S105857
No. ~~S10857~~

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LUMORD JOHNSON, Defendant and Appellant.	Riverside County Sup. Ct. No. CR 66248

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

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APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, §1239.) The appeal is taken from a judgment that finally disposes of all issues between the parties.

STATEMENT OF THE CASE

On July 22, 1996, an information was filed in the Riverside County Consolidated Superior and Municipal Courts charging appellant and Todd Brightmon with the murder of Martin Campos on November 11, 1995 (Count I). It was also alleged as special circumstances that the murder of Campos occurred while appellant and Brightmon engaged or attempted to engage in the crime of robbery under Penal Code section 211 (Pen. Code, § 190.2, subd. (a)(17)(I)) and that appellant murdered "Candy Camarino" within the multiple murder special circumstance under Penal Code section

190.2, subdivision (a)(3). Appellant was also charged with the murder of "Candy Camarino" on June 25, 1994 (Count II). The information alleged that appellant had murdered Martin Campos and committed multiple murder as a special circumstance within the meaning of Penal Code section 190.2, subdivision (a)(3). Appellant was also charged with the personal use of a firearm in regard to both counts under Penal Code sections 12022.5 and 1192.7 and it was alleged that appellant had committed a prior crime of manslaughter within the meaning of Penal Code section 667. (1 CT 195-199.)

The information was amended on November 20, 1998, to add another special circumstance under Count I, alleging that the murder of Martin Campos was committed while appellant and Brightmon were engaged in the commission or attempted commission of kidnaping and kidnaping for robbery under Penal Code sections 207 and 209.[1/] (3 CT 646-670.)

Appellant filed a motion on November 12, 1998, to sever the two counts charged against him. (3 CT 497.) On April 20, 1999, the Riverside County Superior Court denied appellant's motion. (3 CT 780.)

A preliminary hearing was held on July 8, 1996. (1 CT 15.) On December 15, 1998, appellant filed a motion to dismiss the special circumstances of robbery and kidnaping pursuant to Penal Code section 995. (3 CT 642.) The Riverside County Superior Court denied this motion

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[1/] The amended information listed the crime as robbery but cited the Penal Code section defining kidnaping. A second amended information was filed on April 23, 1999, correctly listing the charged offenses. The second amended information corrected the name of the victim in Count II to Candy Camerina Lopez. (3 CT 787-791.) The Lopez name will be used throughout this brief.

on April 2. 1999. (3 CT 781.) On April 22, 1999, the Court of Appeal of the State of California, Fourth Appellant Division, denied a petition for writ of mandate and request for stay that appellant had requested seeking dismissal of the two special circumstances. (3 CT 792.)

The jurors were sworn and the trial commenced on March 22, 2000. (13 CT 3502.) Juror deliberations began on April 27, 2000. (14 CT 3685.) On May 8, 2000, the jurors asked for clarification of a particular instruction and indicated that they were unable to reach a unanimous verdict as to both counts against appellant. (14 CT 3695a.) The trial court instructed the jury and deliberations continued. On May 9, 2000, jurors asked for clarification of another instruction. (14 CT 3696a.) The trial court instructed the jury that they were no longer to consider the first degree murder charge for Count II, and were only to consider second degree murder or other lesser offenses. (14 CT 3696, 3832.) The jury reached a verdict on May 10, 2000, finding appellant guilty of first degree murder in Count I, second degree murder in Count II, and that the special circumstances and enhancements were true. (14 CT 3884.)

On May 11, 2000, the penalty phase of the trial began. (14 CT 3891.) The jury began deliberations on June 7, 2000. (15 CT 4006.) On June 15, 2000, the trial court found that the jury was deadlocked on penalty and declared a mistrial. (15 CT 4012.)

A penalty phase retrial began on September 24, 2001. (15 CT 4195.) On October 9, 2001, the jury was sworn and presentation of evidence began. (25 CT 7013.) The jurors began deliberations on November 14, 2001. (26 CT 7249.) After three days of deliberations, the jurors returned a verdict on November 18, 2001, setting the penalty of death for the murder of both Martin Campos and Camerina Lopez. (26 CT 7261.)

On April 8, 2002, the trial court denied appellant's automatic motion to modify the death judgment under Penal Code section 190.4, subdivision (e). (26 CT 7306.) On the same day the court imposed a sentence of death for both counts against appellant and stayed sentencing on the remaining allegations found to be true. (26 CT 7306.)

STATEMENT OF FACTS

A. Camerina Lopez

On June 25, 1994, Jose Alvarez drove past the intersection of Lincoln and Beloit, in the Casa Blanca section of Riverside. (20 RT 3115.) His girlfriend, Camerina ("Candy") Lopez, lived about a half-block away from this corner and he often visited her. (20 RT 3121.) Alvarez stated that he did not remember how the encounter began, but while he was driving past the house on the corner, he had a few words with appellant. Appellant told him to keep on going straight. The incident made Alvarez angry and they exchanged profanities before Alvarez drove back home. (20 RT 3115-3119.) He spoke with Lopez on the phone and described the encounter to her. (20 RT 3120.)

The house on the corner belonged to Vallerie Williams, an older bedridden woman who was known throughout the community. It was not unusual for appellant and others to be there. (12 RT 2004, 2045.)

Later that day, Alvarez picked Lopez up, but as they were driving back to her house he saw appellant on the porch of Williams' residence. He made a U-turn and returned to the front of the house where appellant was sitting. Lopez asked him to stop because she knew appellant. (31 RT 3122.) Two or three other males were on the porch. (20 RT 3127.) Alvarez got out of the car and raised his hands up, asking what was going on. (20 RT 3124.) Alvarez acknowledged that his gesture could have been taken as

an invitation to fight. (20 RT 3155.) Appellant also raised his hands up, with his palms up, which Alvarez took to be a challenge. (20 RT 3144.)

Alvarez testified that appellant reached down, grabbed a shotgun, ran over to where Alvarez was standing, and began hitting him with the handle of the gun. (20 RT 3126.) Lopez got out of the car as the two began struggling over the gun. (20 RT 3127-3128, 3148.) Lopez stood next to him. She was about a foot away when appellant drew the gun around, cradling the handle and the barrel of the gun. The gun went off and Lopez was shot. (20 RT 3122-3133.) The gun was never pointed at Alvarez and he did not see appellant pull the trigger. (20 RT 3153.)

Deborah Galloway, appellant's aunt, provided care for Williams and lived in the house with her. (12 RT 2004.) She testified that an Hispanic man had come to the door earlier that day asking for appellant. She told appellant about the man. She thought it might have been Alvarez, but was not sure. (12 RT 2038-2039, 2043-2044.) Later in the afternoon, she heard loud noises outside and Williams asked her to see what was happening. Appellant was on the porch with several other people. He was arguing with an Hispanic man. Appellant asked him to lower his voice because the woman that lived in the house was ill and had just returned from the hospital. He asked the man to go with him to the side of the house. (12 RT 2005-2006, 2009.) Galloway checked on Williams and then watched the two "tussling" or wrestling on the street. Appellant pushed Lopez out of the way, but she came back around to get between them. (12 RT 2013, 2047.) She saw something moving but could not tell what it was and heard a "boom." (12 RT 20104.)

Galloway acknowledged that she told the prosecutor's investigator that appellant had a gun and struck the other man with it. As part of her

statement to the investigator, she said that she saw the handle of a gun while they were tussling. She could not see the barrel or tell who was holding the gun while they were wrestling over it. Appellant hit the man in the head. The gun went off when Lopez got in the middle, trying to separate the two. (12 RT 2021-2025, 2048-2049.) They were within arm's reach of each other when this happened. Galloway told the investigator that appellant looked surprised and shocked when the gun went off and Lopez was shot. (12 RT 2051, 21 RT 3177.)

Shortly after the shooting, Galloway heard appellant shout for "Todd," but did not see appellant again.[2/] (12 RT 2031-2032.)

Todd Brightmon testified that a white car pulled up.[3/] It burned a little rubber and stopped immediately in front of the house. A man he did not recognize jumped out. He had one leg and one arm inside the car, and held up the other arm, saying "What's up?" The man was angry and made a gesture as he yelled something out. Appellant grabbed a shotgun from the steps and ran towards the man. They struggled for the gun. Lopez went to the opposite side, like she was trying to stop them. She was about five feet from them when the gun went off and she was shot. (22 RT 3396-3400.) Brightmon believed that the shooting was an accident. (22 RT 3441.)

A neighbor, Wilson Cooper, was in his backyard around 6:50 p.m., when he hard a gunshot. He ran to the side of the gate and looked to the

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[2/] Right after the shooting, Galloway told officers that she had not seen the incident – by the time she came out, Lopez was on the ground and appellant was gone. (12 RT 2096, 2107.) At trial, she testified she did not tell the police officers who came to the house about what she had seen because she did not want to get appellant into trouble. (12 RT 2034, 2042.)

[3/] Brightmon was appellant's co-defendant on the Campos case.

front, where he saw Lopez lying on the ground, a man standing up, and appellant leaving the scene. (12 RT 1965,1966.) Cooper panicked, since Lopez was his friend, and started yelling for help. Lopez told him, "He shot me." (12 RT 1967.)

Jon West, a California Highway Patrol officer, responded after he was flagged down and directed to the scene. He found Lopez lying on her side, in a fetal position. She appeared to be in great pain. He asked her who shot her. She said, "Lamar did it" and described appellant.[4/] (12 RT 1979-1981.)

Roger Sutton, a Riverside police officer, arrived on the scene. He saw Lopez lying on the ground, apparently unconscious. Alvarez was bleeding behind his right ear and was very angry and upset. Sutton had to place Alvarez in handcuffs and put him in the police car. (13 R 2075-2076.)

Mario Roman, Lopez's brother, was on the phone when his niece ran into his bedroom and told him that her mother had been shot. (12 RT 1955.) They ran out. Lopez was lying in the street and a Highway Patrol officer was there. (12 RT 1956.) Lopez was barely able to talk and appeared to be cringing in pain. Lopez told him that appellant had shot her. (12 RT 1958-1959.) Alvarez was hysterical. Roman had to push Alvarez against a palm tree and scream at him. At some point, Alvarez said, "It was that fucking nigger, Lumord." (12 RT 1961.)

Darryl Hurt, a Riverside police officer, arrived on the scene and saw that Lopez appeared to be in great pain and was lapsing into unconsciousness. He spoke to paramedics who were treating her and advised her that her condition was very serious and that she might not live.

[4/] Appellant was also known as "Lamar" or "Mars."

She told him that "Lamar" had shot her and identified the Williams house. (12 RT 1990-1991.) Officers searched the house and the neighborhood following the shooting but could not find appellant. (12 RT 2095.) An officer found a shotgun outside of the back of the house. (12 RT 2081.)

After Lopez was taken to the hospital, Officer Patrick Olson took her statement before she went into surgery. Although he did not remember the interview, he wrote a report soon after it was conducted. Lopez told him that appellant started an argument and was holding a rifle as she and her boyfriend were standing next to the car. Lopez could not tell him what the argument was about or what was said, but appellant pointed the rifle at Alvarez. Lopez said she immediately stepped between them because she thought appellant was going to shoot Alvarez, but did not think appellant would shoot her. She said that she was shot once. (12 RT 1999-2000.)

Socorro Roman, Lopez's mother, saw Lopez in the street and went to the hospital with her. Lopez died in surgery that night. (12 RT 1950-1951.)

Dr. Joseph Choi, who performed the autopsy, testified that Lopez suffered a single shotgun wound. He estimated that she was anywhere between six inches and two feet away when the gun was fired. (14 RT 2226.) She died from loss of blood following the shooting. (14 RT 2235)

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B. Martin Campos

Oscar Ross was Todd Brightmon's cousin.[5/] Appellant was married to his niece. (19 RT 2859.) Ross owned a large parcel on Day Street that contained several mobile homes. (19 RT 2855.) He had been disabled for a lengthy period of time. Margie Escalera lived in the trailer next to his and provided care for him. (18 RT 2730.) There were others who lived in mobile homes on the property. (18 RT 2728.)

Ross sometimes bought cocaine and marijuana in order to resell it to "retailers." (19 RT 2860, 3000.) He had arranged to buy kilos of cocaine from Martin Campos on several occasions, perhaps around 10-12 times. (19 RT 2950.) He had also gone with Campos to bring some guns to a drug dealer in Los Angeles. (19 RT 2954.) He had come to trust Campos. One night, Ross needed to pay Campos for a kilo of cocaine. It was raining and Ross did not want to go outside and get his money, which he kept hidden in a PVC pipe. Since he trusted Campos, Ross told him how the money was hidden and asked him to get it. (19 RT 2861.)

Ross later came to believe that this trust was misplaced. (19 RT 2860.) A few weeks after he told Campos about where his money was hidden, armed robbers came to his property seeking the PVC pipe. They all spoke Spanish and held Ross, Escalera, and others living on the property at

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[5/] Ross was originally charged with first degree murder in the present offense. Pursuant to an agreement, he pled guilty to second degree murder and received a 15-year to life term. The prosecutor agreed to write a letter on his behalf supporting parole when he became eligible, around 6½ years from the time of the trial. Ross agreed to testify truthfully. (19 RT 2911, 2941, 2944; 20 RT 3063-3064.) Ross believed the deal saved his life and that there was a good chance he would be paroled. (20 RT 3011-3012.)

gunpoint.. (19 RT 2783 19 RT 2862.) Although they did not find the PVC pipe, they took drugs, money, and other items. Since Campos was the only one who knew about how Ross kept his money, Ross concluded that Campos had set up the robbery. (18 RT 2787, 19 RT 2863.)

Escalera and Ross testified that appellant and Brightmon visited Ross some time after the robbery had occurred. (18 RT 2739-2741, 19 RT 2865.) Appellant had his three- year-old son with him. One of them said that he had heard Ross was having problems, which Ross took to mean the robbery that Campos had set up. They stayed a short time and left. (19 RT 2867.) That night, Ross having thought things over, came up with a plan to have Campos deliver a kilo of cocaine to him, which was worth around $22,500. Ross planned to tell Campos that he knew about his role in the robbery. He intended take the cocaine without paying for it and force Campos to leave the area. He expected that Campos would back down and leave. Brightmon and appellant were simply to stand there and intimidate Campos. Ross maintained that he had no plans to hurt Campos. He simply wanted Campos to leave the area and move on. Brightmon and appellant agreed to help.[6/] (19 RT 2869-2874.)

Campos could not bring the cocaine until Saturday, November 11, 1995. (19 RT 2884.) He contacted Jose Garcia's brother. Although the brother was in Mexico, he arranged for Garcia to pick up the cocaine in Los Angeles. A man gave Garcia a block of cocaine, which he put in the trunk and then drove over to Campos's house. (15 RT 2432, 2469; 16 RT 2513-

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[6/] Ross originally told the investigators that he was just a middleman and was caught up in a drug deal gone bad. (21 RT 3202.)

2519.) Campos asked him for a ride to deliver the cocaine. (15 RT 2434; 16 RT 2521.) Garcia did not bring any weapons with him. (16 RT 2524.)

Joseph Marshall, who was close to Ross and other people who lived on the property, had spent the night at Day Street. He looked out a window and thought he saw both appellant and Brightmon in the morning. (16 RT 2580.) He was not certain because he was not wearing his glasses and he had not seen appellant for several years before the shooting. At the time, he believed he recognized appellant, but when the District Attorney's investigator, Martin Silva, showed him some pictures he could not identify appellant. He testified that he was not sure who he saw that day. (16 RT 2596-2597, 2598-2599.)

James Aston, who lived on the Ross property and worked for him one day a week as a mechanic, stated that he saw appellant having coffee with Ross and Escalera on the morning of the homicide.[7/] (15 RT 2399.)

Ross testified that appellant and Brightmon had stayed around the Ross property to wait for Campos to arrive with the cocaine. (19 RT 2884.) Ross was in the yard when Campos arrived. Appellant and Brightmon were between the trailers and the back gate, milling around the area with rakes so that Campos would not suspect anything. (19 RT 2886-2887.) Ross had expected that Campos would arrive alone, but his plans did not change because another person was driving Campos. (19 RT 2886.)

Garcia stayed in the car until Campos came back with two men. (16 RT 2526.) According to Ross, Campos told Garcia to get the cocaine from

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[7/] Aston was close to Ross's brother, Harold, and had problems with Oscar in the past. Oscar once threatened him after he had climbed a fence when the gate was locked. Aston took him at his word and did not climb the fence anymore. (15 RT 2407.)

the trunk, but Garcia saw that appellant was holding a gun, pointing it in the direction where Campos was sitting.[8] (19 RT 2891-2892.) Garcia testified that appellant pointed a gun at Campos's head. (15 RT 2439.) When Garcia saw the gun, he tried to run away but Brightmon caught him and took him to an old U-haul truck that Ross had parked nearby.[9] (15 RT 2441, 19 RT 2893.) Garcia testified that he could not understand what was being said, but believed that they wanted to get him to get into the truck. He did not want to go there. (15 RT 2445.) Brightmon grabbed him and hit him in the face. He fell into the truck. Campos was already in the back of the U-Haul. (15 RT 2446.) Ross denied that anyone was hit or forced into the back of the truck. (19 RT 2896.)

Campos tried to run. (19 RT 2896.) Garcia testified that when he fell on his back after being hit, Campos jumped down from the truck. Brightmon and appellant went after him. He heard a single shot. Campos screamed, "No, man," and fell to one side. Appellant was in front of him. No one else had a gun. (15 RT 2447-2450.)

Ross stated that appellant went after Campos around the back of the truck. Appellant still had the gun. The next thing he heard was a shot, three to four seconds after appellant took off. (19 RT 2897-2898.) Garcia took off over the fence. Campos tried to crawl, as if he was trying to make

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[8] Garcia failed to identify appellant from a photographic lineup conducted by Martin Silva in 1996, picking a picture of another person. He first identified appellant at the preliminary hearing when he saw appellant as the defendant, dressed in an orange jumpsuit. (16 RT 2538-2539, 2540-2542; see also 55 RT 8369, 56 RT 8470.)

[9] Garcia estimated that he was taken around 19 feet after he was stopped by Brightmon. (15 RT 2442.) Ross thought it was 40 feet. (19 RT 2895.)

it back to the car. Ross saw appellant with the gun, 15-20 seconds after the shot was fired. (19 RT 2901.)

Margie Escalera stated that she had gone into her trailer about the time that Campos arrived.[10/] She heard an argument and looked out one of the windows. She saw Campos struggling in a bear hug with appellant over a gun. Brightmon was within 12 feet, perhaps closer. Campos fell. He was on the ground when he was shot, but it all happened within seconds. She heart two shots. Another Hispanic had been standing in the truck, but she did not see him leave. (18 RT 2746-2748, 2750, 2799-2802.)

As this was happening, Garcia was able to run away, jump the fence, and make it to the street. (15 RT 2452.)

Escalera testified that Brightmon tried to pick Campos up after the shooting. However, a group of African-Americans had driven up in a blue car. She had never seen them before and did not know them. Some of the people put Campos in the car. (18 RT 2753, 2803.)

Ross testified that Campos was still alive after the shooting. Campos looked up at Ross but did not say anything. Brightmon and appellant put Campos in the trunk of Garcia's car and shut the lid. No one tried to give him first aid or seek medical help. (19 RT 2903.) They looked for the

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[10/] Escalera had gone to lay down because she had taken medication and was feeling ill. (18 RT 2797.) She needed glasses, but did not get them until after the shooting. (18 RT 2798.) She originally told the detectives that she guessed the shooter was "one of them boys. I don't know which one. Probably Mars." (18 RT 2793.) She also testified at the preliminary hearing that Brightmon held the gun, but immediately corrected the testimony to state that it was appellant. (18 RT 2795; 1 CT 99.)

cocaine in the car but could not find it. (19 RT 2902.) Appellant left the property right after these events. (18 RT 2754; 19 RT 2909,)

Ronnie Moore lived on the Day Street property and did some work for Oscar Ross. (15 RT 2368, 2383.) He was with Joseph Marshall when they heard a gun shot. Moore took his son in order to leave, but a man came to them with a gun and told them not to go. (15 RT 2371.) The man got in the car with them, on the passenger's side, and pointed his gun at Moore. He had Moore drive him around between a half-hour and an hour. Afterwards, the man apologized and gave Moore $30.00. (15 RT 2376, 2378.) He was not sure if the man was appellant and could not remember what the person looked like.[11/] (15 RT 2380, 2387.) James Marshall testified that Moore told him that he had given appellant a ride. (16 RT 2586.)

Ross stated that another car drove on the property just after appellant left. He gave the driver a few dollars to push Garcia's car down the street. They had to break the steering column. His mechanic, Jim Aston, helped get the car out. (19 RT 2911.)

Immediately after they removed Garcia's car from the property, a truck with a number of Hispanics drove up to his gate. (18 RT 2755; 19 RT 2912.) There was a gun in the back of the truck. Ross thought about the time he had been robbed, took out a rifle, and shot it in the ground. The people left. (18 RT 2756, 19 RT 2912.)

[11/] Investigator Silva showed pictures to Moore, who thought that two of the pictures looked similar to the man he had driven. Moore picked out a picture of appellant and told Silva that it might be the person, but he did not know. (15 RT 2387, 2393.)

Ross thought it was time to get away from the property. He dropped off Brightmon and took Escalaera to spend the night at one of his cousins. It had been 15-20 minutes since the shooting. (19 RT 2913-2914.)

In the meantime, Garcia got a ride back to Campos's house. (15 RT 2455.) Garcia met Campos's brother, Raul, and told him that Martin had been shot. (21 RT 3281.) The two of them went back to Garcia's residence to get some guns and then returned to search for Campos. (15 RT 2456-2458, 21 RT 3283-3284.) They did not see Campos, but found the car down the street about a mile away from the Ross property. They took the car back to Campos's house and called the police, who accompanied them to the Ross property on Day Street. (15 RT 2458-2459.)

Deputy Sheriff Michael Angeli responded to Raul's call and went to the Ross property to investigate. He found fresh tire tracks and what appeared to be blood at various locations. He went into the main trailer and found a gun case and ammunition. (15 RT 2336-2345.) He believed it was a crime scene. (15 RT 2354.)

The next morning, Garcia opened the trunk of the car and found Campos's body. He did not know what to do, and did not want to be blamed for the death, so he drove the car away and dumped the body a short distance from the road. (15 RT 2460; 16 RT 2530-2531.) He cleaned out the car and found the cocaine, which he returned to the person who had provided it. (15 RT 2461; 16 RT 2531.)

Before Ross returned to his property the following day, he stopped at the feed store and purchased lime. (18 RT 2759.) Ross asked Aston to spread it over his property. (15 RT 2402; 19 RT 2915.) That evening, the sheriff's investigators came to the property and took Ross and Escalera to the station for questioning. (19 RT 2916.)

Ross initially told the detective that he was not there, but somebody had been shot on his property. (21 RT 3222.) He then stated that he had been working as a middleman on a drug deal that had gone bad. He named appellant and Brightmon and stated that appellant shot Campos when he tried to take the cocaine. (20 RT 3097.)

Escalera was scared when she spoke with the investigators. After the detective threatened her, she told him that there were two boys, ages 17 and 20, who had been dropped off at the property by Ross's daughter on the morning of the shooting. She denied hearing gunshots. (18 RT 2791, 2792) The detective asked who did it. She stated that it was one of the two boys, "probably Mars." (19 RT 2793.)

