mitigating factors as required by section 190.4, subdivision (e), his death sentence must be vacated and remanded for rehearing because it violates appellant's federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and

the analogous provisions of the California Constitution. (Cal. Const., art. I, §§ 1, 7, 15, 16, 17.)

X

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

A. Procedural History of Appellant's Vienna Convention (*Avena*) Claim

Appellant is a Mexican citizen, and not a United States citizen. (13 RT 3331.) Upon his arrest on April 2, 1999, he was not notified of his right to speak with the Mexican consulate pursuant to Article 36 of the Vienna Convention on Consular Relations ("VCCR") and the California Penal Code. (*13 RT 3331;* Vienna Convention on Consular Relations, April 24, 1963, United Nations, *Treaty Series*, vol. 596, p. 261.) As a result, he did not speak with any Mexican consular official. Appellant was convicted and sentenced to death on February 23, 2001. (13 RT 3253-3254.)

On June 7, 2001, appellant moved for a new trial or in the alternative, modification of his death sentence to life without parole as a remedy for the violation of his rights under Article 36 of the VCCR. (3 CT 1093.) Appellant's motion was heard on October 3, 2001. (13 RT 3275-3363.)

During the hearing, appellant introduced the testimony Sandra Babcock, a lawyer and director of the legal assistance program for Mexican

citizens facing the death penalty. (13 RT 3302.) Her role in the program is to assist attorneys representing capital defendants of Mexican citizenship by recommending certain experts. (13 RT 3305.) She was assigned to assist appellant when she was contacted by the Mexican consulate in Santa Ana. (*Ibid.*) She testified that she was not aware of, nor did she believe, that the Mexican government was aware of appellant's situation until after he was convicted. (*Ibid.*) She contacted appellant's defense counsel only after the jury recommended that appellant be sentenced to death. (13 RT 3318.)

Ms. Babcock obtained funding from the Mexican government to provide appellant with an expert witness, Dr. Ricardo Weinstein, who also testified at the hearing. (13 RT 3309.) Dr. Weinstein is an expert in psychology, specializing in Hispanic populations. (13 RT 3278-3280.) Dr. Weinstein reviewed extensive documents, such as the probation officer's report, appellant's school records, and he interviewed appellant and his family members, but again, only after the death sentence had already been imposed. (13 RT 3280-3281.)

After reviewing documents and conducting interviews, Dr. Weinstein identified several mitigating factors that could have been presented during the penalty phase. (13 RT 3288-3297.) One factor is that the Minnesota Multiphasic Personality Inventory (M.M.P.I.), the

psychological test relied on by the prosecution during the penalty phase, was invalid because it is biased against people of Hispanic origin. (13 RT 3292-3294.) Also, Dr. Weinstein identified that appellant came from a dysfunctional family, which contained sexual abuse; that appellant suffered brain injuries, which resulted in diminished cognitive abilities; that appellant suffered from depression, which he self-medicated; and that appellant had been addicted to drugs and alcohol at an early age. (13 RT 3289-3291.) "Although all these issues do neither justify nor explain clearly or diminish the culpability . . .", Dr. Weinstein testified, "it [*sic*] certainly are factors that are used in mitigation, and none of these were presented." (13 RT 3290-3291.) In addition, Dr. Weinstein testified that "had [he] been contacted prior to trial [he] could have assisted in [appellant's] defense in mitigation." (13 RT 3295.)

The trial court agreed that appellant's Article 36 rights had been violated. (13 RT 3358.) Nevertheless, the court denied appellant's motion, because there was no remedy enumerated in the VCCR and that the requested remedy was unreasonable. (13 RT 3358-3359.) The court also added that appellant "failed to show any prejudice." (*Ibid.*)

B. Post-Conviction Habeas Corpus Review is the Necessary Venue for the Resolution of Appellant's Claim that He Was Prejudiced by the Article 36 Violation.

This Court's has previously held that Vienna Convention claims should be addressed in habeas petitions. (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"].) "Whether defendant can establish prejudice based on facts outside of the record is a matter for a habeas corpus petition." (*People v. Martinez* (2009) 46 Cal.4th 945, 957 [habeas review of claim included "whether petitioner was prejudiced by any violation of his article 36 rights"].)

The Article 36 violation in appellant's case was first raised in his motion for a new trial, and is therefore included in 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.) Additionally, no factual findings on the question of prejudice should be made on direct appeal without the opportunity for an evidentiary hearing.[27] (*Ibid.*) Accordingly, this Court should defer any resolution of the matter on direct appeal.

Appellant anticipates that habeas corpus counsel (who has not been appointed) will likely provide additional support on the Vienna Convention issue. Apparently, Mexican consular officials did not learn about appellant's case until he had already been convicted and the jury had recommended a death sentence. (13 RT 3305.) Thus, there is a significant likelihood that further investigation in preparation for an evidentiary

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[27]Other courts have also determined that habeas review is the appropriate venue for the consideration of Article 36 claims. In his concurrence in *Medellin v. Texas,* Justice Stevens noted that "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." (*Medellín v. Texas* (2008) 552 U.S. 491, 537, fn. 4 (Stevens, J., concurring.); *Torres v. State* (Okla.Crim.App 2005) 120 P.3d 1184, 1186.) As a result of the post-conviction review undertaken by the Oklahoma 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." (*People v. Torres, supra*, 120 P.3d at p. 1180, fn. 18.)

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 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.)

Whether defense counsel's failure to contact the consulate and seek its assistance in this case constituted incompetent representation is a matter for habeas review, one that will require extensive 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 probability 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 claim in his application for habeas corpus relief.

C. Developments Since *Medellín v. Texas* Urge 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 Case Concerning *Avena* and Other Mexican Nationals (*Mexico. v. United States*) (2004) Judgment, I.C.J. Reports 2004 p. 12 [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, supra*, at ¶ 153(9).) The review and reconsideration of 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.)

Furthermore, 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." (*People v. Martinez*, *supra* 46 Cal.4th at p. 960.) Indeed, *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:

> the 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*, *supra*, at ¶ 139.)

Thus, the ICJ 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, supra,* 552 U.S. at p. 491, appellant wishes to preserve this claim for further review. 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." (*Id.* at p 524; see also *Medellín v. Texas*, *supra*, 552 U.S. at p. 566 (Breyer, J., dissenting) [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 automatically constitutes self-executing federal law that preempts state limitations on filing of successive habeas petitions. (*Medellín v. Texas*, *supra*, 552 U.S. at pp. 503-532.) The United States 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, 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.)

Although the *Medellín* Court was deeply divided on the questions presented, the justices were in agreement on one crucial issue: congress possesses the 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 *Medellín v. Texas*, *supra*, 552 U.S. at p. 535, fn. 3 (Stevens, J., concurring) [discussing "Congress' implementation options" for ICJ decisions]; *Medellín v. Texas*, *supra*, 552 U.S. at p. 566 (Breyer, J., dissenting) [majority's holdings "encumber Congress with a task [post-ratification 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. (Sen. No. 1194, 112th Cong., 1st Sess., (2011)) 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).) Under its terms,

> [A] Federal court shall have jurisdiction to review the merits of a petition claiming a violation of Article 36(1)(b) or (c) of the Vienna Convention on Consular Relations . . . filed by an individual convicted and sentenced to death by any Federal or State court before the date of enactment of this Act.

(*Id.* at p. 3780, sec. 4(a)(1); see also Leahy, *Full Text of the Consular Notification Compliance Act*, (June 14, 2011) <http://leahy.senate.gov/imo/media/doc/BillText--ConsularNotificationComplianceAct.pdf> [as of December 29, 2011] ("*Act*".) An individual such as appellant will be required to "make a showing of actual prejudice to the criminal conviction or sentence as a result of the violation." (*Act*, *supra*, at sec. 4 (a)(3).) The reviewing court "may conduct an evidentiary hearing if necessary to supplement the record and, upon a finding of actual prejudice, shall order a new trial or sentencing proceeding." (*Ibid.*).

Finally, 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).)

Testifying before the Senate Judiciary Committee on July 27, 2011, the State Department's Under Secretary for Management emphasized that passage of the legislation is "a matter of great urgency" and that "failure to act is not an option." Similarly, the Deputy Assistant Attorney General and Counselor for International Affairs of the U.S. Department of Justice testified that passage of the bill "is critical to the law enforcement interests of the United States" and "strongly urge[d] passage of this bill because it protects American citizens abroad while preserving our interests in maintaining critical law enforcement cooperation with foreign allies and seeing justice done in capital cases." Efforts are ongoing to pass this

crucially important legislation in Congress. It is thus not merely a hypothetical possibility that the United States will adopt legislation or other means to give effect to *Avena* – the United States must do so, and there are persuasive indications that implementing legislation will be adopted.