After obtaining their initial statements, Sergeant Arthur Horst let Ross and Escalera speak together. Ross told Escalera that he had already told the detective what had happened. After that, Escalera told Horst that she knew about the shooting. (20 RT 3057.) While being taken to see another investigator, Ross told Horst that he was not being entirely truthful. He stated that he had wanted to take the cocaine from Campos because he blamed Campos for the initial robbery. (21 RT 3207-3209.) Ross told Horst that he knew that appellant had a gun when he set up the deal with Campos. (21 RT 3212.)

Dr. Joseph Choi performed the autopsy on Campos. There were abrasions on his face and wrist that were consistent with scraping while he was still alive. (14 RT 2237.) A gunshot perforated Campos' heart and lungs and caused him to die. (14 RT 2243.) Other abrasions occurred after death. He did not think Campos could have lived longer than a minute or two after being shot. (14 RT 2243, 2260.)

C. The Defense to the Campos Case

Appellant presented an alibi defense to show that he was in Oklahoma at the time of the Campos murder.

Roberta McConnell testified that she knew Francisco Trotter for almost ten years. Trotter introduced her to appellant in 1995 at a family gathering in Oklahoma. (22 RT 3324.) On direct examination, she stated that she went with Trotter to get a flag and visit his father's grave on Veterans Day, November 11, 1995. Appellant was with them. (22 RT 3325.) They dropped her off at her home in Tullahassee and she saw appellant a couple of times after that. (22 RT 3326.)

After reading a statement she had given to a defense investigator, she acknowledged that she told the defense investigator that appellant had left after breakfast and had not gone with them to the cemetery. (22 RT 3343.) She thought that appellant had come with them because he had been there earlier in the day, but evidently he did not go. (22 RT 3345.) The date only became important when Trotter called to tell her that appellant was in jail. Trotter tried to help her to remember what had happened that day. He asked if she remembered appellant coming over and cooking him breakfast. She remembered that. (22 RT 3348.) Trotter reminded her that it was Veterans Day and helped her to put the pieces together. It was the only time that Trotter brought a flag when he visited the cemetery so the date stood out for her. (22 RT 3353.) She had not been thinking of appellant. (22 RT 3349.)

Francisco (Cisco) Trotter testified that he met appellant in July, 1994. Appellant was using the name "Tony Ruff" because he was wanted by the law following an accidental shooting. (23 RT 3575-3576.) Appellant went to New Mexico with Trotter in 1995. Trotter had a pound of marijuana and the two were arrested in Albuquerque. Appellant again

used the name "Tony Ruff" and represented himself. (23 RT 3577-3578.) After they were released, appellant returned to Tulsa. They saw each other quite often, working out and raising pit bulls together. (23 RT 3578.)

Trotter had a hard time remembering dates, but after speaking to the investigator he went home and looked at an old calendar and saw that the day was Veterans Day. Trotter decorated his father's grave on Memorial and Veterans Days and talked with appellant about what he planned to do for that particular visit. He told appellant that he was going to drop McConnell off at her home after they visited the grave. Appellant did not go with them. (23 RT 3582-3583.) After this, Trotter saw appellant on several occasions. (23 RT 3584.)

Robin Levinson investigated the case for appellant. When she spoke with Trotter she was under the impression that the Campos murder took place on November 21, 1995. (RT 3638.) She did not give any dates to Trotter. (23 RT 3649, 3650.) She talked with them about Thanksgiving of that year. He called her back the next day and told her about Veterans Day, but she did not think it important because it did not establish an alibi. (23 RT 3640-3642.)

Todd Brightmon testified that appellant left the area after the Lopez shooting and he did not see appellant again until both of them were in jail. (22 RT 3346.) Brightmon had gone to visit Ross because his truck needed some mechanical work. (22 RT 3365.) Escalera was there, along with one of her relatives. Ross told him to wait for the mechanic to return, but the mechanic had left with Ross's brother. Brightmon slept in his car. The next morning Ross again told him to wait until after he had finished a transaction. (22 RT 3366-3369.)

Brightmon knew that Ross had been robbed on a previous occasion, but Ross did not want to talk about it. Brightmon believed that he was there primarily to keep Ross from being robbed again. (22 RT 3423.) He did a few other jobs around the property and then sat down to talk to Ross. (22 RT 3370-3371.) A short time later, he saw Garcia and Campos drive up in a white car. Ross gave him his gun, a .357 magnum, and told Brightmon to watch over things so that he did not get robbed. (22 RT 3372-3373.)

Ross and Campos spoke to each other in front of the car for a few minutes. Brightmon kept his eye on Garcia, who was still in the car. (22 RT 3375.) Garcia got out of the car and began to walk around the property. Brightmon was worried because he had noticed a white truck in the area. He grabbed Garcia and told Ross that he was moving around too much. (22 RT 3377-3378.)

Suddenly, Ross said something about a "jack" and Brightmon saw Mexicans come running toward him. He ran up, grabbed Campos as he was running away, and took out the gun. Campos said to get out of his way. Brightmon was trying to see if he had anything in his hand. In the process, they both fell and the gun went off. (22 RT 3379-3380.)

Ross told Brightmon to help him clean things up. He said that Brightmon would have to touch the body or he would be shot, too. Escalera's relative helped put Campos in trunk of the car. Brightmon stated that he was shocked and in a daze. (22 RT 3381-3382.)

A group of Hispanics came in a truck with Garcia after Campos was shot. Garcia drove to the front of the yard and stopped. Escalera brought the assault rifle and Ross fired it into the dirt. The Hispanics left. (22 RT 3384.)

Shortly after this, three or four black men came by in a blue car. He does not think Ross knew the people, but they helped to turn the car around by breaking the steering wheel and pushing it out with their car. (22 RT 3382-3383.) Ross drove Escalera and Brightmon away in his car. (22 RT 3386.)

Brightmon asked Ross what he should do. Ross did not like appellant and told Brightmon to blame it on him. Ross and appellant had some problems in a previous incident where Ross had pulled a gun on appellant and ordered him off the property. (22 RT 3389.) Brightmon was arrested two days after Campos was shot and gave several statements to the police. He initially blamed the death on someone else, but explained that he lied to protect himself after Detective Horst told him that he could face the death penalty. (22 RT 3389-3390.)

Brightmon gave a lengthy statement when he was questioned. He admitted being present when Campos was killed and chasing down Garcia. He also told the detectives that he chased Campos down and wrestled with him until appellant told him to get out of the way. He said that he backed off and appellant shot Campos. (22 RT 3422-3424.) In his interview with Detective Horst, he took a lot of pains not to name appellant. He said "assailant." He sometimes talked about the third person being "Timbuktu" or "Mr. X" because he knew appellant did not commit the crime. But he slipped a number of times and said it was appellant. (22 RT 3447-3450.) During his testimony, he explained that he lied when he talked about

appellant during the interview in order to try to protect himself.[12] (22 RT 3460.)

D. Victim Impact Evidence in the Penalty Retrial

A penalty retrial was held after the initial jury could not reach a verdict on penalty. The retrial included substantially the same testimony related to the two crimes that was presented in the guilt phase.[13] Apart from the facts of the crime itself, the prosecution presented victim impact evidence relating to both the capital charge and the second degree murder.

1. Camerina Lopez

Socorro Roman, Lopez's mother, testified about her daughter's life. Lopez had a daughter and son and did everything she could for her children. They lived with her for three years before the murder. (43 RT 6568.) Her death affected the whole family. Lopez's brothers took it very hard. Roman's oldest son, Alex, lost his job and started drinking. He was sick and for awhile she thought she would lose him, too. Mario was living with them and took it hard. He was numb and would not talk about her. Her husband is a quiet man, but he is hurting. (43 RT 6582-6583.)

Roman raised Lopez's children. (43 RT 6584.) Roman thought about her death every time she went down the street. She still looked for the spot of blood where Lopez died. It was on the street for years. (43 RT 6572.) There are many things that she no longer enjoyed and she had to take a pill in order to sleep. (43 RT 6590.)

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[12] In rebuttal, the prosecution played the taped interview and introduced it into evidence. (24 RT 3679; People's Exhibits 95, 96.)

[13] The major differences in the presentation of evidence concerning guilt was that Jose Alvarez was located and testified at the penalty retrial and that appellant did not present McConnell and Trotter as alibi witnesses.

Marion Roman was the younger brother of Lopez. He felt empty after her death. Holidays and birthdays were not the same. (43 RT 6617.) Her death still hurt. His father was very quiet. His mother was hysterical. (43 RT 6619.) Lopez's children took her death very hard. (43 RT 6622.) Each day he went by the spot where she was murdered and tried to think about her good spirit. (43 RT 6620.)

Anna Lopez, Lopez's daughter, remembered that her mother was always happy and would do anything for anybody. (44 RT 6639.) She told the jurors about many of her memories through photos of her and her mother. After Lopez died, Anna could not open up to anybody. The funeral was an awful experience; it was hard to go back to school and her grades dropped. Nothing was the same. She was angry that her mother was taken from her. (44 RT 6642-6445.)

2. Martin Campos

Gladys Felipe had three sons with Martin Campos, who ranged from six months to three years old when Campos was killed. (48 RT 7198.) Campos had ten brothers and sisters, and every weekend there would be a family gathering at their house. Campos was in the center of things. (48 RT 7201.) After Campos's death, she was in denial and could not understand why he was gone. (48 RT 7207.) She lost about 20 pounds and had to explain things to her children. Her oldest son would talk about Campos and remember the bike rides they took together. (48 RT 7209.) It was hard to raise a family on her own. She moved in with her parents and is now living with her boyfriend. (48 RT 7211.) The holidays were particularly sad after Campos's death because he always made them laugh. (48 RT 7813.) His murder made her angry. (48 RT 7815.)

Amador Campos was Martin's older brother. (51 RT 7763.) Martin liked to keep everyone in the family together and had regular weekend gatherings. (51 RT 7766.) Martin was an excellent friend and father. Amador tried to imitate him because he was a great father. He trusted everybody and was the best of the family. (51 RFT 7768.)

When Martin was 18, he took a trip to Mexico. He had planned to stay a month, but returned in a week because he had given away all of his clothing and everything in his suitcase. (51 RT 7769.)

The way that Martin died was particularly painful, unlike an accident or sickness, and it affected Amador in a deep way. He went into a depression after Martin's death. He could not move. He could not eat. He lost 20-25 pounds. He had to get help at a hospital. He no longer felt safe. (51 RT 7774-7776, 7779.)

To help protect Campos's mother, they had to tell her that Martin died in a car accident. (51 RT 7780.)

E. Other Crimes in Aggravation

The prosecution alleged numerous offenses under Penal Code section 190.3, factors (b), and (c).[14/]

1. Voluntary Manslaughter of Norberto Estrada

Norberto Estrada was shot on March 26, 1983, at the Ahumada Market in Riverside. (45 RT 6731.) People commonly stood around the parking area and drank. It was not unusual for police to respond to fights and drunkenness there. (45 RT 6740.)

[14/] During the first penalty trial, the prosecutor did not present evidence concerning the shooting of Nigel Hider or four fights at Corcoran State Prison (incidents with Aguero, Jackson, Davis, and Townsend).

Jesus Ramirez had been sitting and drinking around the market with Estrada and two others. (45 RT 6744.) They had been drinking all morning and were drunk. (45 RT 6756.) A black man came up and talked to Estrada about marijuana.[15/] Estrada was not interested and the black man left. Soon after, he came back with a gun and shot Estrada three or four times. Estrada had no weapons. (45 RT 6745-6749.) At the time of the incident, Ramirez told a Riverside police officer that Estrada had called the black man a "nigger" immediately before the shooting took place and that the two had exchanged racial slurs. (51 RT 7784, 7786, 7789.)

Pedro Golinas was also at the market. He testified that Ramirez was there with six others. They offered him a beer and he stayed there, drinking with him. (45 RT 6767.) A black man came up and argued with Estrada. Estrada said the marijuana was no good or that he did not want any. Estrada got up to fight, but the black man left. The black man returned 40-60 minutes after this incident and shot Estrada. (45 RT 6767-6769, 6776.)

Victor Rodriguez testified at the preliminary hearing of the case involving the shooting.[16/] He told much the same story as the other witnesses and identified appellant as the man who shot Estrada. (46 RT 7030, 7038.)

Patricia Mayo, appellant's half-sister, testified that she had been to the market that day with a girlfriend. There was a group of Hispanics who had been drinking all day and were very drunk. One of them came up to her holding money and said something to them. She felt as if she was being

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[15/] Police later found a marijuana cigarette with Estrada's property. (45 RT 6740.)

[16/] Rodriguez had since died in Mexico. (46 RT 7007.)

addressed as a prostitute. She saw appellant as she was leaving. He told her to go home. She heard the gunshots. (51 RT 8775-7876.)

Mayo stated that after the shooting, appellant told her that he was in trouble because the gun had gone off accidently and he did not know what to do. (51 RT 7883.) Appellant visited his mother and told her about the shooting, again stating that the gun went off accidentally after the man had tried to grab it. She brought appellant to the police station the next day. (51 RT 7842-7843.) Appellant talked to the police about ten days after the shooting. He stated that he had been involved in the incident, but it was an accident that happened in self-defense. (46 RT 6881-6883.)

Appellant was convicted of voluntary manslaughter. (51 RT 7717.)

2. Possession of Shanks at San Quentin

On March 16, 1986, while appellant was serving his sentence for the manslaughter conviction, correctional Officer David E. Smith found two shanks in the cell occupied by appellant. (45 RT 6783.) The shanks were rounded metal that was sharpened to a point. (45 RT 6786.) Nothing stood out about the incident. Such things were a daily occurrence. (45 RT 6787.)

On August 27, 1986, Howard Johnson was working as a correctional officer at San Quentin, watching over the exercise yards. Two prisoners caught his attention because they looked up to see if he was watching. He noticed appellant walking around the yard with his hand in his pocket. (44 RT 6666.) After a little while, they began to relax and play basketball. Appellant jumped up for the ball and a shank fell from his pocket. The officers removed appellant from the yard and recovered the shank. (44 RT 6667-6668.)

3. The Fight with Frank Stevens

Frank Stevens occupied the prison cell directly below that of appellant. Stevens sometimes talked in Swahili to a friend who was in the cell above appellant. Appellant once told Stevens to stop banging on the walls. (45 RT 6837.) On May 3, 1986, when they were both on the prison yard, appellant looked at Stevens in a way that Stevens regarded as a challenge. (45 RT 6839.) Stevens stated that when a prisoner looks at another like that, "you approach them and see what the problem is." Stevens walked up to appellant and said, "What's up?" but did not give appellant a chance to respond. Instead, he immediately swung at appellant. (45 RT 6840.)

Stevens threw the first blow. (45 RT 6844.) Appellant punched "at him" and the two tussled until ordered to stop. (45 RT 6842.) Stevens stated that such altercations were common and that it really did not amount to a fight. The two had no problems after the incident. (45 RT 6845-6846.)

A correctional officer testified that he observed both prisoners fighting and exchanging blows. The fight stopped after he fired a warning shot and ordered them down. (44 RT 6684.)

4. The Nigel Hider Shooting

Nigel Hider was shot on February 28. 1989. Hider testified that he was standing near the street and a white man, driving a blue truck, pulled up and shot him. He did know if the gun was aimed at him or if it was a gang incident. No one else was hit. He thought he was in the wrong place at the wrong time. (46 RT 6988-6989.)

At the time of the shooting, Hider was an active gang member in the Gardena Payback Crips. (46 RT 6993.) He knew appellant before the shooting and denied that he told an officer that appellant had shot him. (46

RT 6991.) He testified that it could not have been appellant. (46 RT 6999.) He also did not recall telling investigator Silva that he would not be a snitch. (46 RT 6992.)

Angela McCurdy was with Hider when he was shot. She testified that she did not see the actual shooting, but saw Hider go to the ground. She saw a car turn around, but does not remember if she told an officer that it was a small brown car. (46 RT 7010-7012.) McCurdy also did not remember telling investigator Silva that a small vehicle passed, did a U-turn, and came back; that the passenger of the car was a bald black man who fired a gun so that she could see the muzzle flash. (46 RT 7016.)

Investigator Silva stated that he interviewed McCurdy on March 9, 2000. She read the police report and stated that it was accurate as best as she could recollect. McCurdy said that she saw a muzzle flash from the car fired by a black male with a bald head. Although she knew appellant, she could not say one way or the other if it was him. (46 RT 7024-7025.)

Guy Portillo was a Riverside police detective. In 1989, he was assigned to the follow-up investigation involving the shooting of Nigel Hider. He saw Hider at the hospital where he was recovering from gunshot wounds. He was uncooperative and reluctant to give any information at all. He said he would not testify. Ultimately, Hider told him that appellant shot him. He did not show Hider any photo lineups, nor did he record the interview. (47 RT 7101-7103.)

Duane Beckman was a Riverside police investigator who worked in the Casa Blanca area of Riverside. He spoke with appellant in 1999. Appellant bragged that he had run the Gardena Payback Crips out of the Casa Blanca area. (51 RT 7720-7721.)

5. The Fight with Wilbur Townsend

On June 17, 1989, Wilbert Townsend was a prisoner in the Segregated Housing Unit (SHU) at Corcoran State prison, where he had been placed after he had assaulted a correctional officer. (51 RT 7735.) He had been leery about going out to the yard. The second time he was there, there were five people having a conversation. The others walked away so he was alone with appellant. Even the correctional officer looked away or was distracted.

Townsend got down to do some pushups when appellant jumped him on his back. He was not sure if appellant kicked him. He got up and they were both head-to-toe when the officers ordered them down. (51 RT 7736-7739, 7743.) He believed that the officers knew what was going to happen because they had told him that they did not like people who assault other officers. (52 RT 7744.)

Thomas Benson was a correctional officer who served as the yard gunner on the SHU exercise yard. (50 RT 7548.) He saw appellant approach Townsend with a clenched fist and strike him in the face. Appellant kicked him in the face. Benson ordered them to get down and they both complied. (50 RT 7552.) There was nothing extraordinary about the fight. It was a very common occurrence in the unit. (50 RT 7557.)

6. The Fight With Ruben Davis

Ruben Davis had been a leader in the Mexican Mafia. (45 RT 6808.) He was housed in the Corcoran SHU. Normally he exercised with a friend so that they could watch out for one another. However, on July 8, 1989, his friend was called out for a visit. Appellant was behind him, talking to a gunner (correctional officer). When the officer turned around to get some nail clippers, appellant jumped Davis and started hitting him on the back of

his head. He was dazed and his whole body went down. (45 RT 6798-6799.) When he tried to get back up, the gunner drew a gun and told him to stop. (45 RT 6800.) He felt like he had been sucker punched. (45 RT 6801.)

Appellant was released back to the yard eight days later. Davis believed that he had to retaliate so that he would not be seen as being weak. He had a weapon. Davis went into a group of blacks and started fighting. Appellant caught him with a left hand. The gun officer started shooting. He was not able to use his shank. (45 RT 6803-6804.)

Fights were common in the unit. Before the incident, one of the guards told Davis that they would turn their heads if he attacked appellant. After the fight, one of the guards said he knew that Davis had a knife. (45 RT 6817.)

Davis has since dropped out of the Mexican Mafia. The prosecutor agreed to write a letter verifying his cooperation in this matter. (45 RT 6808.)

7. The Fight with Marvin Jackson

Marvin Jackson was a prisoner at Corcoran State Prison on February 16, 1990. He used to play handball with appellant. Jackson testified that he argued over a game with appellant and started a fight with him. He swung first and appellant swung at him in response. (46 RT 5889-6990.)

Investigator Silva interviewed him on September 19, 2001. (47 RT 7104.) During the interview, which was introduced by the prosecution to impeach Jackson's testimony, Jackson stated that he had exchanged bad words with appellant at a handball game. Appellant came from behind and hit him as Jackson walked off. (25 CT 7021 [transcript of taped

interview].) Jackson told Silva that he had time to do and did not want to testify. (25 CT 7033-7034.)

8. The Fight with Freddie Aguero

Freddie Aguero was a prisoner at Corcoran State Prison on June 2, 1990. Aguero was released on a yard at Corcoran State Prison with 15 black inmates and immediately attacked appellant. Aguero testified that he attacked the first person he saw – appellant – when he was released from the sally port to the prison yard. (46 RT 6938, 6945.) He believed that the officers set up the fight because he should not have been released to that yard. (46 RT 6940.) Appellant may not have even seen him since it happened so fast. (46 RT 6941.)

Aguerro told Martin Silva, the prosecutor's investigator, that he had exchanged words with appellant before the fight. (51 RT 7750-7751.) He also told Silva that he believed the officers had set up the situation. (51 RT 7756.)

9. The Incident with Eric Dawson and Anita Smith

Anita Smith testified on January 9, 1992, that she was staying with her husband, Earl Smith, in Room 206 at the Motel All-American. (46 RT 6965.) During the stay, Eric Smith argued with Reginald Robinson. Eric Dawson, a friend of her husband, was also there. (46 RT 6966-6967.) They threatened to shoot each other. Appellant was not involved in the argument. Anita went up the stairs to the room. (46 RT 6980.) When she was in the room, Earl and Dawson ran into it and told her to go into the bathroom. She started to get up when she heard a gunshot. Dawson came into the room. His arm was bleeding. (46 RT 6968-6970.) She did not see who shot Dawson, although she later saw Robinson with a shotgun. (46 RT 6981,)

Anita went downstairs after things had quieted down in the room. She testified that Robinson was driving appellant's car, with appellant in the passenger's seat. She may have told them that she had the license number, but does not recall doing so. (46 RT 6972.) Robinson got out of the car and pointed the shotgun at her, aiming at her face. Appellant got out and told him not to shoot. Robinson hesitated, then backed off and put the gun down. Appellant got in the way of the gun so that Robinson would have had to shoot him. (46 RT 6973-6974, 6975, 6981.) She believed that appellant saved her life. (46 RT 6974, 2975.) After Robinson put the gun down, appellant slapped her and walked away. (46 RT 6974.)

Gunnar Toussaint, a Riverside police officer, went to the motel after the shooting. (46 RT 6957.) He found Eric Dawson lying in the bathroom, bleeding. There were shotgun pellets that appeared to have hit the door of the room. (46 RT 6958-6959.)

Toussaint interviewed Anita Smith, who told him that she had seen two males arguing in the parking lot. She identified one of them as Reginald Robinson. Appellant was not involved in the argument. (49 RT 7420, 7423, 7424.) Smith told Toussaint that she heard a loud gunshot as she walked up the stairwell. Robinson got into a car that started to drive away, but as the car approached her she yelled out that she had their license plate number. The car stopped. Appellant was driving and went up to her and slapped her in the face. (49 RT 7420-7421.) Robinson got out. He had a shotgun and pointed it at her. Robinson told appellant to move away so that he could shoot her, but appellant stepped in front of the gun, into the line of fire and told Robinson not to shoot. They both got back in the car. (49 RT 7421-7423, 7424-2425.)