D. Conclusion

Accordingly, appellant asserts that he remains entitled to comprehensive review and reconsideration of the Vienna Convention violation in his case by 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," so as to ascertain whether "the violation of Article 36 committed by the authorities caused actual prejudice to the defendant. . ." (*Avena, supra.* at ¶¶ 121-122.)

XI

INSTRUCTING THE JURY PURSUANT TO CALJIC NO. 8.85 VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION

A. Introduction

At the conclusion of the penalty phase, the trial court instructed the jury pursuant to CALJIC No. 8.85. (1 CT 906-907; 13 RT 3245-3247.) As discussed below, this instruction is constitutionally flawed. This Court has previously rejected the basic contentions raised in this argument (see, e.g., *People v. Farnham* (2002) 28 Cal.4th 107, 191-192), but it has not adequately addressed the underlying reasoning presented by appellant here. This Court should reconsider its previous rulings in light of the arguments made herein.

B. The Trial Court's Failure To Instruct That Statutory Mitigation Factors Were Relevant Solely As Potential Mitigators Precluded a Fair, Reliable, And Evenhanded Administration of Capital Punishment

The instructions given failed to advise the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (See 1 CT 906-907; 13 RT 3245-3247.) This Court has concluded that each of the factors introduced by a prefatory "whether or

not"- factors (d), (e), (f), (g), (h), and (j) - are relevant solely as possible mitigators. (See *People v. Hamilton* (1989) 48 Cal.3d 1141, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn. 15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1995) 41 Cal.3d 247, 288-289.) But the jurors here were left free to conclude on their own with regard to each "whether or not" sentencing factor that any facts deemed relevant under that factor were actually aggravating. The jurors here were not even instructed pursuant to CALJIC 8.85.6 that the absence of a statutory mitigating factor "does not constitute an aggravating factor." For this reason, appellant could not receive the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-85; *Zant v. Stephens* (1982) 462 U.S. 862, 879; *Woodson v. North Carolina, supra*, 428 U.S. at p.280.)

By instructing the jury in this manner, the trial judge ensured that appellant's jury could aggravate his sentence upon the basis of what were, as a matter of state law, mitigating factors. The fact that the jury may have considered these mitigating factors to be aggravating factors infringed appellant's rights under the Eighth Amendment, as well as state law, by making it likely that the jury treated appellant "as more deserving of the

death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

The impact on the sentencing calculus of the trial judge's failure to define mitigating factors as mitigating will differ from case to case depending upon how a particular sentencing jury interprets the "law" conveyed by CALJIC No. 8.85. In some cases, the jury may actually construe the pattern instruction in accordance with California law and understand that if evidence of a mitigating circumstance described by factor (d), (e), (f), (g), (h), or (j) is presented, the evidence must be construed as mitigating. In other cases, the jury may construe the "whether or not" language of CALJIC No. 8.85 as allowing jurors to treat as aggravating any evidence presented by appellant under that factor.

The result is that from case to case, even in cases with no difference in the evidence, sentencing juries will discern dramatically different sets of aggravating circumstances because of differing constructions given to CALJIC No. 8.85. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973, quoting *Gregg v. Georgia* (1976) 428 U.S. 153,

189 (lead opn. of Stewart, Powell, and Stevens, JJ.), and help ensure that the death penalty is evenhandedly applied. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.)

Accordingly, the trial court, by reciting the standard CALJIC No. 8.85 jury instruction, violated appellant's Eighth and Fourteenth Amendment rights. Appellant's death sentence should be reversed.

ARGUMENTS RELATING TO THE UNCONSTITUTIONALITY OF THE CALIFORNIA DEATH PENALTY STATUTE

XII

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW

A. Introduction

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.

In *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304, this court held that what it considered to be "routine" challenges to California's capital punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider

that decision." In light of this court's directive in *Schmeck*, appellant briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the opportunity to present supplemental briefing. The California Supreme 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. "The 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 n.6 [165 L.Ed.2d 429, 126 S.Ct. 2516].)

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 in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. California's death penalty statute potentially sweeps virtually every murderer into its grasp. 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, who may not agree with each other, and who are not required to make any findings. Paradoxically, the fact that "death is different" has been turned 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 to put to death.

B. Penal Code Section 190.2 Is Impermissibly Broad

A constitutionally valid 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*, *supra*, 47 Cal.3d at p. 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) To satisfy this requirement, a state must genuinely narrow, by rational and objective criteria, the class of murderers eligible for death. (*Zant v. Stephens*, *supra*, 462 U.S. at p. 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. According to the California Supreme Court, the requisite narrowing in this state is accomplished by the "special circumstances" set out in section 190.2.

(*People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.) However, the special circumstances found true in this case served no meaningful narrowing function.[28] Penal Code section 190.2, subdivision (a) (17) encompasses almost every imaginable form of felony murder. These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to making every murderer eligible for death.

Appellant's case exemplifies this constitutional dilemma. Appellant was sentenced to death because of a single felony murder conviction with a single special circumstance based upon that felony murder. (13 RT 3254.) A death sentence based on one street robbery does not constitute the requisite narrowing required for a constitutionally acceptable death verdict. This Court should reconsider and overrule its prior precedent and hold section 190.2(a) is so broad that it fails in violation of the Eighth and Fourteenth Amendments properly to narrow the set of death eligible defendants.

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[28]One special circumstance was found to be true pursuant to Penal Code section 190.2, subdivision (a)(17)(A), namely, murder which is committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit robbery in violation of section 211. (11 RT 2817.)

C. The Broad Application of Section 190.3, Factor (a), Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." Prosecutors can allege aggravation in almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. In this case the prosecution relied solely on factor (a) in support of its call for death. It relied on the circumstances of the homicide, and the victim impact evidence, which this Court has said comes within the ambit of the circumstances of the crime. (*People v. Zamudio* (2008) 43 Cal.4th 327, 324-325.) This Court has not applied a limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749.) The "circumstances of the crime" factor, however, can hardly be called "discrete." (*Brown v. Sanders* (2006) 546 U.S. 212, 222.) The concept of "aggravating factors" has been applied so loosely that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As a result, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than "that a particular set of facts surrounding a murder . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the

imposition of the death penalty." (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California, supra,* 512 U.S. at pp. 987-988 [rejecting challenge to factor (a)].)

Appellant is aware that this Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3, subdivision (a), results in the arbitrary and capricious imposition of the death penalty. (See, e.g., *People v. Kennedy* (2005) 36 Cal.4th 595, 641.) However, appellant respectfully urges the Court to reconsider its previous holdings.

D. The Jury Instructions Caused The Penalty Determination To Turn On An Impermissibly Vague And Ambiguous Standard

The question of whether to impose the death penalty on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that death was warranted rather than a sentence of life without the possibility of parole." (CALJIC 8.88; 3 CT 908.) The phrase "so substantial" is a vague and impermissibly broad descriptor and does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v.*

Cartwright, *supra*, 486 U.S. at p. 362.) This Court has found that the use of the "so substantial" language does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant asks this court to reconsider.

E. The Use Of Restrictive Adjectives In The List Of Potential Mitigating Factors Impermissibly Acted As Barriers To Consideration Of Mitigation By Appellant's Jury

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see Pen. Code §190.2, factors (d)and (g)) act as barriers to the meaningful consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.) Appellant is aware that this Court has previously rejected this argument (*People v. Avila* (2006) 38 Cal. 4th 491, 614), but respectfully urges reconsideration.

F. The Failure To Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators Precluded A Fair, Reliable, And Evenhanded Administration Of The Capital Sanction

As a matter of state law, each of the factors introduced by a prefatory "whether or not" - factors (d), (e), (f), (g), (h), and (j) - are relevant solely as possible mitigators. (*People v. Hamilton*, *supra*, 48 Cal.3d at p. 1184; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1034.) The jury, however, was

left free to conclude that a "not" answer to any of these "whether or not" sentencing factor queries could establish an aggravating circumstance. The jurors were thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by thee Eighth and Fourteenth Amendments. (*Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) Further, the jury was also left free to render a death verdict based on an affirmative answer to one of these questions. The jurors were thus permitted to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence in violation of both state law and the Eighth and Fourteenth Amendments. (But see *People v. Morrison* (2004) 34 Cal.4th 698, 730.) The very real possibility that appellant's jury aggravated his sentence on the basis of non-statutory aggravation deprived him of an important, state-law generated procedural safeguard and liberty interest - the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 762, 772-775), and thereby violated appellant's Fourteenth Amendment right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 343; *Fetterly v. Paskett* , *supra*, 997 F.2d at p. 1300 [holding that Idaho law specifying manner in

which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

It is highly likely that appellant's jury aggravated his sentence on the basis of what were, as a matter of state law, non-existent factors and did so believing that the State - as represented by the trial court - had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law but the Eighth Amendment by encouraging the jury to treat appellant "as more deserving of the death penalty than [he] might otherwise be by relying upon ... illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