10. Telephone Threats to Jarah Smith and Tina Johnson

While appellant was in jail awaiting trial on the present charges, his wife, Tina Johnson, began to have an affair with Jarah Smith. (47 RT 7114.) When appellant learned about the affair, he was angry, heartbroken, and upset. (47 RT 7115, 7119.) Appellant told her that he would blow up the school where she worked if she did not stop seeing Smith. (47 RT 7116.) He did not say there was a bomb on campus, and she did not report his words to anyone. She knew it was not possible for him to blow up the school. (47 RT 7123.) She knew his words were directed to her and that it did not have any meaning other than that he was heartbroken and upset. (47 RT 7118.)

Appellant used a third party to set up phone calls to Jarah Smith. (47 RT 7156.) He tried to call Smith on several occasions, but only talked with him a few times. (41 RT 7138, 7147.) The first time or two that appellant called, he was calm and polite. Appellant asked if Smith was seeing his wife; he asked Smith not to see her anymore. Appellant said that he loved his wife and she was going to come back to him. (41 RT 7148.) Smith testified that appellant grew agitated during the third call because the affair was continuing. He did not make a direct threat, but told Smith that he knew where he lived. Appellant tried to "punk" Smith, who did not take him seriously. (47 RT 7141-7144; 26 CT 7206-7207.) The relationship between Smith and Tina continued for a few months after this, but eventually they mutually ended it. Smith did not feel he was in danger, they just went their separate ways. (47 RT 7153.)

Chaka Coleman arranged some of appellant's phone calls and listened to a conversation between appellant and Smith. (47 RT 7156.)

Appellant told Smith, "I can have something done." He said, "I already told you, you know what could happen." She thought that Johnson meant he could have somebody beat Smith. (47 RT 7158.) Appellant seemed to mean business but he did not make a direct threat. (47 RT 7174.) She thought that Smith may have been a little scared. (47 RT 7161.)

Investigator Silva interviewed both Smith and Coleman. (55 RT 7751-7752.) During the interview, Smith said that appellant was upset. He was saying things like, "leave her alone" or "don't let me hear you was messing with her." He told Smith that he knew where Smith lived. (27 CT 7206.) Appellant never made a direct threat. (27 CT 7207.) Smith was not concerned with what appellant said. He told Silva that appellant was just trying to "punk him out." (27 CT 7208-7209.)

Coleman told Silva that she was not sure what kind of threat was made – whether there was a death threat or a threat of violence – but the words were harsh and Coleman was scared. He appeared to be terrified. (27 CT 7203, 7205.) However, Smith did not stop seeing Tina. (27 CT 7204.)

11. The Fight with John McHenry

John McHenry shared a cell with appellant while he was awaiting trial in the Riverside county jail. (41 RT 7177.) They had a few disagreements and McHenry wanted to be moved to a different cell. There was an altercation after McHenry left the water running in the sink, but he did not remember what happened. (41 RT 7178.) Appellant was a lot neater than he was and it irritated appellant when McHenry would leave the toilet dirty. It was an old jail and fights happened all the time. It was not that big of a deal to him. (41 RT 7184-7186.)

McHenry told investigator Silva that he had his back to appellant. Appellant grabbed him in a choke hold from behind and rammed him up against the wall. Appellant swung his fist but McHenry did not think he actually was hit. He had a scrape on his face. (51 RT 7749.)

F. Appellant's Family Mitigation

1. Joe Ann Johnson

Joe Ann Johnson is appellant's mother. His father lived somewhere in Oklahoma and has had no contact with appellant. Appellant has three sisters, including the twins Patricia and Patrina. (51 RT 7798.)

Joe Ann first married Linton Williams and had a daughter with him, Sheralyn. However, he was already married and she got an annulment. (51 RT 7800,)

After she broke up with Williams, she had a very good relationship with Alto Lee, who treated the children well. They loved him but he did not want to get married. Appellant was six or seven when the relationship ended. (51 7801-7802.)

After that, she began living with James Johnson. James was not appellant's father, but had put his name on the birth certificate when appellant was born. (51 RT 7803.) James worked in aerospace but never held a job for longer than a year. After Joe Ann's father died, James became increasingly violent, both physically and mentally. He drank a lot and got into a lot of fights. (51 RT 7804-7806.)

She tried to shield the children when they argued and fought, but there were times when they saw what was happening. Appellant tried to

intervene when he was little, and the police were called a few times.[17] (51 RT 7808.)

She tried to leave James on many occasions. She went to Oklahoma but he came and brought her back. His brother put her on the bus to Los Angeles, where her mother lived, but James was waiting when she arrived. (51 RT 7810, 54 RT 8156.)

James treated Patricia and Patrina like he treated her. He hit them and beat them for no reason. Appellant got punished like everyone else, but the girls got it worse. Appellant sometimes witnessed the abuse of both Joe Ann and the twins. (51 RT 7812.)

Joe Ann eventually moved to Riverside and lived with her sister, Janet McCord, until she got an apartment. When she first moved there she had no money and appellant stayed with James for about a month. (51 RT 7836.) He was a teenager and James was his only father figure. Appellant had some affection for him, and when James was not fighting things were better. (51 RT 7814-7815.)

Joe Ann hurt her back after they moved to Riverside. She could not work, so appellant quit school and got a job at a convalescent hospital. He came home and put money on her bed. He told her, "Now you can pay your bills." (51 RT 7821.)

Appellant did not get into trouble until he was convicted of voluntary manslaughter in 1983. (51 RT 7823.) He put on weight and got huskier in prison, but he was still respectful to Joe Ann. (51 RT 7825.)

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[17] Joe Ann testified at the first trial that appellant did not try to intervene. (51 RT 7831, 7849.)

Appellant married Tina after he was in prison. They had two children, including a daughter from appellant's previous relationship and a son. (51 RT 7826-7827.) Appellant was a loving father. (51 RT 7828.)

When appellant came to Oklahoma he lived with Joe Ann until he got a place of his own with a cousin. Tina visited on several occasions with the children. (51 RT 7851-7853.)

2. Leonard Galloway

Leonard Galloway, appellant's uncle, testified that Joe Ann and James knew each other before appellant was born, but that he came back into her life after she left Alto Lee. (53 RT 8090.) Galloway was young, around five years old when he first met James, but recalled James drinking with friends around the neighborhood, which often led to James becoming violent. (53 RT 8091.)

James was violent to Joe Ann and beat her on a regular basis, using mops, skillets, or whatever weapons he had. The abuse happened in their apartment or even in the street. Galloway recalled that James once hit Joe Ann when they were driving down the street with him. (53 RT 8092.) The violence got worse after 1975. (53 RT 8108.)

The abuse often happened after James had been drinking. (52 RT 8093.) It often took place in front of the children. (53 RT 8094.) When Galloway was 21 years-old he picked up James and almost threw him from a second-story apartment rail after he had been beating Joe Ann. After that, James no longer hit Joe Ann in his presence. (53 RT 8095.)

Joe Ann left James on occasion, but James would find her. (53 RT 8094.) At one point, Joe Ann moved to Oxnard to get away from him, but he followed her there and the beatings resumed. James abused and tortured the twins, and also hit appellant. (53 RT 8096-8097.)

Patrina and Patricia ran away as a result of the abuse. Appellant was scared by it. He would ask James to stop, and then run to his room crying over what was happening. (53 RT 8098-8099.) Appellant was protective of his sisters and mother. (53 RT 8100.) At the same time, appellant loved James. (52 RT 8099.)

3. Patrina Mayo

Patrina Mayo was appellant's half sister. (51 RT 7858.) She remembered Alto Lee as a good father, who always made sure that they had want they wanted. (51 RT 7861.) However, James was an alcoholic who would drink most of the weekend; during these occasions he would be abusive to Joe Ann and the rest of the children. Patrina and her sister were abused worse than appellant, but he tried to help them. (51 RT 7862-7863.)

James used to sell drugs and ran around with different women. She both loved him as a father and did not love him for what he did. (51 RT 7864.)

Patrina was wilder than appellant. She started drinking when she was 12 years-old, got drugs from James when she was older, and continued to have problems with drugs and alcohol. (51 RT 7867, 7869, 7871.)

Patrina ran away away from home on several occasions. (51 RT 7865.) Child Protective Services took her and her sister out of the home when Joe Ann moved to Riverside. They went to a shelter home and ended up living with her aunt for awhile. (51 RT 7870.)

Appellant stayed home to help their mother. He stayed away from the house to be with friends, but also stayed to himself and spent a lot of time with his dogs. (51 RT 7865, 7871.)

Appellant has been a wonderful father to his children and an uncle to her children. (51 RT 7872-7873.)

4. Patricia Johnson

Joe Ann married James when Patricia was around 11 years old. (54 RT 8151.) Her mother had an abusive relationship with James. The physical abuse generally happened on the weekends when James had been drinking. It occurred in front of the children. Sometimes the police were called and would take James to jail for the night. (54 RT 8153-8155.)

Patricia and her sister were often the targets of the abuse and appellant was also beaten. When this happened, appellant was silent. He would not cry. (54 RT 8160-8161.) When appellant was 13, he knocked James's teeth out after James beat up his mother. (54 RT 8156.) James stopped abusing him after that. (54 RT 8161.)

Patricia ended up using drugs and alcohol until she was able to go to Tulsa and change her life. (54 RT 8159.) Appellant responded differently. He was a quiet child, but had to grow up fast. (54 RT 8160.) He always liked dogs and never got into trouble with the law. (54 RT 8162.)

When Patricia moved to Oklahoma in November, 1994, appellant was already there with his family. Appellant was staying with their mother, but moved to an apartment and they often saw each other. Tina and appellant spent time with the children, loved each other, and had a good marriage. After Tina went back to California, they talked to each other and she visited during the holidays. (54 RT 8163-8164.) She knew that they still loved each other. (54 RT 8165.)

5. Janet McCord

Appellant's aunt, Janet McCord, knew him throughout his life. (53 RT 8036.) Appellant has always been respectful to her, treating her more like a mother than an aunt. (53 RT 8038.)

James was abusive to Joe Ann. One time he put a gun on her when they were together. Another time he put a dead snake in her lap when they were playing cards. (53 RT 8042.) Janet picked up Joe Ann one time after James had lost money gambling. He had hit her and blood was running from her head. (53 RT 8043.)

There were many times when the children were around during these incidents. (53 RT 8044.) She took it upon herself to get the girls away from him and they came and lived with her. (53 RT 8046.) Appellant, however, stayed with his mother. (53 RT 8048.)

After appellant married, he seemed to have a very good marriage to Tina. They were in love and treated each other with respect. (53 RT 8046.) She knew that appellant has been convicted of the crimes in this case. but continued to love him. (53 RT 8047.)

6. Tina Johnson

Tina Johnson met appellant when she was 15 years old. (52 RT 7962.) It did not bother her that appellant had been in prison for manslaughter because he was always nice to her. During the time that they dated, he returned to prison for a parole violation, but the relationship continued and they married when she turned 21. (52 RT 7963-7965.)

Tina's mother, Estella Coachman, testified that she knew that appellant had been in prison for manslaughter. However, she talked with him and any concerns that she had were overcome by appellant. He was respectful and showed his love to Tina. (54 RT 8221-8223.)

After Tina and appellant were married, appellant's daughter, Lumora, lived with them. Her mother had been found to be unfit because of drugs and they gained legal custody in March, 1993. She continued to live

with Tina after appellant was arrested in the present case. (52 RT 7967-7968.)

They had a son, Jihad (whose name means "struggle within"), who was born in November, 1993. (52 RT 7966.) Appellant loved his family and worked hard at his job at Club Distribution, becoming "employee of the month" there. (52 RT 7974.) He wanted to have a big house so he could have dogs and horses for the children[18]. (52 RT 7977.)

They separated for a short time in April, 1994, when Tina was feeling depressed after the birth of Jihad. They continued to see each other during this period, and appellant bought her a bike so they could ride together. (52 RT 7971.)

After the Lopez shooting, appellant was in Oklahoma for almost two years until his arrest in 1996. (52 RT 7971.) She visited there frequently and lived in Oklahoma for almost five months until she took a permanent job as a secretary in a Riverside school. (52 RT 7972-7973.) She knew that appellant had a brief affair with someone in Oklahoma, but Tina did not believe it was a sexual relationship. (52 RT 7973.)

After appellant was arrested, he continued his relationship with his children, giving them advice, helping them with homework during their

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[18] Appellant's former landlord testified that Tina and appellant were model tenants. They paid the rent on time and maintained the house and property. They were friendly and seemed to be a loving couple. She made an exception for them and allowed them to have dogs. (52 RT 7951-7953.)

visits, and encouraging them with school. (52 RT 7979.) She loved him and knew that appellant loved her and the children.[19/] (52 RT 8002-8003.)

7. Dr. Gretchen White

Dr. Gretchen White, a psychologist, recounted appellant's family history and the effect that various problems had on him. She stated that three aspects were particularly significant: family instability, lack of a father, and physical and emotional violence within the family. (56 RT 8325.)

Appellant was born in 1965, the third child in the family, although he never met his biological father. He had twin sisters, Patricia and Patrina, who were fathered by James Johnson in 1963. (56 RT 8625.)

When he was two, his mother, Joe Ann, married Littleton Williams. The marriage did not last long, and Williams was married to another woman during this time, but Joe Ann had a child with him. After this, Joe Ann lived with Alto Lee, an alcoholic, but a hard worker who was decent to his family. They stayed together for five years. Joe Ann began living with James Johnson when appellant was about six. They married in 1975. (56 RT 8326.)

[19/] In addition to this testimony, appellant presented several witnesses who testified about the strength of the relationship that appellant enjoyed with his wife and children. Estella Coachman testified that appellant and Tina loved each other. Tina continued to love him and Coachman believed that appellant could still play an important role in his children's lives. (54 RT 8225, 8229, 8231.) Stella Nick knew appellant for 15 years. He was like a big brother to her children. She believed that he had a beautiful relationship with Tina. (54 RT 8125-8128.) Bayyinah Nick testified that appellant was a brother to her. He was a good husband to Tina and a good father to his children. (54 RT 8136-8143.)

James was violent even before they were married. The twins had been subject to beatings with electric cords and frying pans. (56 RT 8362.) This pattern escalated after Joe Ann's father died in 1975. James was extremely violent toward his wife and the twins, and to a lesser extent towards appellant. (56 RT 8326, 8361.) James terrorized the family, both physically and emotionally. (56 RT 8332.) He beat the girls and insulted them, calling them bitches and whores. He told them that they would never amount to anything. Although the level of violence directed to appellant was not as extreme as that inflicted upon the girls, he was beaten a couple times a month. (56 RT 8334.)

According to Dr. White, Joe Ann fit the pattern of a classically abused woman, the battered wife. (56 RT 8326.) The typical pattern involves three periods: initial tension when violence is imminent, the actual violence, and a period of separation and reconciliation. Joe Ann often left following a beating, but James courted her and treated her like a queen until she came back and the cycle started over again. (56 RT 8336-8337.) Battered women also minimize the extent of the violence and feel guilty about it. (56 RT 8360.)

The children did not want to call the police when James was violent because he told them he would kill their mother. Joe Ann was also reluctant to press charges. When the police were called, they often ended up giving James a warning. (56 RT 8335.) If James was arrested, the charges would be dismissed after Joe Ann refused to testify. (56 RT 8336.)

On one occasion, the police were called after James pulled a gun on Joe Ann and pointed it at her stomach. Appellant reached up to grab the gun and was thrown back on the coffee table. When the police arrived,

James was gone and the gun was hidden in the backyard. (56 RT 8326-8327.)

Appellant withdrew as a result of the turmoil. He was fond of dogs and would try to stay out of the way by being with them. He felt helpless and guilty. He occasionally tried to intervene and told James that when he got to be a man, he would never let him hurt his mother again. (56 RT 8337.)

There was significant instability throughout appellant's childhood. By the time he was six years old, he had lived with three different men and had never met his real father. (56 RT 8328.) His family lived in numerous locations during his childhood, primarily in Compton, Riverside, and Oklahoma. (56 RT 8326.) They lived in at least 17 different places. He attended four different elementary schools and four different junior highs. They usually moved when James lost his job and the family could not pay the rent, or when Joe Ann left James. She waited until he was asleep or out of the home, and then packed up the kids and called relatives. Sometimes they would stay for a few days, sometimes for a couple of months. The children did not go to school during that time. (56 RT 8328.)

Children who move in and out of classrooms get different teachers who use different curriculum. They are isolated because they are not able to form long term relationships. A child growing up in this environment has a basic sense of uncertainty, not knowing what is going to happen. For such a child, the world is a very unstable place. (56 RT 8339.)

Appellant got poor grades when he was in the 8th grade. His IQ was listed as 78, but Dr. White believed that might have been due to poor education, a chaotic upbringing, and lack of exposure to an enriched environment. His high school records indicate that he did better. He dropped out in the 10th grade to help support his family. (56 RT 8364.)

Appellant never met his father and developed a lifelong yearning to fill that need. The other men in his life served to perpetuate that sense of loss and longing. When appellant was eight years old, living in Oklahoma, a relative of his father was going to pick him up so they could meet. Appellant was dressed up and very excited, but his father did not show up. (56 RT 8330.)

Appellant formed an attachment to James because he felt that James loved him enough to give him his name and take him on as if he were his father. James's name was very significant to appellant. When James was angry or had been drinking, he hurt appellant by telling him that he was not his son. (56 RT 8331.) Appellant had such a strong need for a father that this was more hurtful than any physical abuse. (56 RT 8332.) On one hand, appellant was very close to James because he was his father figure, but on the other hand, he despised him for what he did to his mother and sister. (56 RT 8338.)

Joe Ann finally left James for good when appellant was 16 years old. (56 RT 8337.) However, appellant's experiences affected him throughout his life. He was very protective of his sisters. He reacted very quickly and overreacted to perceived threats. (56 RT 8340.) He had a low frustration tolerance and impulse problems that can lead to violence. (56 RT 8340, 8353, 8355.)

G. Institutional Mitigation

Appellant was 18 when he was imprisoned for manslaughter. (53 RT 8012.) Peter Scalisi was the prosecutor in that case. Appellant had requested to be sent to the California Youth Authority (CYA), but the trial court refused to do this. Although Scalisi opposed the request, he did not have strong feelings about it, and could not recall any other case where a

defendant under the age of 21 had not been sent to CYA. (53 RT 8010-8011.) Scalisi was particularly surprised because appellant looked so young. (53 RT 8012, 8034.)

Robert Richardson, a parole agent for a youth facility, testified that CYA was a place for youthful offenders, who could be housed there through the age of 25. (54 RT 8186-8187.) CYA wards are assessed for educational and vocational needs. Wards may be placed in specialized counseling, intensive treatment, or general population. (54 RT 8189.) An 18 year-old with a manslaughter conviction would have been accepted into the CYA. (54 RT 8191.) Wards must complete a violent offender program before being housed with the general population. (54 RT 8201.) They would be placed in a weekly group with similar offenders, where they are encouraged to address contributing factors that led up to the offense. They work with a psychologist on both anger management and victim awareness. (54 RT 8193, 8194.) A ward must work with the program or he is sent to the Department of Corrections. (54 RT 8203.) But the emphasis at the CYA is on rehabilitation rather than punishment and there have been real success stories where wards have turned their lives around. (54 RT 8206.)

Instead of CYA, appellant was housed as an adult in the Department of Corrections (CDC). William Rigg worked for the CDC for 17 years, retiring as a program lieutenant with experience in both the general population and segregated housing unit (SHU). (55 RT 8253.) According to Rigg, the SHU units are for prisoners who are a threat to safety or security. (55 RT 8266.) It was an extremely violent environment. Prisoners were placed on yards with known enemies so that officers could watch them fight. (55 RT 8270.) A prisoner who had four fights in 13 months would be regarded as a relatively well-behaved inmate. It was

impossible for prisoners to avoid fights and survive. (55 RT 8276.) Younger looking prisoners were particularly vulnerable. They were subject to predators and tested in many ways. (55 RT 8277, 8278.)

In addition to this testimony, appellant presented several witnesses who had been cellmates with him in the Riverside County jail. Kenneth Jones testified that appellant encouraged and supported him, to the extent that his mother continued to correspond with appellant and considered him a second son. (56 RT 8316-8317.) Reginald Brimmer requested appellant as a cellmate and stated that appellant helped him by discussing spiritual matters, reading, and talking about relationships. (54 RT 8111, 8114-8115.) Steven Pete testified that appllant gave him a shoulder to lean on and talked about positive things. (53 RT 8055.) Appellant gave Dylan Dunn good advice, teaching him how to play chess, and discussing spiritual matters. (53 RT 8061, 8063.) Appellant also helped Damion Moore by teaching him to be patient and to talk things through if problems arose. (53 RT 8073. 8074.) None of these people had any problems with appellant, they were not threatened by him in any way.

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ARGUMENTS

I.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO SEVER THE TWO UNRELATED MURDERS, VIOLATING APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND A FAIR AND RELIABLE VERDICT

On November 15, 1995, appellant was charged in a felony complaint only with the first degree murder of Marin Campos. (1 CT 1.) The complaint was amended on June 5, 1996, to add a second count charging appellant with the murder of Lopez.[20/] (1 CT 10.) Following the preliminary hearing and appellant filed a motion for severance of these charges under Penal Code section 954. (3 CT 497.) The trial court denied this motion, finding that the interests of justice would not be served by severing the counts. (1 RT 141.) The trial court abused its discretion in refusing to sever the cases and the resulting prejudice violated appellant's state and federal constitutional rights to a fair trial and reliable jury verdicts in this capital case. (Cal. Const., Art. 1, §§ 7, 15; U.S. Const., 8th & 14th Amends.)

A. The General Principles of Law

Penal Code section 954 authorizes the state to join two or more offenses of the same class of crime in one pleading. In relevant part, it provides:

> An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown,

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[20/] Lopez was identified in the Amended Information as "Candy Camarino."

> may in its discretion order that the different offenses or counts set forth in the accusatory pleading be trid separately . . . .

The purpose of the statute 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.)

That joinder may be preferable under California law does not mean that it is acceptable in all circumstances. The state's interest in joinder must be considered in light of the state and federal Constitutions guarantees of the right to a fair trial. (U.S. Const., 5th & 14th Amends.; Calif. 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* (1984) 36 Cal.3d 441, 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 weigh the potential prejudice against the state's interest in joinder and consider whether any actual and substantial benefits will be gained from a joint trial. (See, e.g. *People v. Bean*, *supra*, 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.)

Moreover, the constitutional protections are particularly important in a capital case, since 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 the joinder links capital and noncapital offenses that may render the defendant 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.)

Reversal is required if the effect of the joinder was so prejudicial as to deprive the defendant of a fair trial or due process of law. (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, this Court must reverse the judgment in this case if there is a reasonable probability that the joinder affected the verdict. (*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 [prejudicial effect of state court's denial of severance motion violated defendant's due process right to fair trial].)

Federal courts have recognized that "'a high risk of undue prejudice [exists] whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.'" (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1084, quoting *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.) That is because jurors at a joint trial cannot adequately "compartmentalize" damaging information about the defendant, and because such a trial often "prejudice[s] jurors' conceptions of the defendant and of the strength of the evidence on both sides of the case." (*United States v. Lewis*, *supra*, 787 F.2d at p. 1322; *Bean v. Calderon*, *supra*, 163 F.3d at p. 1084.)

The risk of prejudice is higher when charges are joined because they are similar, rather than "based on the same transaction," or "connected

together or constituting parts of a common scheme or plan . . . ."[21] (*United States v. Pierce* (11th Cir. 1984) 733 F.2d 1474, 1477; *United States v. Halper* (2nd Cir. 1978) 590 F.2d 422, 430.) But the risk of prejudice is always high at a joint trial, because jurors are prone to regard a defendant charged with multiple crimes "with a more jaundiced eye." (*United States v. Smith* (2nd Cir. 1940) 112 F.2d 83, 85.)

Accordingly, in determining whether joinder should be allowed, 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 of the 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*, *supra*, 15 Cal.4th at pp. 27-28.)

Overall, a court should order severance in the trial of otherwise joinable offenses when it appears that separate trials are required in the interest of justice. (*People* v. *Bean*, *supra*, 46 Cal.3d at p. 935.) Thus, the criteria developed by reviewing courts may be of aid in arriving at the

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[21] Federal Rule of Criminal Procedure 8(a) provides that offenses may be joined only "if [they] . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

ultimate decision regarding whether to sever or join offenses, but the final test is whether a denial of severance, or the granting of joinder, denied the defendant a fair trial. (*Ibid.*)

B. The Trial Court Abused its Discretion by Finding That Severance of the Charges Would Not Serve the Interests of Justice

Appellant did not dispute that the two cases were of a similar class and could be joined under Penal Code section 954. (3 CT 9.) However, appellant argued that severance was warranted under state law and federal constitutional standards because the cases were not cross-admissible and both cases were weak, creating a substantial risk that the jury would convict based upon the spillover effect of the aggregate evidence. (3 CT 497-534.) These factors make it clear that the trial court erred in not granting appellant's motion to sever the charges.

1. The Evidence was Not Cross-Admissible

When two or more offenses of the same class of crimes have been charged, evidence need not be cross-admissible before they are tried together before a single jury. (Pen. Code, § 954.1.) However, as discussed above, cross-admissibility is a key factor in determining the propriety of joinder of charges. (*People v. Memro* (1995) 11 Cal.4th 786, 850.) 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. Soper* (2009) 45 Cal.4th 759, 774.)

"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.)

Appellant argued that the Lopez and Campos homicides were two very distinct crimes that occurred under very different circumstances. Appellant acknowledged that he was "responsible for the shot that killed" Lopez. (1 RT 133.) However, he maintained that her death involved a struggle between appellant and Jose Alvarez – Lopez was shot when she tried to intervene and the gun that appellant was carrying went off. The Campos crime occurred long after this event. It involved a drug deal and a plot to avenge an alleged robbery that Campos was believed to have masterminded. (1 RT 132.)

In the Lopez shooting, the only issue was appellant's intent. The facts of the Campos shooting were not cross-admissible to establish this intent. Indeed, in order to show intent, the two crimes must be substantially similar to support the inference that appellant probably harbored the same intent in each instance. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402; *People v. Guerrero* (1976) 16 Cal.3d 719, 728.) The Campos homicide had no connection to the Lopez shooting other than that appellant was alleged to have committed both offenses and Todd Brightmon was said to have been present at each.

The primary theory advanced by the prosecutor to show cross-admissibility between the two cases was that Oscar Ross alleged that appellant was at his house the night before the Campos murder. According

to the prosecutor, appellant admitted that he had killed Lopez. Ross stated that appellant had a hatred of Mexicans and had said, "It is easier to kill someone the second time."[22/] (1 RT 135; 3 CT 689.) The prosecutor argued that these statements were important in the Lopez shooting and that a severed jury could not fully evaluate Ross's credibility without hearing the extent of his testimony in the Campos murder. The prosecutor argued that severing the cases would mislead the jurors about Ross. (3 CT 689.)

None of these allegations used by the prosecutor to argue against severance established appellant's intent at the time of the Lopez shooting – his role as a shooter was not contested; his alleged hatred for Mexicans was not advanced as a reason for the Lopez shooting – indeed, Lopez was friends with appellant, indicating that he did not have a universal hatred. (1 CT 31 [preliminary hearing testimony of Jose Alvarez]). Even if appellant said that it was easier to kill a second time, this did not establish his intent

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[22/] At trial, Ross denied that appellant had spoken to him about the Lopez shooting or that he knew about the shooting at the time of the Campos murder. (19 RT 2878-2881.) Ross testified that appellant mentioned that "it comes easy" to kill someone, but Ross did not assume that it was said in regard to the Lopez case. (19 RT 2880.) During a break in the trial, Ross listened to an interview with him that was taped by Detective Kensinger, but denied that he told Kensinger that appellant had admitted shooting a Mexican girl in Casa Blanca. (19 RT 2909.) Ross did not testify that appellant hated Mexicans. Ross stated that he heard about the Casa Blanca shooting while he was in jail. (18 RT 2987.)

George Callow, a Riverside police investigator, testified that Ross told him that appellant had stated that he shot a girl in Casa Blanca who was Mexican and that it was easy for him to kill her. (21 RT 3193.) Sergeant Horst testified that Ross told him that the person "everybody knows" that they were seeking in the Campos crime was the same person who had shot a girl in Casa Blanca. (21 RT 3203.)

in the Lopez shooting. Appellant could have said this even if the Lopez shooting was accidental.[23/]

Moreover, if the counts had been severed, the jurors would not have been misled in the Lopez case as the prosecutor argued. (1 RT 135.) In a separate trial, the jurors could have assessed Ross's credibility as any other witness is assessed. (See Evid. Code, § 785, *et.seq.*) Even if the jurors would not have heard all of the details about the Campos shooting during the Lopez trial, the jurors would have been able to determine whether the statements that appellant allegedly made *before* that shooting took place were believable.

That some evidence concerning Ross would not be heard in separate trials does not mean that the evidence of the Campos murder was cross-admissible in the Lopez shooting, as the prosecutor seemed to argue. Because certain evidence concerning Ross's activities in the Campos murder would not be heard in the Lopez case, the evidence in this case was *not* cross-admissible because it would not be heard in each trial. (*People v. Soper*, *supra*, 45 Cal.4th 759, 774.) At bottom, the underlying facts of the Campos murder would not have been admissible in the Lopez case for their truth and the prosecutor did not argue otherwise.

In the Campos case, in which appellant presented an alibi defense, the prosecutor contended that Todd Brightmon's presence at both shootings established the kind of partnership that made it more likely that both appellant and Brightmon were involved in the killing. (1 RT 137, 3 CT 689-690.) The prosecutor argued that Brightmon, Ross, and appellant all

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[23/] The first shooting presumably referred to the Estrada homicide, in which appellant was convicted of voluntary manslaughter.

knew about the Lopez shooting and it was part of the basis for their partnership and trust that made it more believable that they would be drawn together in the plan to rob Campos. (3 CT 690.)

The prosecutor's argument was flawed in several respects. Brightmon was a witness in the Lopez shooting, but did not participate in the incident and was not charged in that crime. His presence at the Williams house did not indicate any particular partnership apart from their general friendship.[24/] Indeed, after Lopez was shot, the two went their separate ways: Brightmon stayed in Riverside and appellant fled to Oklahoma, indicating that the "partnership" was limited at best. There was no evidence that appellant's role in the Lopez shooting caused either Brightmon or Ross to trust him more while the Campos robbery was allegedly planned. The prosecutor could have established that Brightmon and appellant were friends without bringing in the details of the Lopez shooting. Accordingly, Brightmon's presence at both events did not render the facts of the Lopez shooting to be cross-admissible in the Campos case.

The prosecutor also argued that Tina Johnson attempted to provide appellant an alibi for the Lopez murder and that it would affect her credibility should she testify to provide an alibi in the Campos matter.[25/] (3 CT 890.) Although Tina may have been subject to impeachment, this is

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[24/] At trial, it was only established that appellant was with a group of men on the porch, including Brightmon. (See 12 RT 2009 [Galloway testimony]; 20 RT 3127 [Alvarez] 22 RT 3393 [Brightmon].) Galloway testified that appellant yelled, "Todd" after the shooting. (12 RT 2010.) The most that could be shown from this was that appellant and Brightmon were friends. This did not show any kind of partnership that made it likely that appellant participated in the Campos murder.

[25/] Tina Johnson did not testify as an alibi witness at trial.

separate and distinct from the crime itself. At bottom, the facts of the crimes themselves were distinct and would not be admissible in the separate cases. (*People v. Balderas*, *supra*, 41 Cal.3d at pp. 171-172.)

None of the reasons advanced by the prosecutor established that the events of the two shootings would be admissible in separate trials. Accordingly, the lack of cross-admissibility weighed in favor of severance.

2. Appellant offered to testify in the Lopez case

Appellant represented to the trial court that he wanted to testify in regards to the Lopez shooting. (1 RT 133; 3 CT 516.) Because appellant's intent was the only contested issue in that case, his testimony would have been an important part of his defense. Appellant argued that his willingness to testify about Lopez, but his silence about Campos, would be prejudicial. (*Ibid.*)

In *People v. Smallwood*, *supra*, 42 Cal.3d 415, the defendant presented a defense to one count against him, but not the other. This Court emphasized that "his willingness to testify as to one charge could not help but leave an unfavorable impression with regard to the other." (*Id.* at p. 432, citing *Cross v. United States* (D.C. Cir. 1964) 335 F.2d 987, 989 ["a defendant's silence on one count would be damaging in the face of his express denial of the other"].)

The prosecution argued that this factor did not make severance mandatory. (1 RT 137, citing *People v. Sandoval* (1992) 4 Cal.4th 155, 174.) While this situation may not mandate severance, it nevertheless is a factor to consider in weighing the interests of justice. Appellant was in a "Catch-22" situation, in which he needed to explain his intent in the Lopez case, but his silence about Campos, which was being tried as a capital case

with special circumstances, would be particularly harmful. Thus, this factor weighed in favor of severance.

3. The interests of justice required severance

Since cross-admissibility is not the end of the inquiry regarding consolidation, and these offenses are the same class of crime, this Court must weigh the prejudicial effects of joinder against its benefits to determine whether the trial court erred in consolidating these cases for trial. In doing so, this Court must consider the benefits of a joinder when juxtaposed against factors such as whether certain of the charges are unusually likely to inflame the jury against the defendant, whether a weak case has been joined with a strong case, and whether any of the charges carries the death penalty. (*People v. Cunningham* (2001) 25 Cal.4th 926, 985.)

This Court has found that consolidation of charges is generally a preferred method of trial because it promotes efficiency. It avoids the needless harassment of the defendant that results from separate trials and the waste of public funds that results from presenting the same general facts before separate juries. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) In *People v. Soper*, *supra*, 45 Cal.4th at p. 781, this Court emphasized that if properly joined charges are severed, the burden on the public court system of processing the charges is substantially increased. It noted that severance of properly joined charges denies the state the substantial benefits of efficiency and conservation of resources otherwise afforded under Penal Code section 954. (*Ibid.*)

However, this does not mean that charges that may be joined under Penal Code section 954 must inevitably be consolidated. Since joinder will always eliminate the need for separate trials, the issue is whether judicial

efficiency alone weighs more than the interests of justice favoring severance. In *Soper*, this Court held that justice did not demand severance because the cases were similar in nature, when compared to each other, and neither case was likely to unduly inflame a jury against the defendant. (*People v. Soper*, *supra*, 45 Cal.4th at p. 780.) This Court also found that the proffered evidence was sufficiently strong in both cases to avoid a spillover situation where the outcome of one or both cases might be altered as a result of consolidation. (*Id.* at p. 832.) In contrast, joinder in this case presented a far greater danger that the charges in one case would affect the juror's consideration of the other.

The consideration of whether certain of the charges would inflame the jury against the defendant is a complex one. As this Court has made clear, the issue is not necessarily whether the jurors would have their passions aroused more by one crime than the others, but rather whether the jurors can be expected to try the crimes fairly. This Court has recognized that it can be error to join an inflammatory charge with a less egregious one "under circumstances where the jury cannot be expected to try both fairly." (*People v. Mason* (1991) 52 Cal.3d 909, 934.) The rule guards against the danger that evidence in one case might be used to bolster the case on another crime. (*Ibid.*)

Similarly, the Court has examined whether the mere fact that a defendant is charged with multiple offenses may contribute to a guilty verdict. Even "'when cautioned, juries are more apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one.'" (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 432, fn. 14, quoting *United States v. Halper* (2d Cir. 1978) 590 U.S. 422, 431.) Accordingly, as this Court has recognized, joinder "should never be a vehicle for bolstering

one or two weak cases against one defendant." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454; see *Bean v. Calderon*, *supra*, 163 F.3d at p.1086 [potential for undue prejudice from joinder of strong evidentiary case with a weaker one]; *Lucero v. Kerby* (10th Cir. 1998) 133 F.3d 1299, 1315 [danger in consolidation of offenses is that overlapping consideration of the evidence will lead to convictions of both].)

Here, joinder unfairly affected the jury's consideration of the charges against appellant. In the Lopez case, appellant's potential liability ranged from first degree murder to manslaughter. Jose Alvarez's testimony at the preliminary hearing showed that the shooting occurred after he and appellant exchanged racial slurs earlier in the day. (1 CT 25, 27.) Just before the shooting, Alvarez made a U-turn, stopped his car, got out, and made a gesture that could have been taken as an invitation to fight. (1 CT 31, 33, 63.) Alvarez was angry and ready to fight appellant. Appellant then picked up the shotgun and walked towards him. (1 CT 63.) Appellant swung the gun at Alvarez and the two began to struggle. At one point, Alvarez was able to grab the gun. (1 CT 37.) Lopez stepped close to Alvarez, to just one side. (1 CT 42.) Alvarez stated that appellant brought the gun around, past Lopez, but that he was not certain if appellant was going to strike him or point the gun at him. He did not see appellant pull the trigger. (1 CT 38, 61.) Lopez was still on the side when she was shot. (1 CT 40.) Under these circumstances, appellant's actions and intent were very much at issue: the shooting occurred in the midst of a fight, after heated exchanges, and appellant did not shoot directly at Alvarez.

The Campos case was likely to affect the jury's consideration of these matters. Indeed, at the preliminary hearing, Margie Escalera testified that appellant shot Campos after the two of them struggled. (1 CT 98.) A

juror could have found that if appellant committed the Campos murder with premeditation and deliberation as the prosecution alleged, then he would similarly have intended to shoot Alvarez. Appellant's disposition alone would have influenced their consideration of whether the crime was murder or manslaughter. Under these circumstances, joinder was likely to have created a spillover from one case to another.

Appellant's trial counsel also contended that joinder made it easier for the jurors to dismiss appellant's alibi defense and find that appellant killed Campos. (3 CT 513-516.) The case against appellant rested largely upon the testimony of Oscar Ross and witnesses who were living on his property or had close ties to Ross.[26/] At the preliminary hearing, Margie Escalera, Ross's companion and caretaker, testified that she was trying to keep Ross out of trouble when the sheriff's investigators interviewed her. (1 CT 141.) The one witness who had no ties to Ross, Jose Garcia, had been unable to identify appellant when questioned by investigators at a photo lineup. He did not identify appellant until the preliminary hearing, after receiving immunity on the drug charges. (16 RT 2538-2539, 2540-2542; see also 56 RT 8470.) Credibility, then, was an important consideration. As a result of hearing evidence about the Lopez case, jurors would be more willing to credit the testimony against appellant if they found the alleged actions in the Campos case were in keeping with his disposition in the Lopez shooting.

[26/] Ross did not testify at the preliminary hearing. At trial he testified under a plea agreement that reduced capital charges to second degree murder, and required the prosecutor to support his release at the earliest possible date. (2 Supp. CT 10-11.)

This Court has provided trial courts with guidance in assessing the relative strength of charges for severance purposes. In *Williams v. Superior Court*, *supra*, 36 Cal.3d 441, the trial court denied the defendant's motion to sever two murder cases against him, both of which raised a question of identity. In one case, a burst of gunfire was heard and "[s]everal witnesses placed petitioner Williams in the group of assailants and saw him run from the scene along with the others." (*Id.* at p. 445.) Witnesses testified that the defendant did not know the victim; however, the defendant was a member of the Bloods and the victim was a friend of, or affiliated with, a rival gang. (*Ibid.*) In the other, an eyewitness identified the defendant as one of three occupants of a car from which a gun was fired, killing the victim. The victim was in territory claimed by a rival gang and wearing that gang's colors. The defendant later allegedly said that members of a rival gang were "hassling" him about the murder. (*Id.* at pp. 445-446) This Court characterized the cases as "involving the joinder of one weak case and one strong case or alternatively of two relatively weak cases." (*Id.* at p. 453.) It acknowledged, "Others obviously may differ in their assessment of the relative strengths of the two cases, but under either approach the danger of prejudice remains manifest." (*Ibid.*, fn. 10.)

Similarly, in *People v. Smallwood*, *supra*, 42 Cal.3d 415, the trial court denied the defendant's pretrial motion to sever two unrelated murder charges against him based on the preliminary hearing evidence. A witness to the first murder testified at the preliminary hearing that she had seen the defendant and had heard him say that he "had a piece" or a gun and was "going to make some money." Shortly thereafter, she heard the sound of gunshots. She ran in their direction and saw the defendant with several other people around a body. The defendant bent over the body, his hands

empty, before running away. The victim's empty wallet was later found 300 feet from his body. About 45 minutes later, the witness saw the defendant with a gun. She did not come forward with her account until seven or eight months later, after she had been shot by her cousin. While she explained that she did not come forward sooner because she did not want to get involved, there was also evidence that a motive to fabricate arose in the interim: she believed the defendant had encouraged her cousin, who was also the defendant's girlfriend, to shoot her. (*Id.* at pp. 422-423.) This Court characterized the evidence as weak and concluded that "such thin evidence must necessarily have been bolstered by allowing the jury to receive evidence of the unrelated [second] homicide." (*Id.* at p. 430.)

Using *Williams* and *Smallwood* as a benchmark, the evidence on which the severance motion was based as to both charges against appellant was weak. At the very least, the evidence as to the Lopez murder charge was exceedingly weak as compared to the Campos case. In either case, the aggregate effect of the evidence weighed heavily in favor of severance.

This Court has long 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].) The evidence of criminal disposition inherent in both the Lopez and Campos cases was exactly this type of prejudice.[27/] Accordingly, the trial court erred in finding that the interests of justice did not support severance.

C. Due Process Required Severance

Even if this Court decides that the trial court's consolidation ruling was correct at the time it was made, this Court must reverse the judgment if joinder actually resulted in gross unfairness amounting to a denial of due process. (*People v. Arias*, *supra*, 13 Cal.4th at p. 127.) The general law regarding the standards to apply in making this type of determination is discussed above. Application of those standards to the facts of this case reveal the type of gross unfairness that compels reversal.

[27/] Appellant presented numerous studies that indicated that there was an increased likelihood of conviction when the nature of the offenses leads a jury to infer a criminal disposition or propensity. (3 CT 519-527; 546-643.) As discussed above, these studies confirm what courts have long recognized: joiner invites a jury to improperly infer the defendant has a criminal disposition and is therefore guilty of both charges. (See , e.g. *People v. Thompson*, *supra*, 27 Cal.3d at p. 314 [prejudicial effect of joinder].)

In particular, this Court has recognized that only when the evidence on each count is overwhelming, or at least extremely strong, can a reviewing court be confident that prejudice did not result from the joinder of charges. (See *People v. Odle* (1988) 45 Cal.3d 386, 404; *People v. Lucky* (1988) 45 Cal.3d 259, 278.) When that standard is applied to the facts extant here, a prejudice finding is required.[28/]

As discussed above, both cases had weaknesses that were affected by joinder. The jurors deliberated for a substantial period and had difficulty reaching a verdict in both cases (29 RT 4395, 4400;14 CT 3695a [on fifth day of deliberations, jurors could not reach verdict on either count].) The jurors eventually reached a verdict after seven days of deliberation. (14 CT 3700a.) Under these circumstances, the verdict must be seen as very close. (See *People v. Cardenas* (1982) 31 Cal.3d 897, 904-907; [length of deliberations indicates closes case]; see also *Parker v. Gladden* (1966) 385 U.S. 363, 365 ["the jurors deliberated for 26 hours, indicating a difference among them"]; *Dallago v. United States* (D.C.Cir.1969) 427 F.2d 546, 559 [close case established after the jury deliberated for five days before returning its verdict].)

Given this closeness, the Court should find that this case is a prime example of the "spillover effect" that can render joint trials fundamentally unfair. (See *United States v. Lewis*, *supra*, 787 F.2d at p. 1322; *Drew v. United States* (D.C. Cir. 1964) 331 F.2d 85, 88.) Indeed, the joinder of

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[28/] In applying this standard, it is important to bear in mind that the test is not whether it is unlikely the jury would have returned a guilt verdict on one of the charges if there had been no joinder; that would be a sufficiency of the evidence issue rather than a joinder issue.

these charges permitted the state to use appellant's disposition against him in both charges. As the prosecutor argued, Lopez died because Alvarez fought back against appellant (27 RT 4103.) Campos was "another person who died" because he resisted appellant. (27 RT 4108.) As he summed up, "Two people are dead. Two lives were brutally ended because they resisted [appellant]." (27 RT 4142.) The combined weight of the evidence brought into the cases as a result of the joinder thus led jurors to conclude that appellant had the malice necessary for second degree murder in the Lopez shooting and strengthened the case against appellant in the Campos homicide. Under these circumstances, this Court should find that joinder unfairly influenced appellant's trial in significant ways that violated due process standards.

D. Reversal is Required

The trial court's order consolidating these offenses for trial constituted an abuse of discretion under state law (see *People v. Bradford* (1997) 15 Cal.4th 1229, 1315-1318 [ordering joint trial reversible error when it results in demonstrable prejudice to defendant]), and resulted in a trial which was fundamentally unfair and unreliable under both the state and federal constitutions. (U.S. Const. 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 15, 16, and 17; see *People v. Arias*, *supra*, 13 Cal.4th at p. 127; *Featherstone v. Estelle*, *supra*, 948 F.2d at p. 1503.) It also constituted an arbitrary denial of appellant's right to separate trials as provided under state law, in violation of the Due Process Clause of the Fourteenth Amendment. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

This Court has held that reversal is the appropriate remedy where a joint trial caused gross unfairness and deprived the defendant of due process of law. (*People v. Turner* (1984) 37 Cal.3d 302, 313.) Here, as discussed

above, joinder improperly affected both cases. Under these circumstances, the judgment against appellant must be reversed. (*Ibid.*)

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II.

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION CHALLENGING THE DISCRIMINATORY USE OF THE PROSECUTOR'S PEREMPTORY CHALLENGES

The discriminatory use of peremptory challenges to remove African-American and other minority groups from a jury violates both the California and United States Constitutions. (*People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79; Cal. Const., art. I, § 16 [right to jury drawn from representative cross-section of the community]; U.S. Const., 6th & 14th Amends. [Equal Protection Clause].) Indeed, this Court has recognized that the exclusion by peremptory challenge of even a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal. (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

Here, appellant made a motion to challenge the prosecutor's use of peremptory challenges against African-Americans during selection of the alternate jurors. (8 RT 1384.) The trial court considered all the challenges that the prosecutor had made against African Americans and found that there was a prima facie case of discrimination, but denied appellant's motion after the prosecutor stated his reasons for making the challenges. (8 RT 1392.) This ruling was erroneous since the trial court merely noted that the prosecutor appeared to have good reasons, without making the kind of inquiry demanded under *Wheeler* and *Batson*. This Court should review the totality of the relevant factors and find that the trial court erred in its review and that the prosecutor violated appellant's rights in violation of due process and equal protection standards.