G. Appellant's Death Sentence Is Unconstitutional Because It Was Not Premised On Findings Made Beyond A Reasonable Doubt

California law does not require the use of a reasonable doubt standard during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; see *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255.) Appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. But the United States Supreme Court's decisions require that any fact used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. (*Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington*, *supra*, 542 U.S. at p. 296; *Ring v. Arizona* (2002) 536 U.S. 584; and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466.) In *Ring*, the Supreme Court of the United States struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 593.)

Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it

must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt. In *Cunningham*, the United States Supreme Court rejected the California Supreme Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law (hereinafter "DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence.

The United States Supreme Court explicitly rejected the reasoning used by the California Supreme Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (See *Cunningham v. California, supra*, 549 U.S. 270.) California law as interpreted by the California Supreme Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial relied on as an aggravating circumstance, except as to prior criminality and even in that context the required finding need not be unanimous. (See *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.)

California's statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, Section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially

outweigh any and all mitigating factors. CALJIC No. 8.88 is California's "principal sentencing instruction." (*People v. Farnam* (2002) 28 Cal.4th 107, 177.) Appellant's jury received this instruction, which stated in pertinent part: "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; 3 CT 980.) Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.

In *People v. Loker* (2008) 44 Cal.4th 691, 755, this court held that, notwithstanding *Cunningham*, *Apprendi*, and *Blakely*, a capital defendant has no constitutional right to a jury finding on the facts supporting a death sentence. In the wake of *Cunningham*, however, it is clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of

a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed. Under California law, once a special circumstance has been found, true life without possibility of parole is the default sentence. Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Pen. Code §190.3.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the state labels it - must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona* , *supra*, 530 U.S. at p. 604.) The issue of the Sixth Amendment's applicability hinges on whether, as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." *Ring* and *Cunningham*, require the requisite fact-finding in the penalty phase to be made unanimously and beyond a reasonable doubt.

California law violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Appellant urges this court to reconsider its decisions holding that California law is consistent with

Cunningham, *Ring*, *Blakely*, and *Apprendi*. Appellant further urges this Court to reconsider its holdings that the Eighth and Fourteenth Amendments do not require the trier of fact to be convinced death is the appropriate penalty and that the factual bases supporting the penalty are true beyond a reasonable doubt.

H. California Law Violates The Sixth, Eighth, And Fourteenth Amendments By Failing To Require That The Jury Base Any Death Sentence On Written Findings Regarding Aggravating Factors

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal Sixth, Eighth, and Fourteenth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Because California juries have discretion without significant guidance on how to weigh potentially aggravating and mitigating circumstances (see *People v. Fairbank*, *supra*, 16 Cal.4th at p. 1255), there can be no meaningful appellate review without written findings. It is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) This Court has held that the absence of written findings by the sentencer does not render the death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such

findings are otherwise considered by this court to be an element of due process so fundamental that they are even required at parole suitability hearings and routinely in administrative law proceedings. A convicted prisoner who believes that he or she has been improperly denied parole must proceed by filing a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at p. 267.) Similarly, administrative decisions must be supported by written findings. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515.) The same analysis applies to the far graver decision to put someone to death.

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Pen. Code § 1170, subd. (c).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant

or a civil litigant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*, 536 U.S. at p. 593), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen. Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 383, fn. 15.) Even where the decision to impose death is "normative" and "moral" its basis can be, and should be, articulated. The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh*, *supra*, 548 U.S. at p. 179 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find

unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings in appellant's case thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment. This Court has rejected these contentions in other cases. (See, e.g., *People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant respectfully urges this court to reconsider.

I. The Death Verdict Was Not Premised On Unanimous Jury Findings

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jurors, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) "Jury unanimity. . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina*, *supra*, 494 U.S. at p. 452 [conc. opn. of Kennedy, J].) This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.)