A. Legal and Factual Background

Under both state and federal law, the defendant has the initial burden of showing that peremptory challenges are being exercised for discriminatory reasons against a cognizable group. (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 93-97.) When a defendant believes the prosecution is exercising its peremptory challenges on the grounds of group bias alone, it must alert the trial court to the improper tactics, thus triggering the three-step analysis established in *Wheeler* and *Batson*.

First, the defendant must establish a prima facie case of discriminatory use of a peremptory challenge by the prosecution (step one). The prosecution must then provide a facially race-neutral explanation for the challenge (step two). Finally, if a facially race-neutral explanation is tendered, the trial court must determine whether the defendant has established purposeful discrimination by the prosecution (step three). (*People v. Wright* (1990) 52 Cal.3d 367, 399; *People v. Wheeler, supra*, 22 Cal.3d at pp. 280-282; *People v. Batson, supra*, 476 U.S. at pp. 96-98.)

If the trial court finds that there is a prima facie case of discrimination, it must analyze the reasons advanced by the prosecutor to support his peremptory challenge. The critical question in determining whether there has been purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. (*Miller-El v. Cockrell* (2003) 5537 U.S. 322, 338-339.) Accordingly, a trial court has an obligation to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation." (*People v. Hall* (1983) 35 Cal.3d 161, 167-168.)

Batson requires more than a general finding that the prosecutor's reasons appear sufficient. (*People v. Silva* (2001) 25 Cal.4th 345, 386; see also *Galarza v. Keane* (2nd Cir. 2001) 252 F.3d 630, 640 [trial court failed to discharge its duties under *Batson* when it did not adjudicate whether it credited the prosecutor's proffered race-neutral explanations for striking three prospective jurors with Hispanic names].) A trial court's failure to engage in a careful assessment of the prosecutor's stated reasons is reversible error. (*People v. Silva*, *supra*, 25 Cal.4th at p. 386; see *Purkett v. Elem* (1995) 514 U.S. 765, 768 [final step in *Batson* requires trial court to determine whether facially non-discriminatory reasons are implausible or a pretext].)

On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous. (*Snyder v. Louisiana* (2008) 552 U.S. 472 [128 S.Ct. 1203, 1207].) Thus, if the trial court makes such a "sincere and reasoned" effort to evaluate the justifications offered, its conclusions are entitled to deference on appeal. (*People v. Ervin* (2000) 22 Cal.4th 48, 75.) However, where an insufficient inquiry is made and the prosecution's reasons are either unsupported by the record or inherently implausible, the trial court's mere acceptance of the prosecution's reasons is not entitled to deference. (*People v. Silva, supra*, 25 Cal.4th at pp. 385-386; see *Snyder v. Louisiana, supra*, 128 S.Ct. at p. 1212 [reviewing the record to determine that the prosecutor acted with discriminatory intent].)

A reviewing court accordingly must scrutinize the prosecutor's stated reasons: "When there is reason to believe that there is a racial motivation for the challenge, neither the trial courts nor [the reviewing court] are bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it. Any other approach leaves *Batson* a dead letter."

(*Johnson v. Vasquez* (9th Cir. 1993) 3 F.3d 1327.) This Court must therefore consider "all of the relevant facts" when determining the validity of the prosecutor's explanations for the use of his challenges. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-97.)

In this case, during the selection of the alternate jurors, appellant brought a motion challenging the discriminatory use of peremptory challenges under both state and federal constitutions after the prosecutor had struck three out of four African Americans on the jury panel.[29] (8 RT 1384.) The trial court found that there was a prima facie case of discrimination and asked the prosecutor to explain the reasons for his challenges. (8 RT 1386.)

The prosecutor stated that he struck the first juror, Keith Boyd, because he was a retired minister who spent a considerable amount of time in his ministry visiting inmates. Boyd had stated that he leaned on the side of mercy, even though he could consider the death penalty. The prosecutor believed that it was unlikely that he would be able to vote for death. (8 RT 1386-1387.)

The prosecutor stated that he struck Vanessa Huguley, an alternate juror, because she stated that she based her religion on Jesus Christ and the commandment not to kill. The prosecutor believed that her feelings about the death penalty were unclear. She could not commit to whether she would be able to vote for death – she stated that she thought she could but did not know. Further, she was on a civil jury that had not reached a verdict and she was upset at other jurors. The prosecutor also noted that her stepson had been killed but the police wrote it off as a drug-related crime. The

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[29] One African American, juror number 8, was selected to sit on the actual jury. (8 RT 1385.)

prosecutor argued that she had a hard time following the prosecutor's questions and that he was not able to follow what she was saying. (8 RT 1387-1388.)

The final African American alternate juror was Myra Paige. In her initial voir dire, she stated that she would always vote for life without parole, no matter how heinous the crime. Although she said she would be open to consideration of the death penalty, she stated that it was not a realistic option. The prosecutor did not challenge her for cause, but did not believe she would be a good juror for him. (8 RT 1389.)

Appellant's counsel responded by noting that Mr. Boyd was a conservative, retired Seventh Day Adventist minister. Because he visited prisoners as part of his ministry did not make him "a prison groupie . . . or something like that." (8 RT 1389-1390.) Although counsel acknowledged that the prosecutor had "some other reasons," apart from race, for his challenges, the fact remained that three out of four African Americans were excluded.[30/] (8 RT 1391.)

Appellant particularly focused on the prosecutor's challenge of Vanessa Huguley. She was married to a Marine and worked as a security officer on the base. Appellant pointed out that other jurors who were selected by the prosecutor had expressed similar concerns about imposing the death penalty as did Huguley. When she sat on the jury in the civil case, she was upset with the jurors who seemed to have decided the case before it

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[30/] The prosecutor used eight challenges in all. (8 RT 1395-1396.) Thus, almost 38% of his challenges were directed against African-Americans, who were only a small percentage of the entire panel. It appears the prosecutor directed the focus of his challenges on African Americans, making it likely that racial considerations affected his use of challenges.

was complete and did not have an open mind. Appellant believed that she was a "great juror" for both sides who could fairly decide this case. (8 RT 1390-1392.)

The trial court denied appellant's motion, finding that "it does appear that [the prosecutor] has a legitimate peremptory challenge for each of these, for good reasons, and reasons that he stated for the record." (8 RT 1392.)

B. The Trial Court Failed to Engage in a Step Three Analysis to Determine Whether the Prosecutor's Reasons Were Supported by the Record.

The court's stated reason for denying the motion – that it appeared the prosecutor had good reasons for his challenge – was simply another way of stating that the prosecutor had satisfied step two of the *Wheeler/Batson* analysis. As the United States Supreme Court has clearly explained, it is *only* "'at th[e] second step of the inquiry [that] the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is *inherent* in the prosecutor's explanation, the reason will be deemed race-neutral'" and the analysis proceeds to step three. (*Purkett v. Elem, supra*, 514 U.S. at pp. 767-768, quoting *Hernandez v. New York* (1991) 500 U.S. 352, 360, italics added; accord, e.g., *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830, and authorities cited therein [trial court must undertake third step of the analysis and evaluate whether the "facially race-neutral reasons are a pretext for discrimination"].)

As discussed above, at step three of the review, the trial court may not simply accept the prosecutor's explanations at face value, but rather must make a "sincere and reasoned attempt to evaluate" those facially race-neutral explanations and determine whether they are bona fide or pretextual (step three). (*Purkett v. Elem*, *supra*, 514 U.S. at pp. 767-768; *Batson v.*

Kentucky, *supra*, 476 U.S. at p. 98, fn. 20; *United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 969.)

In *United States v. Alanis*, *supra*, 335 F.3d 965, the prosecutor offered facially gender-neutral reasons at step two for his challenges to women. The trial judge denied the defendant's *Batson* motion, stating: "it appears to the court that the government has offered a plausible explanation based upon each of the challenges discussed that is grounded other than in the fact of gender of the person struck. The *Batson* challenge is denied." (*Id.* at pp. 968-969.) The reviewing court held that these remarks made it clear that the trial judge had failed to engage in step three of the *Batson* analysis:

> The government argues that the [trial judge] in fact conducted step three of the *Batson* process by deeming the prosecutor's [race]-neutral explanations "plausible." But under *Batson* it is not sufficient for equal protection purposes that a trial court deem a prosecutor's [race]-neutral explanations facially plausible. Rather, in determining whether a challenger has met his or her burden of showing intentional discrimination, the district court must conduct a sensitive inquiry into such circumstantial and direct evidence of intent as may be, as we noted above. *Batson*, 476 U.S. at 93, 106 S.Ct. 1712. The district court's deeming the prosecutor's explanation "plausible" was not the required "sensitive inquiry."

(*Id.* at p. 969, fn. 3; accord, e.g., *People v. Hall*, *supra*, 35 Cal.3d at pp. 165-166, 168-169 [trial court's statements that *Wheeler* motion must be denied unless prosecutor's explanation admits intent to exclude jurors based on race demonstrated that trial court erroneously failed to undertake third step of *Wheeler* analysis]; *Dolphy v. Mantello* (2nd Cir. 2009) 552 F.3d 236, 239 [trial court's denial of motion with statement, "I'm satisfied that is a race-neutral explanation, so the strike stands," demonstrated that court erroneously terminated the analysis at step two and failed to engage in step

three]; *Riley v. Taylor* (3d Cir. 2001) 277 F.3d 261, 286, 291 [trial court's denial of *Batson* motion with "terse" and "abrupt" "comment that the prosecutor has satisfied *Batson*" demonstrated that it failed to perform "the crucial [third] step of evaluating the State's proffered explanations in light of all the evidence"]; *Jordan v. Lefevre* (2nd Cir. 2000) 206 F.3d 196, 200 [trial court's denial of *Batson* motion with "conclusory statements" that there "is a basis for the challenge" and "there is some rational basis for the exercise of the challenge," simply indicated that prosecutor's explanations were facially race-neutral and, thus, that court did not engage in third step of *Batson* analysis by determining credibility and validity of those explanations]; *Lewis v. Lewis*, *supra*, 321 F.3d at pp. 831-832 [trial court's denial of *Batson* motion with statement that the prosecutor's proffered reason was "probably . . . reasonable" was "more like the analysis required in *Batson* step two than in step three" and thus indicated that court terminated the analysis at step two and failed to engage in step three]; *McCain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1223 [court's denial of *Batson* motion with statements that prosecutor had "articulated a basis which I find to be a good faith articulation of [her] reasons" and, in response to defense counsel's effort to rebut those reasons, "I'm not here to second-guess [the prosecutor's] reasons" demonstrated that the "trial court abdicated its duty to make the ultimate determination on the issue of discriminatory intent"].)

Here, just as in the foregoing cases, the trial court's stated reason for denying the motion was limited to whether the prosecutor appeared to have good reasons for his challenges. (8 RT 1392.) This limited review affirmatively demonstrates that the court terminated the analysis at step two and failed to engage in the critical third step by evaluating whether the prosecutor's "apparently" race-neutral reasons were bona fide or pretextual.

In so doing, the court clearly erred in violation of the state and federal Constitutions.

C. This Court Must Carefully Review the Prosecutor's Reasons for Striking Potential Jurors

Where the trial court has failed to engage in the third step of the analysis, and thus made no determination on the ultimate question in denying a *Wheeler/Batson* motion, it has made no factual findings that are entitled to deference. (*People v. Silva*, *supra*, 25 Cal.4th at pp. 385-385.) That the trial court in this case did not engage in a proper third step inquiry under *Batson* is demonstrated by the reasons given by the prosecutor, which were simply incorrect, implausible, or otherwise demanded further explanation. As this Court has held, "when the prosecutor's stated reasons are either unsupported, inherently implausible, or both, more is required of the trial court['s step three analysis] than a global finding that the reasons appear sufficient." (*Id.* at p. 386.) A sincere and reasoned effort to determine whether the prosecutor's facially race-neutral reasons were bona fide or prextual required the trial court to point out the inconsistencies between the prosecutor's explanations and the true facts and further inquire into his unsupported or implausible explanations. (*Ibid.*; accord, e.g., *People v. Turner*, *supra*, 42 Cal.3d at p. 728.)

Moreover, even assuming that the trial court engaged in an actual third stage analysis, this Court should review whether the inconsistent and improbable explanations advanced by the prosecutor demonstrated racial motives. In *Miller-El v. Dretke* ["*Miller El II*"] (2005) 545 U.S. 231, the United States Supreme Court found that it was not enough for a court to simply accept a prosecutor's reasons for striking potential jurors. Courts

must determine if race was a significant factor in determining who was challenged. (*Id.* at p. 252) Moreover, a court cannot substitute its judgment for that of the prosecutor – it must review the prosecutor's stated reasons rather than develop potential reasons on its own. (*Ibid.*)

Miller-El II used a number of factors to make this determination. It examined statistical evidence (*Miller-El v. Dretke*, *supra*, 545 U.S. at pp. 240-241); determined whether the record supported the prosecutor's reasons (*id.* at pp. 250-251); and contrasted the voir dire of black and non-black panel members (*id.* at p. 255.) In particular, the Court found that side-by-side comparisons between jurors who were excused and those who were selected were powerful evidence to support a claim of discrimination:

> If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered.

(*Id.* at p. 241; see also *id.* at p. 244 [comparing potential juror with the treatment of panel members who expressed similar views].)

Here, one of the primary factors relied upon by the prosecutor to justify his challenge of Vanessa Huguley was an uncertainty about whether she could vote for death. (8 RT 1387.) Appellant objected that other sitting jurors had expressed similar reservations. (8 RT 1390.) Comparative review therefore was squarely before the trial court.

The prosecutor maintained that one of Huguley's initial voir dire answers, citing her religion and the commandment not to kill, led him to doubt whether she could impose the death penalty. (8 RT 1387.) Yet, in its full context, her statement should have given him no such doubt about her position. She said that she could make a decision based on the evidence. She did not have an opinion about the death penalty because she had never

been in a situation of being a prospective juror in a capital trial. Although her religion told people not to kill, she affirmed that "if it was based on the evidence and special circumstances, I can look at it both ways. I really don't have any problem with it." (6 RT 1199.)

In answer to the prosecutor, Huguley stated that before making a decision about life or death, she would need to look at the evidence. (6 RT 1226.) She stated, "if it comes down to everything and I weigh the evidence and the evidence says that he should be put to death . . . . It has to be something really important that I want to see. So I – I think I can." (6 RT 1228.) Indeed, the prosecutor seemed to agree with her approach:

Huguley: I'm not going to give you an answer like "Yeah" right now –

Prosecutor: Sure.

Huguley: – because I do not know yet. But I think I can.

(6 RT 1228.) The prosecutor had no other questions about this issue.

Huguley's answer was appropriate. The decision of weighing the two most severe punishments that the law provides, of holding the life of another individual in the balance, can never be an easy one. As the prosecutor acknowledged, "We hope that [the penalty decision] would be difficult for everybody." (6 RT 1127.) Other sitting jurors – who were not African American – recognized that the decision would be difficult and the best they could answer would be that they thought they could make it. Juror Number 5 said it was hard to answer the prosecutor's question because he had never been on a jury. He acknowledged that he would not want to make the decision for death, but "I think I could." (4 RT 1018.) Juror No. 6 stated that he thought he could impose the death penalty, but he would have to be sure about it, given the difficulty of the decision. Alternate Juror Number 1

stated that it was a hypothetical situation since they did not have the evidence, "And when it actually comes down to it I – I believe I could. But I'm just saying yes now." (5 RT 910; see also 5 RT 1019 [Juror Number 4 agreed with prosecutor that it would be a difficult decision and stated, "I think I could do that"]; 6 RT 1218 [Juror No. 1 recognized difficult decision and stated "I think I could [make it]."].)

Review of the juror questionnaires also shows how similar Huguley's opinions about the death penalty were to sitting jurors. She wrote that she was not against the death penalty, but believed that her feelings did not count.[31] (8 CT 2020.) She rated herself as being "five" on a scale of ten, indicating that she had no particular opinions about the death penalty one way or the other. (8 CT 2021,) Her views were similar to at least half the jurors who decided this case.[32] Accordingly, Huguley's attitude about the death penalty and her willingness to impose it were not substantially different from many sitting jurors, indicating that the prosecutor's challenge was based on racial considerations rather than his inability to determine her attitude toward the death penalty.

Ultimately, the primary theme that the prosecutor returned to in citing his reasons for challenging her was that she would have been a "very bad

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[31] Huguley explained in voir dire that she believed that the opinions of African-Americans did not really count in society as a whole. (6 RT 1228.)

[32] The following jurors indicated that they were generally in favor of the death penalty but had "no opinion" about it. (4 CT 985-986 [Juror No. 2]; 4 CT 1042-1043 [Juror No. 5]; 5 CT 1099-1100 [Juror No. 8]; 5 CT 1137-1138 [Juror No. 10]; 5 CT 1156-1157 [Juror No. 11]; 5 CT 1175-1176 [Juror No. 12].) Only a few jurors had relatively strong opinions in favor of the death penalty.

juror for me on death." (8 RT 1388.) On this crucial point, there was nothing to distinguish her from other jurors who were selected to serve on appellant's jury. It is "powerful evidence" to support a finding of discrimination. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241; see also *Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1212 [finding a *Batson* violation after conducting comparative analysis].) This fact alone "militates against [the] sufficiency" of any other factor advanced by the prosecutor. (*United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 699; see also *Lewis v. Lewis, supra*, 321 F.3d at p. 830 ["The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge"].)

The prosecutor's other reasons for striking Huguley similarly fail under scrutiny. The prosecutor cited her experience in having a stepson murdered. (8 RT 1387.) Huguley stated that she could set aside this experience. (6 RT 1198.) However, this tragedy would have made her more prone to support the prosecution. The police in Michigan had considered the crime to be a drug-related homicide and treated it as if nothing had happened. (6 RT 1198, 1229.) She believed that the case "should have been based on evidence and stuff that was supposed to be in front of the jury people. . . ." (6 RT 1229-1230.) She felt that the police should have done more to find out who committed the crime. To her, the victim was more than somebody who was allegedly involved in drugs. (6 RT 1230.)

Huguley's loss would have helped her to understand the prosecutor's case that ultimately required jurors to believe that Campos was more than a drug or gun dealer, but was a human being who had come to a tragic death. The prosecutor's stated reason for excusing Huguley accordingly does not

provide a plausible reason to support a challenge. (See *Ali v. Hickman* (9th Cir. 2009) 571 F.3d 902, 908 912-913 [prosecutor's explanation that he had challenged black juror because her daughter had been molested was implausible because, if anything, this fact would bias her in favor of prosecution].)

The prosecutor was also concerned that she had served on a hung jury. (8 RT 1388.) Huguley stated that she had expected to deliberate, to listen to what everyone had to say, and then to render a verdict based upon the evidence. Instead, other jurors seemed to have based their votes upon emotional feelings so that the jury could not reach a decision. She emphasized that a verdict must be based on the evidence presented: "I can't base things on my emotional feelings because I just think when you put feelings in the way, you can't really come up with a decision." (6 RT 1231.) As appellant emphasized, that kind of attitude made her a "great juror." (8 RT 1392.) Nothing in the record supported her experience as a reason for the prosecution to challenge her. On its face, this reason was implausible.[33/] (See *Reed v. Quarterman* (5th Cir. 2009) 555 F.3d 364, 377-378 [prosecutor's explanation that he had challenged juror on the basis of one of her statements was prextual given her answers as a whole].)

The decisive question is ultimately whether the prosecutor's explanations should be believed. (*Hernandez v. New York* (1991) 500 U.S. 352, 365 (plurality opinion); *People v. Silva*, *supra*, 25 Cal.4th at p. 386.) In regard to Huguley, the record simply does not support these explanations.

[33/] The prosecutor also referred to problems with understanding Huguley during voir dire. Nothing in the voir dire reflected this, she did not appear to be confused and the prosecutor did not indicate that he had any particular problems during his questioning. (6 RT 1226-1231.)

Accordingly, this Court should find that the trial court failed to conduct a meaningful third step inquiry demanded under *Wheeler* and *Batson* and that race played a significant factor in the prosecutor's decision. The trial court erred in denying appellant's *Batson* claim. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252.)

D. The Judgment Must Be Reversed

An improper challenge to even a single potential jury requires reversal. (*People v. Silva, supra*, 25 Cal.4th at 386; *Miller-El II*, *supra*, 545 U.S. at p. 266.) Accordingly, this Court has not hesitated to reverse the judgment when a trial court fails to engage in the third step of the *Wheeler/Batson* inquiry. (See, e.g., *People v. Fuentes*, *supra*, 54 Cal.3d at p. 721 [trial court's failure to engage in third step of *Wheeler* inquiry "compelled" reversal]; *People v. Turner*, *supra*, 42 Cal.3d at p. 728 [trial court's failure to engage in third step of *Wheeler/Batson* was "reversal per se" under state law and, as structural defect, under federal Constitution].)

In this regard, there is no difference between a challenge made in regard to a regular juror or an alternate. (See *People v. Salcido* (2008) 44 Cal.4th 93, 138 [analyzing challenge to alternate jurors]; *United States v. Harris* (6th Cir. 1999) 192 F.3d 580, 588 [*Batson* applicable to selection of alternate jurors].) Indeed, the selection of an alternative juror was critical in this case because an alternate was needed to serve on the jury. (11 RT 1824.) As a reviewing court has stated in regard to challenges under California's constitution:

> In *Wheeler*, the Supreme Court found that peremptory challenges had been improperly exercised during selection of the 12-member jury. Implicitly, the same result would ensue if the peremptory challenges were improperly exercised during selection of alternates where any one alternate was ultimately

> seated as a juror. In either situation, the trial court's error would have a direct impact on the jury which decided the defendant's fate.

(*People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1034.)

In this case, the trial court failed to engage in the critical inquiry necessary under the third step of *Batson* and the record demonstrates that the prosecutor's reasons were based on racial considerations. Accordingly, this Court must reverse the judgment against appellant. (*People v. Silva, supra*, 25 Cal.4th at 386; *Miller-El II*, *supra*, 545 U.S. at p. 266.)

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III.

THE TRIAL COURT'S IMPROPER ADMISSION OF STATEMENTS MADE BY CAMERINA LOPEZ AFTER SHE WAS SHOT VIOLATED APPELLANT'S RIGHTS TO CONFRONTATION, DUE PROCESS, AND A RELIABLE VERDICT

The trial court allowed the prosecutor to use hearsay statements of Camerina Lopez that went beyond simply identifying appellant as the shooter – a fact that was not contested. The statements were based upon Lopez's perceptions of appellant's actions and his motivation. Appellant had no opportunity to confront Lopez on these issues and the reliability of these statements was not established. Accordingly, the trial court should have held that testimony violated appellant's Sixth Amendment rights to confront the evidence against him and his due process right to fundamental fairness and a reliable guilt and penalty verdict. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15.)

After Lopez was shot, she made a number of statements that the trial court admitted as dying declarations.[34/] (12 RT 1917; see Evid. Code, § 1242 [allowing hearsay to be admitted if the statement was within the personal knowledge of the declarant and made under a sense of immediately impending death].) Most of these statements simply identified appellant as the shooter. However, a Riverside police officer, Patrick Olson, testified

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[34/] Appellant objected that the statements made to the officers were hearsay and violated the Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (12 RT 1912.) The Court granted appellant's request that this be a continuing objection throughout the testimony. (12 RT 1918.)

that he interviewed Lopez at the hospital.[35] (12 RT 1996.) He did not remember the interview, and had no recollection about Lopez's demeanor or how she spoke. (12 RT 2001.) Instead, he read from the report he prepared soon after the interview. (12 RT 1998.) According to the report, Lopez stated that appellant was holding a rifle and started an argument with Alvarez. Lopez stated that during the argument, appellant pointed the rifle at Alvarez. She stepped in between them because she thought he was going to shoot Alvarez; she did not think appellant would shoot her. (12 RT 1999-2000.) Lopez died in surgery, soon after this interview. (12 RT 2001.) (43 RT 6538.) The trial court again overruled the objections.[36] (43 RT 6538-6539, 6606 .)

A. The Trial Court Erred in Allowing the Statements of Camerina Lopez that Went Beyond Identifying Appellant as the Shooter

1. Dying Declarations Should be Subject to the Rule Clarified in *Crawford v. Washington*

At the time of appellant's trial, Confrontation Clause issues were decided under *Ohio v. Roberts* (1980) 448 U.S. 56, which held that hearsay statements could only be admitted if they bore an adequate indicia of

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[35] In addition to the statements given to Officer Olson, Lopez identified appellant to Jon West, a California Highway Patrol officer, who first arrived at the scene after he was flagged down. (12 RT 1979-1981.) She told her brother, Mario Roman, that Lamar Johnson had shot her. (12 RT 1959.) She also identified appellant in a statement given to another police officer, Darryl Hurt, after he arrived at the crime scene and told her that she was gravely injured and may not survive. (12 RT 1990-1991.) Lopez's identification of appellant as the shooter is not at issue here.

[36] The trial court also allowed further testimony that before going into surgery, Lopez asked her mother to take care of the children. (43 RT 6538-6539, 6606 .)

reliability. (*Id.* at p. 66.) In *Crawford v. Washington* (2004) 541 U.S. 36, the United States Supreme Court significantly changed this rule as applied to "testimonial" statements:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rule of evidence, much less to amorphous notions of "reliability". . . . To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

(*Id.* at p. 61.) The Court held that whatever testimonial statements may include, the term would apply to questioning by police. (*Id.* at p. 68.) Such statements cannot be admitted unless there was an opportunity for cross-examination. (*Ibid.*) The rule in *Crawford* has been applied retroactively to cases where the appeal is not final. (See, e.g., *People v. Cage* (2007) 40 Cal.4th 965, 978.)

Here, the statements that Lopez gave during the police interview fall squarely within the type of testimonial evidence addressed in *Crawford.* (See *Davis v. Washington* (2006) 547 U.S. 813, 822 [statements are testimonial if the purpose of the interview is to establish or prove past events potentially relevant to later criminal prosecution].) However, the trial court admitted the statement under the dying declaration exception to state hearsay rules. (12 RT 1917.) In *Crawford*, the Court suggested, without deciding, that dying declarations may be a historical *sui generis* exception to the Confrontation Clause and the rule that it announced. (*Crawford v. Washington*, *supra*, at p. 56, fn. 6; see also *Giles v. California* (2008) __ U.S. _ [128 S.Ct. 2678, 2683] [discussing dying declarations as a common

law exception that allowed evidence to be admitted that was not subject to confrontation].)

In *People v. Monterroso* (2004) 34 Cal.4th 743, this Court found that the dying declaration given in that case was part of a common law exception to the principles adopted in the Confrontation Clause and did not implicate the rule in *Crawford*. As the Court stated, "Dying declarations were admissible at common law in felony cases, even when the defendant was not present at the time the statement was taken. . . . Thus, if, as *Crawford* teaches, the Confrontation Clause 'is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding' [citations], it follows that the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment." (*Id.* at pp. 764-765; see also *People v. D'Arcy* (2010) 48 Cal.4th 257, 291-292 [affirming dying declarations as an exception to the Confrontation Clause].)

Although common law recognized dying declarations as a hearsay exception, this should not end the inquiry. Indeed, the dicta in *Crawford* was based upon dying declarations being a unique *sui generis* exception under common law. (*Crawford v. Washington*, *supra*, at p. 56, fn. 6; *Giles v. California*, *supra,* 128 S.Ct. at p. 2682; *People v. Monterroso*, *supra*, 34 Cal.4th at p. 763.) The uniqueness of dying declarations has been sharply criticized on historical grounds. (See Polelle, *The Death of Dying Declarations in a Post Crawford World* (2006) 71 Mo. L. Rev. 285, 292 ["No legal historian has been found who would define dying declarations as the only criminal hearsay exception at common law"]; see also cases and authorities cited therein.). That dying declarations were recognized as a common law hearsay exception does not indicate that the framers of the Bill

of Rights intended to elevate it as a unique exception to the principles embodied in the Confrontation Clause. Most importantly, the United States Supreme Court has not determined that historical grounds alone justify an exception to the Confrontation Clause. "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." (*Maryland v. Craig* (1990) 497 U.S. 836, 845; *Lilly v. Virginia* (1999) 527 U.S. 116, 123.) Accordingly, under any rule, the goal of the Confrontation Clause is to insure reliability through cross-examination. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 61.) *Crawford* clearly rejected any supposition that reliability obtained by any method other than cross-examination is constitutionally sufficient. (*Id.* at pp. 68-69.) This Court should reconsider its opinion in *Monterroso* and find that dying declarations are subject to the demands of the Confrontation Clause as defined in *Crawford*.

2. Due Process and Constitutional Demands for Reliability in a Capital Case Does Not Permit the Dying Declaration Used in this Case

Even assuming that the statements introduced in this case are not subject to *Crawford*, this Court should find that they were not sufficiently reliable to justify their admission under state and federal guarantees of due process and a reliable capital verdict. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 15, 17.)

Federal courts have long considered whether admission of evidence violates due process to limit the use of unreliable hearsay in contexts where the Confrontation Clause is not implicated. "*Crawford* does not suggest that confrontation is the only mechanism through which reliability of

testimony can be assessed." (*United States v. Fields* (5th Cir. 2007) 483 F.3d 313, 337; see *White v. Illinois* (1992) 502 U.S. 346, 363-364 (conc. opn. of Thomas, J., and Scalia, J.) ["Reliability is more properly a due process concern."].) Consequently, even if the Confrontation Clause does not restrict the use of dying declarations, due process prohibits the admission of evidence that is unreliable. (*United States v. Fields*, *supra*, 483 F.3d at pp. 337-338.) Indeed, due process protects against the admission of unreliable hearsay even in circumstances where the Sixth Amendment right to confrontation is not at issue. (See *Hernandez-Guadarrama v. Ashcroft* (9th Cir. 2005) 394 F.3d 674, 681-682 [due process prohibits untrustworthy hearsay in deportation proceedings; *Singletary v. Reilly* (D.C. Cir. 2006) 452 F.3d 868, 872-873 [due process prohibits untrustworthy hearsay at parole revocation proceeding].) The use of such evidence also violates Eighth Amendment standards that require particular reliability in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625, 637.)

The basis for admitting dying declarations as reliable hearsay statements stems from the belief that no one would want to face their maker if they had not told the truth. (See *Giles v. California*, *supra*, 128 S.Ct. at pp. 2684-2685, quoting *King v. Woodcock* (1789) 1 Leach 500, 503 [168 Eng Rep. 352, 353-354][witness "apprehended that she was in such a state of mortality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertions"].)

That assumption no longer holds true in the modern world. As one court noted in rejecting the application of the dying declaration exception:

> [T]he declarant might have been in a revengeful state of mind which would color his dying statements. No longer subject to the fear of retaliation by his enemies, the declarant might falsely incriminate those persons whom he disliked. If the

> decedent had no religious belief or fear of punishment after death, the statements made while dying would seem to lose much of the trustworthiness traditionally attributed to them. In general, self-serving declarations would be particularly suspect, for the decedent could thereby exculpate himself from questionable association with the circumstances surrounding his death. The declarant's physical and mental state of mind at the moment of death may weaken the reliability of his statements.[37]

(*United States v. Mayhew* (SD Ohio 2005) 380 F.Supp.2d 961, 966, quoting Note, Affidavits, Depositions, and Prior Testimony (1961) 46 Iowa L.R. 356, 375-376.) Thus, the belief that a declarant, at the point of death, has no self-serving motives is an unwarranted generalization that cannot be applied across the board. (See *State v. Weir* (Fla.App 1990) 569 So. 2d 897, 901 ["religious justification for the exception has long lost judicial recognition"]; *Blair v. Rogers* (1939) 185 Okla. 63 [89 P.2d 928, 931] [dying declaration exception does not account for hatred and revenge and ignores that people guilty of murder frequently deny their guilt even when facing death]; *People v. Falletto* (1911) 202 N.Y. 494, 499-500 [fear of punishment after death is not now regarded as so strong a safeguard against falsehood as it was when the rule was laid down].)

In *Carver v. United States* (1897) 164 U.S. 694, the United States Supreme Court expressed skepticism about the reliability of dying declarations:

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[37] "Beyond the motivation of the dying person, however, are the traumatic circumstances of most dying declarations. Many persons facing death and hurried to the emergency room of a hospital suffer severe physical trauma" which affects all the major cognitive functions, such as perception, thinking, and memory. (Polelle, *The Death of Dying Declarations in a Post-Crawford World, supra*, 71 Mo. L. Rev. at p. 303.)

> A dying declaration by no means imports absolute verity. The history of criminal trials is replete with instances where witnesses, even in the agonies of death, have, through malice, misapprehension, or weakness of mind, made declarations that were inconsistent with the actual facts . . . .

(*Id.* at p. 697; see also *Mattox v. United States* (1892) 146 U.S. 140, 152 [dying declarations "must be received with the utmost caution"].) This Court should accordingly give the declaration admitted in this case special scrutiny to ensure that the statements were reliable.

Here, there were no independent factors to establish the reliability of the statements. Officer Olson had no recollection of the interview and his report simply paraphrased much of what Lopez said. Consequently, he did not remember anything in regards to her demeanor or how she spoke when she made her statement. (12 RT 2001.) Nor could he establish how long he was able to speak to her or what her condition was when she made the statement.

Demeanor is often a key to judging the trustworthiness of a statement. (See *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 [credibility judgments based on demeanor and factual matters].) In this case it would have been an important consideration because the trauma that Lopez suffered and her condition at the time of the statements could have affected her perceptions. Yet, on these crucial issues, the record is silent. Her statements were untested in every sense of the word.

It is certain that Lopez was in extreme pain. (12 RT 1914 [prosecutor's offer of proof].) She clearly was worried about her children. (43 RT 6538-6539.) She had at least some alcohol and amphetamines in her system. (48 RT 7240.) Under any circumstance, she would have been under physical and emotional stress, recounting events that happened very quickly. Her hurt and

anger would reasonably have been directed at appellant. It is not simply that she may have sought revenge by stating that appellant pointed the gun at Alvarez in order to shoot him, but her condition would have affected the reliability of her perceptions. Having identified appellant as the shooter, it would not take much to make significant assumptions about his actions and intentions before the gun was fired – to state that appellant must have been pointing the gun at Alvarez and intended to shoot. Accordingly, her assumptions and beliefs may have explained why she tried to intervene in the fight, but they were not reliable evidence as to what appellant actually did or intended to do.

The statements that Lopez made largely stood alone. It is important that the statements in the report varied in important respects from that of the closest witness. Jose Alvarez acknowledged that he challenged Johnson when he stopped the car and got out before the shooting took place. (20 RT 3155; 44 RT 6713-6714.) He stated that there was a brief wrestling match for the gun, although Lopez quickly tried to intervene. (20 RT 3128l 3148; 44 RT 6718.) His testimony placed her to the side of him when the shot was fired. (20 RT 3131, 44 RT 6703,) He said that appellant started swinging the gun around and it went off. He believed that appellant again was going to hit him with the gun; it was not pointed at him at that point and he never saw appellant's finger on the trigger.[38/] (20 RT 3153; 44 RT 6718, 6719.)

The differences between the two statements are significant. Lopez's assertion that appellant initiated the dispute and pointed the gun at Alvarez,

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[38/] The only other witness, Deborah Galloway, testified that the gun went off during a struggle between appellant and Alvarez, and because Lopez got between them there was never enough room for appellant to have pointed the weapon at anyone. (13 RT 2049.)

that she stood directly in front of him because she thought appellant might shoot Alvarez, was not corroborated by the person in the best position to see what happened. (Compare *Chambers v. Mississippi* (1973) 410 U.S. 284, 300 [corroboration provided assurance of reliability of hearsay].) Accordingly, the statements recorded in Officer Olson's report lacked both evidence of her demeanor and substantive corroboration. The trial court therefore erred in admitting the statements in violation of appellant's rights to due process and the requirements for a reliable trial.

The statements in the Olson report were extremely important to the prosecutor's case. As a "dying declaration," they certainly carried the weight of Lopez's tragic death and the jurors undoubtedly gave them special importance. Indeed, the prosecutor argued to the jurors that the statements should be given special consideration as dying declarations:

> We let those in because when somebody is dying, when somebody is in that much pain, we know how serious things are and how serious it is to tell the truth.

(37 RT 4099.) The prosecutor then read the Olson report and emphasized the emotional impact of the statements:

> She is saying, among the last words that she ever spoke on this earth, that he is pointing it at Alvarez, and he is far enough back for her to get in between.

(37 RT 4100.) Her words, spoken from beyond the grave, without any assurance that they were accurate and reliable, were used to establish that the shooting was more than accidental, that appellant allegedly pointed the gun at Alvarez and fired it.

In order to establish that the homicide was murder, the prosecutor had to show that appellant acted with malice aforethought. (Pen. Code, § 187.) The shooting had to be more than a tragic accident that occurred during a

confrontation, the prosecution had to show that appellant intended to shoot the weapon by acting with wanton disregard for life. (See *People v. Watson* (1981) 30 Cal.3d 290, 300 [malice found when defendant commits act with high probability that it will result in death and does so with wanton disregard].) The case against appellant was extremely close, as evidenced by the seven days of jury deliberations before a verdict was reached. Given the importance of the statements by Lopez herself, there is a reasonable possibility that they contributed to the ultimate second degree verdict by providing evidence of malice aforethought necessary for the homicide to rise to that level. Accordingly, both the murder verdict as to Lopez and the special circumstance of multiple murder must be set aside. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Moreover, this Court should reverse the penalty judgment against appellant. The death of Camerina Lopez was a tragic event and the jurors heard extensive testimony relating to the impact it had on her family. They were charged with sentencing appellant not only for the Campos murder but for Lopez's death. (See Argument XXIII.) Thus, the statement that appellant pointed the weapon – that she believed that appellant intended to shoot Alvarez – took on special significance, making the homicide more than a simple aggravating factor. As the prosecutor argued, the crime became murder when appellant intended to shoot Alvarez and the jury should consider the pain that this caused to Lopez and those who loved her. (57 RT 8423-8424.) Her accusations that appellant pointed the gun at Alvarez and shot her when she stepped between them may reasonably have become a focal point leading to a death verdict.

The penalty decision in this case was a close one. Appellant's first penalty jury could not reach a determination. The second penalty phase jury

deliberated for three days before reaching a verdict. (*Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163 [three days of deliberations indicates a close case].) Under these circumstances, the error cannot be held to be harmless beyond a reasonable doubt, requiring reversal of the death judgment against appellant. (*Chapman v. California*, *supra*, 386 U.S at p. 24; *People v. Robertson* (1984) 33 Cal.3d 21, 54 [substantial error affecting penalty phase requires reversal].)

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IV.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A MISTRIAL AFTER A PROSECUTION WITNESS DESCRIBED THE CODEFENDANT AS APPELLANT'S "HENCHMAN"

The prosecutor called Alan Ford to testify that Todd Brightmon was present during the Lopez shooting. During direct examination, the prosecutor asked Ford if he knew what the relationship was between appellant and Brightmon. Ford stated that Brightmon was appellant's "henchman." The trial court granted appellant's motion to strike this testimony. (14 RT 2291.)

Following Ford's testimony, appellant moved for a mistrial, arguing that he had no warning that Ford would describe Brightmon in such a way as to imply that Brightmon was under appellant's control. (14 RT 2313.) The prosecutor stated that he had expected that Ford would describe the two as friends or would say he did not know the nature of their relationship. He did not anticipate that Ford would use the word "henchman." (14 RT 2314.)

The trial court stated that "everybody was caught off guard" and denied appellant's motion for a mistrial. (14 RT 2315.) The court's decision rendered appellant's trial fundamentally unfair in violation of the federal and state requirements of due process and a reliable verdict. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 15, 16, 17.)

It is well established that the purpose of a mistrial is to terminate a trial which has or will deprive one or both of the parties of a fair trial. (*People v. Woodbury* (1970) 10 Cal.App.3d 695, 708.) The motion for mistrial presupposes that objectionable evidence has been introduced which "is so prejudicial as to be incurable by striking it or admonishing the jury to disregard it." (*People v. Guillenheau* (1980) 107 Cal.App.3d 531, 547.) A mistrial should be granted if the court is aware of such prejudice. Whether

the damage from a particular incident is incurable or prejudicial is by its nature a "speculative matter," and the trial court's discretion must not be exercised in an arbitrary or capricious manner. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1060.) However, a motion for mistrial may be properly refused only where the court is satisfied that no injustice has occurred. (*People v. Guillenheau*, *supra*, 107 Cal.App.3d at p. 548.)

In the present case, the trial court found error but attributed it to an inadvertent statement and underestimated its potential prejudice to appellant. "A witness's volunteered statement can provide a basis for a finding of incurable prejudice." (*People v. Woodbury*, *supra*, 10 Cal.App.3d at p. 708). This was the case here. Appellant relied on an alibi defense to the Campos murder, based in part on the testimony of Brightmon, who took responsibility for the murder and denied that appellant was present at the time. (22 RT 3379-3380.) Moreover, Brightmon provided important testimony in regard to the Lopez shooting, describing it as occurring in the midst of a struggle over the gun. (22 RT 3396-3400.) As appellant argued before the trial court, the word "henchman" was particularly devastating to his defense because it described appellant as a king pin, ordering Brightmon about, and being in total control. (14 RT 2315.) Indeed, it is a word that brings forth images of gangsterism and the stock characters that serve as a villain's lackey in innumerable films and books. As such it carried with it emotional connotations that were likely to have affected the jurors' deliberations and verdict.

Although the trial court granted the motion to strike and expressed confidence that the jury would follow its instructions (14 RT 2314), in some situations, "the practical and human limitations of the jury system cannot be ignored." (*Simmons v. South Carolina* (1994) 512 U.S. 154, 171; see also

People v. Ozuna (1963) 213 Cal.App.2d 338, 342 ["The human mind is not so constructed as to permit a registered fact to be unregistered at will."] Thus, this Court has recognized that even if a motion to strike is granted, it can be futile to attempt to "unring the bell" once the matter is before the jury. (*People v. Morris* (1991)53 Cal.3d 152, 188.) The jurors here could not be expected to disregard Ford's description.

This was a close case where the jurors deliberated a long time and reached a verdict only after they reported that they were deadlocked on both counts against appellant. (29 RT 4395, 4400; 14 CT 3695a.) In the course of such deliberations, the image of Brightmon as appellant's henchman was one that was sure to resonate long after it was spoken. After hearing it, a juror could believe that appellant so dominated Brightmon that he was ordered to confess to the Campos murder and falsify his testimony about Lopez. Moreover, it provided a lens through which the jury could view the evidence offered on appellant's behalf, leading the jurors to reject any of the witnesses that appellant presented. The bell that was struck in this case could not have been unrung.

The trial court's error in not granting a mistrial rendered the trial fundamentally unfair in violation of appellant's rights to a fair and impartial jury and due process standards. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825 [due process protects against unduly prejudicial evidence that renders trial fundamentally unfair]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384 [introduction of irrelevant and inflammatory evidence violates due process].) Accordingly, it also rendered the verdict unreliable under the Eighth Amendment. (See *Beck v. Alabama* (1980) 447 U.S. 625, 638 [reliability required in a capital case].) Given the likely prejudice that it caused, reversal is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

V.

THE TRIAL COURT'S ADMISSION OF INFLAMMATORY PHOTOGRAPHS VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND A RELIABLE VERDICT

It is well settled that a prosecutor may not introduce photographs of victims that are "relevant only on what . . . is a nonissue," or where they "are . . . largely cumulative of expert and lay testimony regarding the cause of death" or "are . . . unduly gruesome." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1137.) Here, the autopsy photographs of Martin Campos and Camerina Lopez, as well as a photograph of appellant showing appellant in handcuffs and jail clothing, were irrelevant to any disputed issue and were unduly inflammatory in both the guilt and penalty phases of the trial. The trial court's error in failing to exclude them as irrelevant, or as unduly prejudicial under Evidence Code section 352, violated appellant's state and federal constitutional rights to due process, a fair jury trial and a reliable capital trial. (U.S. Const., 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15)

A. The Law Does Not Permit Autopsy Photos That Are Irrelevant or Inflammatory

No evidence is admissible unless it relates to a disputed fact that is of material consequence. (Evid. Code, § 210.) In *People v. Turner* (1984) 37 Cal.3d 302, this Court held that photographs offered to show the position of the victims' bodies and the nature of their wounds were erroneously admitted where "[n]either the court nor the prosecution articulated the relevance of the position of the bodies or the manner of infliction of the wounds to the issues presented." (*Id.* at p. 321; see also *People v. Marsh* (1985) 175 Cal.App.3d 997, 998 [autopsy photographs irrelevant where coroner's testimony was

uncontradicted and cause of death undisputed].) The photographs used in this present case were similarly irrelevant.

Even assuming that the photographs had some relevance, Evidence Code section 352 provides that a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." This section applies to evidence that uniquely tends to evoke an emotional bias against defendant as an individual and that has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) Evidence is substantially more prejudicial than probative if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14). It is precisely the type of evidence that was at issue in the present case.

The photographs should also have been excluded under this section because they were cumulative to other evidence. (See *People v. Marsh*, *supra*, 175 Cal.App.3d at p. 998 [jury "was not enlightened one whit" by seven autopsy photographs]; *People v. Smith* (1973) 33 Cal.App.3d 51, 69 [finding photographs cumulative to "autopsy testimony regarding the precise location and nature of the wounds, which needed no clarification or amplification"].) "If evidence is 'merely cumulative with respect to other evidence which the People may use to prove the same issue,' it is excluded under a rule of necessity." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1137, quoting *People v. Thompson* (1981) 27 Cal.3d 303, 318.) At bottom, "[T]he prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant." (*People v. Cardenas* (1982) 31 Cal.3d 897, 905.)

The use of prejudicial evidence not only violates statutory law, but renders a trial unfair and unreliable in violation of federal and state constitutional guarantees of due process and reliability in a capital case. (U.S. Const, 5th, 8th, and 14th Amends.; Cal. Const., art 1, §§ 7, 15; see *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 972 [due process requires court to weigh prejudicial effect of evidence against its necessity]; *Lesko v. Owens* (3d Cir. 1989) 881 F.2d 44, 51-52 [same].

1. The Photographs of Camerina Lopez were Irrelevant, Cumulative, and Inflammatory

The trial court admitted five autopsy photographs of Camerina Lopez. Appellant objected to the photographs as a whole on constitutional grounds and under Evidence Code section 352 as being cumulative and more prejudicial than probative. (14 RT 2160; 21 RT 3256 [renewing objections to autopsy photographs at penalty retrial].)