The failure to require jury unanimity also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his or her sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code § 1158, subd. (a).) Since capital defendants are entitled to more rigorous protections, than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required.

To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" violates the right to equal protection and by its irrationality violates both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's

guarantee of a trial by jury. Appellant respectfully urges this court to reconsider.

J. Some Burden of Proof Is Required, Or The Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code § 520.) Evidence code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided. Appellant, therefore, is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Accordingly, the jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. (*People v. Lenart*, *supra*, 32 Cal.4th at pp. 1136-1137.) The court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.)

Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges this court to reconsider these decisions.

K. California Death Penalty Law Violates The International Covenant On Civil And Political Rights And Prevailing Civilized Norms

Clearly, the use of the death penalty in ordinary criminal cases such as this one has been almost universally outlawed in western civilization. These prevailing international norms are persuasive, but do not have the force of law. However, the International Covenant on Civil and Political Rights (hereafter "Covenant") which the United States ratified in 1992, does.

The Constitution and "all treaties made" are the "supreme" law of the land. (U.S. Constitution, Art. IV, sec. 2.) Treaties, as the supreme law of the land, may be given effect without enabling legislation. (*Asakura v. Seattle* (1924) 265 U.S. 332.)

The Covenant was adopted by th United Nations General Assembly on December 16, 1966. The senate consented to the ratification on April 2, 1992, and on June 8, 1992, the United States ratified the treaty, effective September 8, 1992. The Covenant grants the citizens of signatory states several rights. Under Article 2, paragraph 1, each state ensures to all individuals within its jurisdiction all of the rights recognized in the

Covenant. Under Article 2, paragraph 2, each state must take necessary steps to give effect to the rights recognized in the covenant. Article 2, Paragraph 3 guarantees that the rights and freedoms recognized in the Covenant shall have an effective remedy, even if the violation has been committed by persons acting in an official capacity, and that any person claiming such a remedy shall have his right thereto determined by competent authorities.

Article 6, paragraph 1, provides that all human beings have the inherent right to life, and that no one shall be arbitrarily deprived of his life. Article 6, paragraph 2 provides that a sentence of death may be imposed "only for the most serious of crimes" and "not contrary to the provisions of the present covenant." Article 7 prohibits cruel, inhuman or degrading punishment. Article 14 provides for a "fair and public hearing" by a "competent, independent, and impartial tribunal" of all criminal charges.

The Covenant thus provides an independent source of rights capable of being raised as a legal defense to the imposition of the death penalty. Similar to the Fifth, Sixth, Eighth and Fourteenth Amendments, the Covenant protects against arbitrary or unfair sentences of death due to overbroad qualifying crimes, unrestrained prosecutorial discretion; voir dire procedures and review standards which result in an unfair pro-death jury;

elected judges required to make pro-death decisions to be elected; introduction of victim impact evidence; and each of the other aspects of the California death penalty law which contribute to the arbitrary and capricious imposition of the death penalty.

This court has repeatedly denied any claim based upon the Covenant. (*People v. Carrington* (2009) 47 Cal.4th 145, 198-199; *People v. Hawthorne* (2009) 46 Cal.4th 67, 105; *People v. Butler* (2009) 46 Cal.4th 847, 885.) The court is invited to reconsider its position in light of the continuing evolution of our concepts of justice and decency.

L. Intercase Proportionality Review Is Required To Prevent The Arbitrary And Capricious Imposition Of The Penalty Given Other Aspects Of The California System

In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." This court has rejected the claim that California's system requires such review. (*People v. Marshall* (1990) 50 Cal.3d 907, 946-947; *People v. Combs* (2004) 34 Cal.4th 821,

868; *People v. Griffin* (2004) 33 Cal.4th 536, 596.) Appellant asks this court to reconsider its past holdings.