Specifically, People's Exhibit 48 was an autopsy photo that showed Lopez lying on the gurney with an apparatus in her mouth. (14 RT 2161.) Appellant joined in his codefendant's objection that it was not relevant for identification and it had no tendency to prove any disputed issue. Indeed, the photograph did not even show a wound and was not used in the pathologist's testimony. (14 RT 2164-2166) The prosecutor argued that the photograph was used to identify the victim during the preliminary hearing testimony of Jose Alvarez, which was read to the jury after Alvarez could not be located to testify during the guilt phase.[39/] (14 RT 2166, 20 RT 3134.) The trial court

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[39/] During the penalty phase retrial, Dr. Choi, the coroner, testified that the exhibit showed the condition of the body at the time of the autopsy. (48 RT 7221.)

allowed the photograph, finding that it was relevant and that there was no real prejudice in introducing it. (14 RT 2166.)

The trial court erred. The exhibit was not used by the pathologist, did not show a wound, and was simply referred to in the testimony of Jose Alvarez to identify the victim. Her identification was not at issue and appellant offered to stipulate that Alvarez identified Lopez during the preliminary hearing. (14 RT 2162.) The photograph did not illustrate any particular aspect of the shooting. Accordingly, it should have been excluded in light of appellant's proposed stipulation that Alvarez identified Lopez. (See *People v. Poggi* (1988) 45 Cal.3d 306, 323 [offer to stipulate to matters depicted in photographs removed them from being in dispute]; *People v. Ramos* (1982) 30 Cal.3d 553, 577 [prosecutor must accept stipulation and refrain from introducing evidence that is not being disputed].)

The trial court also admitted, over appellant's objections, several photographs showing the gunshot wound. People's Exhibit 51 was an autopsy photograph showing the gunshot wound, along with some bruising that may have occurred during surgery. (14 RT 2168, 2223, 2233 [guilt]; 48 RT 7222 [penalty retrial].) People's Exhibit 52 showed the same wound from a different angle. (14 RT 2169, 2234 [guilt]; 48 RT 48 RT 7225 [penalty retrial].) People's Exhibit 53 showed the shape of the wound. (14 RT 2170, 2223 [guilt]; 48 RT 7222 [penalty retrial].) People's Exhibit 54 showed the wound along with gunpowder that was found surrounding it. (14 RT 2172, 2227 [guilt]; 48 RT 7222 [penalty retrial].)

The autopsy photographs were unnecessary because the pathologist testified about the wounds and could use the sketches he made to illustrate his

testimony instead of the photographs.[40/] (14 RT 2160, 2168.) Moreover, the coroner had taken x-rays to determine how the bullets entered Lopez's body. (14 RT 2222 [autopsy procedure], 2227.) Under these circumstances the photographs were cumulative to the evidence presented through other means and should have been excluded. (*People v. Smith*, *supra*, 33 Cal.App.3d at p. 69.)

The photographs should also have been excluded under Evidence Code section 352 because the probative value of the pictures clearly is outweighed by their prejudicial effect. The probative value of the photographs was minimal since they were used only to illustrate the coroner's testimony, which explained in detail the procedures that he used and the findings that he made. On the other hand, the photographs were highly prejudicial, The autopsy photographs depicted the probes that were used by the pathologist, and showed the victim as the procedures were being done; making them the kind of evidence that tends to evoke an emotional bias against a defendant. This Court should therefore find the trial court's admission of the photographs was erroneous. (*People v. Smith*, *supra*, 33 Cal.App.3d at p. 69 [autopsy testimony needed no further clarification]; *People v. Anderson*, *supra*, 43 Cal.3d at p. 1137 [photographs cumulative of expert and lay testimony regarding the cause of death, the crime scene, and

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[40/] Appellant acknowledges that this Court has often upheld the use of autopsy photographs to illustrate a coroner's testimony. (See, e.g., *People v. Earp* (1999) 20 Cal.4th 826, 881 [photos and slides of murder victim corroborated the coroner's testimony and were properly admitted].) Appellant does not disagree with the general rule that photographs may be used to illustrate testimony, but disputes its applicability to the present case.

the position of the bodies]; *People v. Burns* (1952) 109 Cal.App.2d 524, 535-538 [reversal based on gruesome autopsy photos].)

In addition to being error under state law, the trial court's erroneous ruling admitting the photographs at issue here deprived appellant of his federal constitutional rights to due process, a fair trial, and to reliable guilt and penalty determinations. (U.S. Const., 6th, 8th & 14th Amends.; see *Spears v. Mullin* (10th Cir. 2003) 343 F.3d 1215, 1225-1230 [state's penalty-phase introduction of crime-scene photographs showing victim's mutilated body deprived defendants of a fundamentally fair sentencing proceeding as guaranteed by the Eighth and Fourteenth Amendments].) This Court should therefore find that the photographs should not have been admitted.

2. The Autopsy Photographs of Martin Campos Should Have Been Excluded

Appellant objected to admission of the autopsy photographs of Martin Campos on constitutional grounds. (14 RT 2172.) Appellant also objected that the photographs were overly gruesome and unnecessary to explain the coroner's testimony, showing matters that could be explained without their use. (14 RT 2174; 21 RT 3256 [renewing objections to autopsy photographs])

Specifically, People's Exhibits 13 and 14 showed bruising on Campos's face, although it was uncertain when the bruising occurred. (14 RT 2174, 2175, 2237 [guilt]; 48 RT 7228 [penalty retrial].) People's Exhibit 15 showed the upper torso with various probes to illustrate the entry wound.[41/] (14 RT 2175, 2243 [guilt]; 48 RT 7231 [penalty retrial].) People's Exhibit 17

[41/] The trial court found that People's Exhibit 16 was cumulative, showing the same wound, and did not allow it to be used. (14 RT 2177.)

showed a full length picture of Campos on the autopsy table, showing the wound in relationship to the body, which was admitted with a post-it note stapled over it to cover the lower body. (14 RT 2178, 2240 [guilt]; 48 RT 7230 [penalty retrial].) People's Exhibit 18 showed abrasions on Campos's back and was admitted with the lower part of the body covered with a stapled note. (14 RT 2178-2179, 2238 [guilt]; 48 RT 7229 [penalty retrial].) People's Exhibit 19 showed a laceration on Campos's wrist. (14 RT 2182, 2239.[42]) As discussed above in regard to the Lopez autopsy, these photographs were inflammatory and cumulative. Accordingly, they should have been excluded by the trial court under Evidence Code section 352 and constitutional standards for due process and reliability.

In addition to the autopsy photographs, People's Exhibit No. 46 showed Campos through some weeds, where he was found after Garcia left his body near the road.[43] (14 RT 2180, 2302 [guilt]; 48 RT 7390 [penalty retrial]). Because it was Garcia who brought the body to that location, the photographs had nothing to do with the actions of either Brightmon or appellant and was not relevant to the cause of death or any disputed issue. (14 RT 2179.)

The prosecution argued that the exhibit was important to corroborate Garcia's testimony and show the condition of the body when it was found. (14 RT 2181.) However, Garcia's testimony about this issue was never in dispute. Moreover, a Riverside sheriff's investigator, Robert Joseph,

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[42] This photograph was not introduced during the penalty phase retrial.

[43] The trial court excluded People's Exhibit 47, showing Campos face up by the road as being gruesome and cumulative under Evidence Code section 352. (14 RT 2182.)

presented ample testimony about where the body was found. (14 RT 2300-2303.) The coroner did not testify that the condition of the body at the time it was found was relevant to the cause of death. Accordingly, the exhibit should have been excluded as irrelevant to appellant's guilt.

B. The Photograph of Appellant in Handcuffs and Jail Clothing was Irrelevant and Inflammatory

Appellant objected that a picture (People's Exhibit 86) showing a photographic lineup of six people, including appellant, in jail clothing and handcuffs was irrelevant and prejudicial. (15 RT 2390.) As discussed above, both Evidence Code section 352 and constitutional standards prohibit the use of photographs that are of limited probative value, but whose prejudice affects the fairness and reliability of a trial. (U.S. Const, 8th & 14th Amends.; Cal. Const., art 1, §§ 7, 15; see *Romano v. Oklahoma* (1994) 512 U.S. 1, 12 [considering whether admission of evidence rendered the trial fundamentally unfair]; *Bruton v. United States* (1968) 391 U.S. 123, 131 n. 6 [important element of a fair trial is that a jury consider only relevant and competent evidence].)

Appellant acknowledged that photograph of appellant's face could be used, but asked that the prejudice be minimized by covering up the "jail garb" in the picture. The prosecutor argued that the complete picture was relevant to the identification made by Ronald Moore, who had picked the photo out during an interview with investigator Silva. The prosecutor stated that prejudice was minimal since most jurors would realize that capital defendants

have been in custody. The trial court allowed the photograph to be used at trial.[44/] (15 RT 2391.)

Ronald Moore testified that two people in the photograph might have the person who was at the Ross property during the crime. He was not sure about either of them, but picked out one individual and stated, "Maybe him. I don't know." (15 RT 3492-2393.) Jose Garcia also testified that he was shown the photographic lineup. (15 RT 2474, 16 RT 2537.) However, he could not recognize appellant and the person he picked out was not appellant. (16 RT 2540; see also 55 RT 8369 [testimony of Martin Silva].)

Under these circumstances, the photograph was of limited probative value. Ronald Moore testified that he chose appellant from the lineup as one of two possible people and that he was not certain of his identification. Jose Garcia did not choose appellant from the lineup. There is nothing about the jail clothing, and particularly the use of handcuffs, that affected their identifications in any way. Indeed, in the penalty phase the witnesses testified about their identifications without the use of this photograph, indicating that it was of minimal probative value.

On the other hand, there was a substantial prejudicial effect in showing appellant among a group of prisoners, all of whom were clearly handcuffed in front. Although the jurors would have realized that appellant had been in custody, the handcuffs left appellant's jurors with the impression that he may have been regarded as being a particular danger. (See *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 748 [restraints may create an impression that a defendant is particularly dangerous].) That the restraints in this case were

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[44/] The photograph was not introduced into evidence during the penalty phase retrial.

shown as part of a photographic lineup did not lessen this prejudice, since the effect of showing all six individuals in handcuffs served only to make the entire group seem even more dangerous and foreboding, raising the specter of gang activity or other prejudicial associations.

The showing of six handcuffed individuals highlighted rather diminished the impact of the restraints. Indeed, since the handcuffs did not affect the either the identification or the lack of identification made by the witnesses, the only conceivable purpose was to inflame the emotions of the jurors. Ultimately, the picture reinforced one of themes introduced during the prosecutor's case, that appellant was so dangerous that he needed to be taken "off the streets." (See Argument VI [opinion of detective that he needed to get appellant off the streets was erroneously admitted].)

The photograph was irrelevant to the guilt determination and had a profound effect upon appellant's defense. In light of the photograph, the shooting of Lopez would seem less like an accident that occurred during a struggle and more like a murder committed by a person with a violent disposition. In the Campos case, appellant would be seen as a person who would have been used by Ross and killed with premeditation and deliberation. Accordingly, this Court should find that the photograph was inflammatory and prejudicial, both under both Evidence Code section 352 and federal standards of due process and a reliability in a capital case. (U.S. Const., 8th & 14th Amends.)

C. Reversal Is Required

In addition to violating state law, the court's rulings deprived appellant of his federal constitutional rights to due process, a fair trial, an impartial jury, and a reliable determination of guilt and special circumstance allegations. (U.S. Const., 6th , 8th & 14th Amends.; see *Ferrier v.*

Duckworth (7th Cir. 1990) 902 F.2d 545, 548 [irrelevant photographs of blood- spattered crime scene could render trial fundamentally unfair].) To the extent the errors were solely one of state law, it nevertheless violated appellant's right to due process by depriving him of a state-created liberty interest. (*Hicks v. Oklahoma* (1980) 447 U.S. 343; *Hewitt v. Helms* (1983) 459 U.S. 460, 466 .)

This was a close case, where the jurors deliberated for a long time on guilt issues affecting both cases. As discussed above, the photograph showing appellant in handcuffs introduced emotional factors into the juror's consideration that highlighted appellant's alleged dangerousness in a way that affected the juror's deliberations, making it more likely that the jury would find that appellant had the intent to kill Lopez or participated in the Campos homicide.

Moreover, the autopsy photographs took on special importance. Social science studies have demonstrated that jurors are likely to be dramatically affected by viewing gruesome photographs. (Note, *A Picture is Worth a Thousand Words - The Use of Graphic Photographs in Massachusetts Murder Trials* (2001) 6 Suffolk J. Trial & Appellate Advoc. 197, 208-209; Douglas, et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?* (1997) 21 Law & Hum. Beh. 485, 491-492.) In the present case, the pictures provided multiple exposures of similar views (see *People v. Scheid* (1997) 16 Cal.4th 1, 20) that repeatedly drew the jury's attention to graphic and inflammatory autopsy details.

Under either state or federal law, this Court should find that the photographs swayed the jury to convict appellant. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of a more favorable result];

Chapman v. California (1967) 386 U.S. 18, 24 [error not harmless beyond a reasonable doubt].)

The evidence also affected the penalty decision, since the autopsy photographs were readmitted during the penalty retrial.[45/] As discussed above, the autopsy photographs and the pictures of the victims' bodies provided vivid graphic evidence that inflamed the jurors' emotions. The evidence was incompatible with a rational or impartial penalty judgment. (See *Saffle v. Parks* (1990) 494 U.S 484, 493 [death penalty must be reasoned moral response rather than emotional one].) The trial court's errors in admitting inflammatory photographs should cause this Court to doubt the reliability of appellant's death sentence in light of the heightened scrutiny which the Eighth Amendment places upon capital proceedings. Both the guilt and penalty phase judgments must be reversed.

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[45/] The trial court ruled that all of its decisions on motions during the penalty retrial would be the same as it made during the guilt proceedings. (38 RT 5603.) As noted above, all the exhibits at issue, with the exception of People's Exhibits 19 and 86, were admitted during the penalty retrial.

VI.

STATEMENTS MADE BY THE INVESTIGATING OFFICER ABOUT HIS MOTIVATION TO GET APPELLANT OFF THE STREETS WERE IRRELEVANT AND PREJUDICIAL

Riverside police sergeant Arthur Horst interviewed Todd Brightmon during the investigation of the Campos murder. The tape of the interview was played for appellant's jury to impeach Brightmon's testimony. (23 RT 3665.) The tape included Horst's statement, "I gotta get him off the streets, man. Gotta get him off the streets. You know who else I'm worried for too, right, is all (inaudible), and everything like that. I gotta get 'em. I gotta get 'em." (23 RT 3666, quoting People's Exhibit 95b, p. 15.) The tape was also played during appellant's penalty phase retrial. (49 RT 7426-7427.) Appellant objected that Horst's statements regarding his motivation was irrelevant and inflammatory under Evidence Code section 352, violating appellant's Sixth, Eighth, and Fourteenth Amendment rights. (23 RT 3668.) The trial court erroneously overruled the objection.[46/]

Irrelevant evidence is not admissible. (Evid. Code, § 210.) Sergeant Horst's statements about his motivation, his opinion that he needed to get appellant "off the streets," was irrelevant to the charge against appellant or any material issue in the case and should not have been admitted. [spacing] Even assuming the statement had some relevance as part of the interview that was conducted with Brightmon, it should have been excluded under Evidence Code section 352, as being more prejudicial than probative. The prosecutor's sole rationale for using this statement was that it helped establish the context

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[46/] The trial court ruled that all of its decisions during the guilt trial would be the same during the penalty trial. (38 RT 5603.)

of the interview, making it clear that they were referring to appellant. (23 RT 3667.) However, that context was established by Horst naming appellant both before and after the statement about his motivation. (People's Exhibit 96b, pp. 14-16.) Therefore, the gratuitous expression of Horst's motivation was not needed for this limited purpose. The probative value of Horst's statement was minimal at best.

The potential for prejudice, however, was significant. The statement emphasized appellant's dangerousness as reflected by the opinion of a police officer. Horst's questioning not only made it clear that he believed appellant was guilty, but that he had additional incriminating information that there was an urgent threat against others. (23 RT 3666.) This opinion could not have been presented on direct examination to establish guilt. (See *People v. Hernandez* (1977) 70 Cal.App.3d 271, 280 [officer's opinion invited jury to speculate that he had information not before the jury]; cf. *United States v. Young* (1985) 470 U.S. 1, 18 [allowing jury to hear prosecutor's personal opinion on defendant's guilt presents danger that jury will believe other evidence supports charges].) It was equally improper to introduce the opinion to the jury through the taped interview. (*United States v. Hernandez-Cuartas* (11th Cir. 1983) 717 F.2d 552, 555 ["Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officers in investigating criminal activity."].)

It has long been recognized that the opinion of an officer carries "an aura of special reliability and trustworthiness [citation]." (*United States v. Gutierrez* (9th Cir. 1993) 995 F.2d 169, 172.) The danger here was not only that the jurors would believe Horst's opinion that he had to get appellant off the streets, they would identify with his goal and adopt his mission as their own. Horst's sense of urgency reasonably would be felt by the jurors and

carry over into their deliberations. If he believed that he had to get "appellant off the streets," then so would the jurors. It is precisely against this kind of emotional bias that section 352 is designed to protect. (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Under these circumstances, the trial court should have excluded the testimony as more prejudicial than probative.

The use of Horst's statement rendered the trial fundamentally unfair and unreliable under constitutional standards. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15.) As discussed above, the implication that appellant was an imminent danger to others made it appear that Horst had information that was not before the jury. There was no way that appellant could defend himself against these insinuations. In a close case, as this certainly was, it was likely to have been a substantial factor in the jury's deliberations. Reversal is required under either state or federal standards (*People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of a more favorable result]; *Chapman v. California* (1967) 386 U.S. 18, 24 [error not harmless beyond a reasonable doubt].)

Even assuming that the statement was not prejudicial during the guilt phase, the tape was played during the penalty retrial and would have been particularly fresh in the juror's minds. (49 RT 7426-7427.) Horst's opinion made it appear that appellant was particularly dangerous. It supported the prosecutor's argument that appellant would be a danger in the future. (See, e.g., 57 RT 8451.) Appellant's jurors could take this statement and believe that they, too, had to take appellant off the streets in the most literal way possible, by imposing the death penalty.

This was a close case, with the first penalty jury deadlocked on penalty and the jurors during the retrial deliberating three days before reaching a verdict. (See *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163 [three

days of penalty determinations indicated a close case].) Under these circumstances, this Court should find that the error had a substantial effect on the penalty decision requiring reversal. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 965.)

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VII.

THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURORS THAT FLIGHT COULD BE CONSIDERED AS CONSCIOUSNESS OF GUILT

The trial court instructed appellant's jurors that they could infer that appellant's flight indicated a consciousness of guilt:

> The flight of a person immediately after the commission of a crime, or after [he] is accused of a crime, is not sufficient in itself to establish [his] guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilt or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(14 CT 3278; CALJIC No. 2.52.)

Appellant is aware this Court has upheld the instruction on several occasions. (See e.g., *People v. Loker* (2008) 44 Cal.4th 691, 706; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579.) However, this court should reconsider its previous opinions. As given in this case, the flight instruction was unnecessary and argumentative. Moreover, it permitted the jury to draw irrational inferences against appellant. The instructional error deprived appellant of his Sixth, Eighth and Fourteenth Amendment rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt and special circumstances. Accordingly, this instruction was erroneously given.[47/] Reversal is required.

[47/] Appellant objected that the instruction should not be given in regard to the Campos homicide. (25 RT 3742.) Appellant did not object to the instruction in regard to Lopez (25 RT 3738), but no objection is required to preserve the issue for appeal. (Pen. Code, § 1259 [appellate court may review any instruction that affects substantial rights of the defendant].)

A. The Consciousness-of-Guilt Instruction Was Unfairly Partisan and Argumentative

The flight instruction given in this case was impermissibly argumentative. A trial court must refuse to deliver any instructions that are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly highlight "isolated facts favorable to one party, thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871), or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9), are argumentative and hence must be refused. (*Ibid.*)

Judged by this standard, CALJIC No. 2.52 is impermissibly argumentative. Structurally, it is almost identical to the instruction reviewed in *People v. Mincey*, *supra*, 2 Cal.4th at p. 437, fn. 5, which read as follows:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated.

The instruction here told the jury, "[i]f you find" certain facts (flight in this case and a misguided and unjustified attempt at discipline in *Mincey*), then

"you may" consider that evidence for a specific purpose (showing consciousness of guilt in this case and concluding that the murder was not premeditated in *Mincey*). This Court found the instruction in *Mincey* to be argumentative (*id.* at p. 437), and it also should hold CALJIC. No. 2.52 to be impermissibly argumentative as well.

In *People v. Nakahara* (2003)30 Cal.4th 705, 713, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *Mincey*, *supra*, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" However, this holding does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions . . . : [citation]" (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon* (1973) 412 U.S. 470, 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsay v. Normet* (1972) 405 U.S. 56, 77). Moreover, the prosecution-slanted instruction violated due process by lessening the prosecution's burden of proof. (*In re Winship* (1970) 397 U.S. 358, 364.)

To insure fairness and equal treatment, this Court should reconsider the cases that have found California's consciousness-of-guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th 705, 713; *People v. Bacigalupo* (1991)1 Cal.4th 103, 123 [CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]) and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence" (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137).

Finding that a flight instruction unduly emphasized a single piece of circumstantial evidence, the Supreme Court of Wyoming held that giving such an instruction always will be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, the court joined a number of other state courts that have found similar flaws in the flight instruction. Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988)

429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)[48/]

The reasoning of two of these cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case which had disapproved a flight instruction (*id.* at p. 748) and extended its reasoning to cover all similar consciousness-of-guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

[48/] Other state courts have held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [disapproval of flight instructions].)

The argumentative consciousness-of-guilt instruction in this case invaded the province of the jury, focused the jury's attention on evidence favorable to the prosecution, placed the trial court's imprimatur on the prosecution's theory of the case, and lessened the prosecution's burden of proof. Therefore, it violated appellant's Fourteenth Amendment due process rights to a fair trial and equal protection, his Sixth and Fourteenth Amendment right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury, and his Eighth and Fourteenth Amendment rights to a fair and reliable capital trial.

B. The Consciousness-of-Guilt Instruction Permitted the Jury To Draw an Irrational Permissive Inference about Appellant's Guilt

The consciousness-of-guilt instruction suffers from an additional constitutional defect of embodying improper permissive inferences. The instruction permits the jury to infer one fact, such as appellant's consciousness of guilt, from other facts, i.e., flight. (See *People v. Ashmus* (1991) 54 Cal.3d, 932, 977.) A permissive inference instruction can intrude improperly upon a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts such an instruction also may cause jurors to overlook exculpatory evidence and lead them to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (en banc).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the

effectiveness of permissive inference instructions." (*Ibid*; see also *id.*, at p. 900 (conc. opn. of Rymer, J.) ["I must say that inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury"].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 926.) The due process clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313 [noting that the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County v. Allen*, *supra*, at pp. 157, 162-163.)