M. The Broken System Of Death Penalty Adjudication In California Which Causes Excessive Pre-Execution Delay And Where Actual Execution Is A Rare Occurrence Despite Numerous Death Sentences, Violates the Eighth Amendment

A prolonged wait for execution is itself cruel treatment precluding subsequent execution under the Eighth Amendment and international law. However, this court has repeatedly held that "the delay inherent in the automatic appeal process 'is not a basis for finding that either the death penalty itself or the process leading to it is cruel and unusual punishment." (*People v. Bennett* (2009) 45 Cal.4th 577, 630; see also *People v. Frye* (1998) 18 Cal.4th 894, 1030-1031, and *People v. Ochoa* (2001) 26 Cal.4th 398, 463.) A factor which suggests the court should revisit the issue is the fact that California has for years sentenced far more persons to death than it executes. California has executed only 13 persons since 1978. (California Department of Corrections and Rehabilitation <http://www.cdcr.ca.gov/reports_research/Inmates_Executed.html.>) However, California has sentenced over 820 persons to death since 1978. (California Commission on the Fair Administration of Justice, Report and Recommendations on the Administration of the Death Penalty in California, page 20, http://www.ccfaj.org/rr-dp-official.html). With over 820 persons

on California's death row, the actual imposition of the death penalty by California is now certainly nothing other than "freakish" and arbitrary. The recognition by responsible commentators that the system is broken or "deadlocked" is an additional reason to revisit the issue. (Arthur L. Alarcon, *Remedies for California's Death Row Deadlock* (2007) 80 U.S.C.L. Rev. 697.)

N. Conclusion

Because California's death penalty scheme is defective on its face and as applied to appellant's case, his conviction must be reversed.

XIII

THE CUMULATIVE EFFECT OF THE ERRORS RESULTED IN A DENIAL OF DUE PROCESS AND THUS REQUIRES REVERSAL

Assuming that none of the errors in this case is prejudicial in isolation, the cumulative effect of these errors, in any combination, nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1987) 586 F. 2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"]; see *Greer v. Miller* (1987) 483 U.S. 756, 765 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"].)

As noted by various federal circuits, "a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts." (*United States v. Meserve* (1st Cir. 2001) 271 F.3d 314, 332 and *Alvarez v. Boyd* (7th Cir. 2000) 225 F.3d 820, 924.)

The Ninth Circuit has repeatedly held that where "there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far

less effective than analyzing the overall effect of all 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, quoting *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors. (*Id.* at p. 1381.)

Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

Certainly, any one of the guilt phase or penalty phase errors requires reversal. However, the cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const. 14th Amend.; Cal. Const. Art. I, §§ 1, 7, 15, 16 & 17; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643; *Thomas v. Hubbard* (9th Cir. 2001) 273 F. 3d 1164, 1179; *Whelchel v. Washington* (9th Cir. 2000) 232 F. 3d 1197, 1212; and *United States v. Frederick, supra,* 78 F.3d at p. 1381.)

Appellant's convictions, therefore, must be reversed. (*Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at pp. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown*, *supra*, 216 Cal.App.3d at p. 465 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have

rendered a different verdict absent the error]; see generally *In re Marquez* (1992) 1 Cal.4th 584, 605 [errors harmless at the guilt phase, but prejudicial at the penalty phase].)

Additionally, the cumulative effect of the errors relating to the penalty phase of the trial further undermines the reliability of the death sentence in violation of the Eighth Amendment. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, individually or cumulatively, or in any combination, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

CONCLUSION

Appellant's conviction, in which his life is literally at stake, cannot stand.

The guilt phase of appellant's trial was riddled with a plethora of highly prejudicial errors, many of which constituted blatant violations of appellant's constitutional rights, compelling reversal, and similarly, the penalty phase of appellant's trial was replete with errors.

The due process clause of the Fourteenth Amendment to the United States Constitution as well as the California Constitution, article I, section 7, requires that "no individual should be denied of life, liberty, or property without due process of law." Appellant certainly did not receive the due process of law in which he was entitled.

Due process, as well as fundamental precepts of decency, the sanctity of human life, and justice mandate that appellant not be executed by the government under these circumstances.

Dated: 1/11/12

Respectfully submitted,

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[29]Appellant acknowledges the substantial assistance of California Western School of Law student Rommel Dizon, who helped to conduct research, prepare draft arguments and proof the brief.

CERTIFICATE OF WORD COUNT

I, hereby declare that the APPELLANT'S OPENING BRIEF does not exceed 102,000 words pursuant to California Rules of Court 8.630, subdivision (b) and that the actual word count is approximately 49,490 words.

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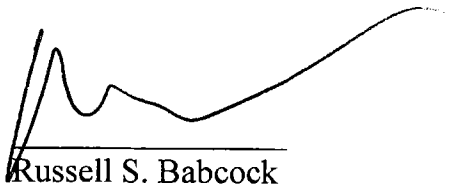

Russell S. Babcock

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