In this case, the permissive inferences inherent in the instruction primarily affected the juror's consideration of the Lopez shooting. There was no dispute that appellant shot Lopez. There was also no dispute that appellant fled the scene and went to Oklahoma where he lived under an assumed name. The issue was appellant's intent when the gun was shot and

the crime that was charged: first degree murder, second degree murder, or manslaughter. On this issue, appellant's flight shed no light. Even assuming that appellant was conscious of having been involved in the shooting, it did not mean that the jurors could infer that he harbored the intent or mental state required for murder. Indeed, given his previous history, appellant could have run simply because he did not want to risk going to prison for *any* crime, even if the crime did not rise to the level of murder.

Although the consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is *not* probative of his state of mind immediately prior to or during the killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 32-33.) Professor LaFave makes the same point: "Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not before or during the killing." (LaFave, *Substantive Criminal Law* (2nd ed. 2003), vol. 2, § 14.7(a), pp. 481-482, original italics.)

Therefore, appellant's flight after the crime, upon which the consciousness-of-guilt inference was based – was not probative of whether he harbored the mental states for murder. There was no rational connection – much less a link more likely than not – between appellant's flight and his consciousness of having committed a homicide that rose to the level of murder.

Appellant did not dispute that he was involved with the Lopez shooting, so the consciousness-of-guilt instruction was completely irrelevant to that charge. Because the consciousness-of-guilt instruction permitted the jury to draw an irrational inference of guilt against appellant, the instruction

undermined the reasonable doubt requirement and lightened the prosecution's burden of proof, thereby denying appellant his Fourteenth Amendment rights to a fair trial, due process of law, and a reliable capital trial.

C. The Consciousness-of-Guilt Instruction Improperly Duplicated the Circumstantial Evidence Instructions

This Court has held that specific instructions relating to the consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455; *People v. Berryman* (1993) 6 Cal.4th 1048, 1079-1080, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800.) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01 and 2.02. These instructions informed the jury that it may draw inferences from the circumstantial evidence, i.e. that it could infer facts tending to show appellant's guilt – including his state of mind – from the circumstances of the alleged crimes. There was no need to repeat this general principle in the guise of a permissive inference of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt. This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [holding that state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [holding that arbitrary preference to particular litigants violates equal protection].)

D. Reversal Is Required

Giving the consciousness-of-guilt instruction was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, appellant's conviction must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24; see *Schwendeman v. Wallenstein, supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

The error in this case was not harmless beyond a reasonable doubt. As discussed above, the length of the deliberations and the problems that the jurors had in reaching a verdict on both counts indicates that this was a close case. In the Lopez shooting, the evidence establishing murder was not strong. Since flight was not disputed, it was almost certain that the jury found the instruction applicable. Moreover, the error affected the only contested issue in the case, i.e., the nature and degree of the homicide. The effect of the consciousness-of-guilt instruction was to tell the jury that appellant's own conduct showed he was aware of his guilt for the very charge he disputed. In the context of this case, this instruction was not harmless beyond a reasonable doubt. Therefore, the judgment on the Lopez murder conviction and the special circumstance allegation of multiple murder must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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VIII.

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

After the trial court instructed the jury that appellant could be convicted of first degree murder if he committed a deliberate and premeditated murder (CALJIC No. 8.20; 14 CT 3766) or killed during the commission or attempted commission of robbery (CALJIC No. 8.21; 14 CT 2768), the jury found appellant guilty of murder in the first degree in Count 1 (14 CT 3867). The instructions on first degree murder were erroneous, and the resulting conviction of first degree murder must be reversed, because the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[49/]

Count 1 of the information alleged that appellant "willfully, unlawfully, and with malice aforethought" murdered Martin Campos. (3 CT 646.) Both the statutory reference ("section 187(a) of the Penal Code") and the description of the crime ("did willfully, unlawfully, and with malice aforethought murder") establish that appellant was charged exclusively with

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[49/] Appellant is not contending that the information was defective. On the contrary, as explained hereafter, Count 1 of the information was an entirely correct charge of second degree malice murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crimes of first degree premeditated murder and first degree felony murder in violation of Penal Code section 189.

second degree malice murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.[50/]

Penal Code section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[51/] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)

Because the information charged only second degree malice murder in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial

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[50/] The information also alleged special circumstances. (3 CT 647.) However, these allegations did not change the elements of the charged offense. "A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 661.)

Also, the allegations of a felony-murder special circumstance does not allege all of the facts necessary to support a conviction for felony murder. A conviction under the felony-murder doctrine requires proof that the defendant acted with the specific intent to commit the underlying felony (*People v. Hart* (1999) 20 Cal.4th 546, 608), but a true finding on a felony-murder special circumstance does not (*People v. Davis* (1995) 10 Cal.4th 463, 519; *People v. Green* (1980) 27 Cal.3d 1, 61).

[51/] Subdivision (a) of Penal Code section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which charges that specific offense. (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

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

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto* (1883) 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and

> murder in the second degree.[52/] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

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

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that section 187 was *not* "the statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe *section 189* as a statutory enactment of the first degree felony-

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[52/] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot both include another crime and be included within it.

murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, emphasis added, fn. omitted.)

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be section 189.

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

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

(1997) 15 Cal.4th 1229, 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[53/]

The greatest difference is between second degree malice murder and first degree felony murder. By the express terms of section 187, second degree malice murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189 (*id.* at pp. 185-186, fns. 2 & 3) and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense" (*id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the

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[53/] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements* for conviction. This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.), original emphasis.)

notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, emphasis added, citation omitted.)[54/]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule (commission or attempted commission of a felony listed in section 189 together with the specific intent to commit that crime) are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. (§ 190, subd. (a).) Therefore, those facts should have been charged in the information. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder also violated appellant's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the

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[54/] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1034-1035.) Therefore, appellant's conviction for first degree murder of Martin Campos must be reversed.

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IX.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS, IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE RETURNING A VERDICT FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

As previously noted, the trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20;) and on first degree felony murder predicated on robbery or kidnaping. (CALJIC No. 8.21; 14 CT 3768.) However, the court did not instruct the jury that it had to agree unanimously on the same type of first degree murder.

The failure to require the jury to agree unanimously as to whether appellant had committed a premeditated murder or a first degree felony murder was erroneous, and the error deprived appellant of his right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Appellant acknowledges that this Court has rejected the claim that the jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony-murder. (See, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.) However, appellant submits that this conclusion should be reconsidered, particularly in light of recent decisions of the United States Supreme Court.

This Court has consistently held that the elements of first degree premeditated murder and first degree felony murder are not the same. In the watershed case of *People v. Dillon* (1983) 34 Cal.3d 441, this Court first acknowledged that "[i]n every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime." (*Id.* at p. 475.) It then declared that "in this state the two kinds of murder [felony murder and malice murder] are not the 'same' crimes and malice is not an element of felony murder." (*Id.* at p. 476, fn. 23; see also *id.* at pp. 476-477.)[55]

In subsequent cases, this Court retreated from the conclusion that felony murder and premeditated murder are not the same crime (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 712 [holding that "[f]elony murder and premeditated murder are not distinct crimes]"), but it has continued to hold that the elements of those crimes are not the same. Thus, in *People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, this Court explained that the language from footnote 23 of *People v. Dillon*, *supra*, quoted above, "meant that the *elements* of the two types of murder are not the same." Similarly, this Court has declared that "the elements of the two kinds of murder differ" (*People v. Silva* (2001) 25 Cal.4th 345, 367) and that "the two forms of murder [premeditated murder and felony murder] have different

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[55] "It follows from the foregoing analysis that the two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. . . . [This is a] profound legal difference. . . ." (*People v. Dillon*, *supra*, at pp. 476-477, fn. omitted.)

elements" (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1131).

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.) Examination of the elements of the crimes at issue is the method used both to determine whether crimes that carry the same title are in reality different and distinct offenses (see *People v. Henderson* (1963) 60 Cal.2d 482, 502-503 (dis. opn. of Schauer, J.), quoted in fn. 18, at p. 122, *ante*) and also to determine to which facts the constitutional requirements of trial by jury and proof beyond a reasonable doubt apply (see *Jones v. United States* (1999) 526 U.S. 227, 232). Both of those determinations are relevant to the issue of whether the jury must find those facts by a unanimous verdict.

Comparison of the elements of the crimes at issue is the traditional method used by the United States Supreme Court to determine if those crimes are different or the same. The question first arose as an issue of statutory construction in *Blockburger v. United States* (1932) 284 U.S. 299, when the defendant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections described different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact that the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockburger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment (*United States v. Dixon* (1993) 509 U.S. 688, 696-697), the Sixth Amendment right to counsel (*Texas v. Cobb* (2001) 532 U.S. 162, 173), the Sixth Amendment right to trial by jury, and the Fifth and Fourteenth Amendment right to proof beyond a reasonable doubt (*Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.);[56] see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 (lead opn. of Scalia, J.)).

Malice murder and felony murder are defined by separate statutes and "each . . . requires proof of an additional fact that the other does not." (*Blockburger v. United States*, *supra*, 284 U.S. at p. 304.) Malice murderrequires proof of malice and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony murderdoes not. Felony murder requires the commission or attempt to commit a felony listed in Penal Code section 189 and the specific intent to

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[56] "The fundamental distinction between facts that are *elements* of a criminal offense and facts that go only to the *sentence* provides the foundation for our entire double jeopardy jurisprudence--including the 'same elements' test for determining whether two 'offense[s]' are 'the same,' see *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and the rule (at issue here) that the Clause protects an expectation of finality with respect to offences but not sentences. The same distinction also delimits the boundaries of other important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt." (*Monge v. California*, *supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.), original emphasis.)

commit that felony; malice murderdoes not. (Pen. Code, §§ 187 & 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.)

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

Examination of the elements of a crime is also the method used to determine which facts must be proved to a jury beyond a reasonable doubt. (*Monge v. California*, *supra,* 524 U.S. at p. 738 (dis. opn. of Scalia, J.); see *People v. Sakarias* (2000) 22 Cal.4th 596, 623.) Moreover, the right to trial by jury attaches even to facts that are not "elements" in the traditional sense if a finding that those facts are true will increase the maximum sentence that can be imposed. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476; see *id.* at p. 490.)

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

Because this is a capital case, the right to a unanimous verdict is also guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See *Schad v. Arizona* (1991) 501 U.S. 624, 630-631 (plur. opn.) [leaving this question open].) The purpose of the unanimity requirement is to ensure 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), and 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* (1980) 447 U.S. 625, 638). Therefore, jury unanimity is required in capital cases.

This conclusion cannot be avoided by recharacterizing premeditation and the facts necessary to invoke the felony murder rule as "theories" rather than "elements" of first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 160, citing *Schad v. Arizona*, *supra*.) There are three reasons why this is so.

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

likewise been characterized as an element of first degree felony murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258; *id.* at p. 1268 (conc. opn. of Kennard, J.).)

Moreover, this Court has recognized that it was the intent of the Legislature to make premeditation an element of first degree murder. As the Court has stated:

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

(*People v. Steger* (1976) 16 Cal.3d 539, 545; *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.)[57]

As the United States Supreme Court has explained, *Schad* held only that jurors need not agree on the particular means used by the defendant to

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[57] Specific intent to commit the underlying felony, the mens rea element of first degree felony murder, is not specifically mentioned in Penal Code section 189. However, ever since its decision in *People v. Coefield* (1951) 37 Cal.2d 865, 869, this Court has held that such intent is required (see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 346, and cases there cited; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), and that authoritative judicial construction "has become as much a part of the statute as if it had written [*sic*] by the Legislature" (*People v. Honig* (1996) 48 Cal.App.4th 289, 328; see also *Winters v. New York* (1948) 333 U.S. 507, 514; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 839). Furthermore, section 189 has been amended and reenacted several times in the interim, but none of the changes purported to delete the requirement of specific intent, and "[t]here is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, citations and internal quotation marks omitted.)

commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was established by the evidence that the defendant used a knife or by the evidence that he used a gun. (*Richardson v. United States*, *supra*, 526 U.S. at p. 817.) This case involves the elements specified in the statute defining first degree murder (§ 189), not means or the "brute facts" which may be used at times to establish those elements.

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

Third, at least one indisputable "element" is involved. First degree premeditated murder does not differ from first degree felony murder only in that the former requires premeditation while the latter does not. The two crimes also differ because first degree premeditated murder requires malice while felony murder does not. "'The mental state required [for first degree premeditated murder] is, of course, a deliberate and premeditated intent to kill with malice aforethought. (See . . . §§ 187, subd. (a), 189.)'" (*People v. Hart*, *supra*, 20 Cal.4th at p. 608, quoting *People v. Berryman* (1993) 6 Cal.4th 1048, 1085; accord *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Malice is a true "element" of murder in anyone's book.

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

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X.

THE TRIAL COURT'S INSTRUCTIONS THAT THE JURORS MUST FIRST ACQUIT ON FIRST DEGREE MURDER BEFORE REACHING A VERDICT ON LESSER OFFENSES SKEWED THEIR DELIBERATIONS IN FAVOR OF THE GREATER OFFENSE

The trial court instructed appellant's jurors that if they agreed that appellant committed the homicide, they must "unanimously" agree that there was a reasonable doubt about the degree of murder (14 CT 3785; CALJIC No. 8.71) or whether the crime was murder or manslaughter (14 CT 3786; CALJIC No. 8.72) before giving appellant the benefit of that doubt and returning a verdict on the lesser offense.[58/]

After deliberating for five days, the jurors indicated that they were unable to reach a verdict on either count and asked the trial court to explain CALJIC No. 8.71. (14 CT 3695a.) During the hearing on how the trial court should answer this note, the prosecutor stated that the jurors had to unanimously agree that the crime was not a first degree murder before considering a second degree verdict. (29 RT 4388, 4389.) Appellant

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[58/] CALJIC No. 8.71 read, "If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree."

CALJIC No. 8.72 similarly provided, "If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder."

objected that the jurors only had to reach a unanimous verdict on the particular degree that they found, regardless of whether they initially rejected first degree murder. The trial court agreed that the best way of instructing the jurors was to state that they had to unanimously agree that it was either a first or second degree murder. (29 RT 4389.) The trial court instructed the jury that if they could not reach an agreement on first degree murder, the verdict did not simply defer to second degree: "You must all unanimously agree on whether it's first or whether it's second." (29 RT 4294.)

On the following day (the sixth day of deliberations), in response to another note by the jurors indicating confusion about transferred intent, the trial court instructed the jurors that they were no longer to consider first degree murder in the Lopez case. It emphasized that CALJIC 8.71 continued to apply to Count I (Martin Campos):

> Previously, I instructed you under 8.71, and other instructions, that you could not return a verdict on second degree murder or any lesser charge unless you unanimously agree that the defendant was not guilty as to first degree murder. This instruction will continue as to Count I, the Martin Campos matter.

(29 RT 4412, 14 CT 3832.[59]) The jury returned a verdict on both counts the following morning. (29 RT 4414.)

Under the circumstances of this case, the trial court's instructions skewed the jury's deliberations toward first degree murder. After correctly instructing the jurors that they had to reach a unanimous decision on either first or second degree murder, the next day the trial court stated that they could only find the latter if they unanimously rejected first degree murder

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[59] The written instruction underlined the word "unanimously," emphasizing the importance of this requirement in their deliberations.

and first acquitted appellant of that charge. This change in instructions undoubtedly confused the jurors and lowered the prosecution's burden of proof in violation of appellant's rights to due process, a trial by jury, and a reliable verdict in a capital case. (U.S. Const., 5th, 6th 8th, and 14th Amends; Cal. Const, art. I, §§ 7, 15, 16; .)

A. Requiring a Capital Jury to Acquit on the Greater Offense Before Being Permitted to Convict of a Lesser Included Offense Violates the Federal Constitution

This Court has held that a jury must unanimously agree to acquit a defendant of a greater charge before returning a verdict on a lesser charge. (*People v. Fields* (1996) 13 Cal.4th 289, 310-311.) The Court should reconsider the holding as it precludes full jury consideration of lesser included offenses, and thereby implicates the due process and jury trial guarantees of the Sixth and Fourteenth Amendments and the Eighth Amendment's requirement for heightened reliability in capital cases. (*Zant v. Stephens* (1983) 462 U.S. 862 462 U.S. 862, 884-885; *Woodson v. North Carolina* (1976) 428 U.S. 280 428 U.S. 280, 305.)

"Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." (*Beck v. Alabama* (1980) 447 U.S. 625, 634, emphasis in original.) Because "[s]uch risk cannot be tolerated in a case in which the defendant's life is at stake" (*id.* at p. 637), the United States Supreme Court has held that a defendant accused of capital murder has a due process and Eighth Amendment right to lesser included offense instructions. (*Id.* at pp. 637-638.) "[P]roviding the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard."

(*Id.* at p. 634.) An instruction that the jury cannot convict on the lesser charge unless it unanimously votes to acquit on the greater charge prevents the jury from making use of lesser included offense instructions in the way contemplated by *Beck,* and subjects jurors to the same pressure to ignore the reasonable doubt standard that they would face if no lesser included offense instruction were given at all.

The instruction prevented the jurors from giving effect to lesser included offense instructions by encouraging a false unanimity. "Members of the jury who have substantial doubts about an element of the greater offense, but believe the defendant guilty of the lesser offense, may very well choose to vote for conviction of the greater rather than to hold out until a mistrial is declared, leaving the defendant without a conviction of any charge." (*Jones v. United States* (D.C. 1988) 544 A.2d 1250, 1253; see also *United States v. Tsanas* (2nd Cir. 1978) 572 F.2d 340, 346; *Cantrell v. State* (Ga. 1996) 469 S.E.2d 660, 662.)

In *United States v. Tsanas, supra*, 572 F.2d 340, for example, the court recognized that an acquittal-first instruction may result in "the defendant . . . being convicted on the greater charge just because the jury wishes to avoid a mistrial . . . ." (*Id.* at p. 346.) This is so because, "[i]f the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser charge." (*Ibid.*)

This view was also expressed by the Ninth Circuit in *United States v. Jackson* (9th Cir. 1984) 726 F.2d 1466, 1469-1470, where the court explained that if the jury must unanimously agree on acquittal on the greater offense before returning a conviction on a lesser included offense, there is a

risk that jurors who have a doubt that the defendant is guilty of the greater offense, but who are convinced the defendant is guilty of some offense, will resolve their doubts in favor of convicting the defendant of the greater offense, rather than holding out and not convicting the defendant of anything. (*Id.* at pp. 1469-1470; see also *Catches v. United States* (8th Cir. 1978) 582 F.2d 453, 459.)

The acquittal-first rule was criticized and abandoned by the Arizona Supreme Court in *State v. LeBlanc* (Ariz. 1996) 924 P.2d 441 because it encourages "false unanimity" and "coerced verdicts." (*Id.* at p. 442.) The court stated that "requiring a jury to do no more than use reasonable efforts to reach a verdict on the charged offense is the better practice and more fully serves the interest of justice and the parties." (*Ibid.*) Instead, the jury should be instructed that it may deliberate on and return a lesser offense "if it either (1) finds the defendant not guilty on the greater charge, or (2) after reasonable efforts cannot agree whether to acquit or convict on that charge." (*Ibid.*)

The acquittal-first requirement also prevents the jury from giving effect to lesser included offense instructions because it gives an unfair advantage to the prosecution. (*Cantrell v. State, supra*, 469 S.E.2d at p. 662 [acquittal-first instruction "gives the prosecution an unfair advantage"].) Indeed, the acquittal-first rule "lends support to jurors who are irrationally holding out for a greater charge" for emotional reasons. (*Ibid.*) Such reasons might include the inflammatory nature of the evidence, or evidence which supports a conviction only for a lesser charge, but which creates such sympathy for the victim that some jurors insist irrationally upon conviction for a greater charge. (See *People v. Helliger* (N.Y. 1998) 691 NY.S.2d 858, 865; *Jones v. United States*, *supra*, 544 A.2d at pp. 1253-1254.) A rule

which does not require unanimous agreement that a defendant is not guilty of the greater charge before convicting of the lesser prevents the State from obtaining a conviction in such circumstances.

Accordingly, the acquittal-first instruction violates the settled principle that "[t]here should be absolute impartiality as between the People and the defendant in the matter of instructions." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; *Reagan v. United States* (1895) 157 U.S. 301, 157 U.S. 301, 310.) An instruction that favors one party over the other deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.*(1989) 490 U.S. 504, 510; *Wardius v. Oregon* (1973) 412 U.S. 470, 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law. (*Lindsay v. Normet* (1972) 405 U.S. 56, 77.) The instruction also has the effect of lessening the prosecution's burden of proof. It therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws, his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury, and his right to a fair and reliable capital trial.

B. The Acquittal-First Requirement Made First Degree Murder the Default Verdict

California Penal Code section 1097 provides that if there is a reasonable doubt about the degree of the crime a defendant has committed, he or she may be convicted only of the lowest degree. Under this principle, if the prosecution proved a crime had been convicted but there was doubt about the nature of the offense, an individual juror must vote for the lesser offense. Thus, CALJIC No. 8.71 "explains the process jurors must go through to determine the degree of murder." (*People v. Pescador* (2004)

119 Cal.App.4th 252, 256.) Similarly, CALJIC No. 8.72 explains the process for jurors to decide between murder and manslaughter. (*Ibid.*)

Previous versions of CALJIC instructed jurors to give a defendant the benefit of the doubt without reference to whether they unanimously agreed. (See CALJIC Nos. 8.71, 8.72, 5th ed., 1988.[60]) This was in keeping with this Court's long-standing rule that jurors must be instructed that "if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*People v. Dewberry* (1959) 51 Cal.2d 548, 555.) The 1996 revision significantly changed this process by instructing jurors to vote for a lesser degree or offense only if they unanimously agree. In other words, under the revised instructions, before jurors give a defendant the benefit of the doubt, they must first unanimously agree that there is a reasonable doubt about the greater charge. If some, but not all, jurors believed that there was reasonable doubt about the nature of the offense, the instruction directs them to first degree murder. Thus, first degree murder becomes the default verdict if there is any disagreement.

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[60] CALJIC No. 8.71 formerly provided, "If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or second degree, you must give a defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree."

CALJIC No. 8.72 formerly stated, "If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime is murder of manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder."

The trial court's instruction in response to the juror's note and the revised instructions in CALJIC appear to be designed to force unanimity. While the ultimate verdict must be unanimous, it is the *process* by which a juror reaches such a verdict that is at issue. Unless the jury cannot reach a conviction on the lesser offense until they unanimously agree to reject the greater offense, "the jury will likely fail to give full effect to the reasonable doubt standard, resolving its doubts in favor of conviction." (*Keeble v. United States*, *supra*, 412 U.S. at pp. 212-213.)

In *United States v. Jackson* (9th Cir. 1984) 726 F.2d 1466, there was overwhelming evidence that the defendant had committed a crime, but a rational jury may have had doubt about the nature of the offense. The trial court instructed the jury that if it unanimously found the defendant to be not guilty of the crime charged, then it should determine the lesser offense. (*Id.* at p. 1469, fn. 1.) The Ninth Circuit recognized that if jurors were unable to reach a unanimous verdict on any charge, in theory the result would be a mistrial.

> Practically, however, in this case the risk was substantial that jurors harboring a doubt as to defendant's guilt of the greater offense but at the same time convinced that defendant had committed some offense might wrongly yield to the majority and vote to convict of the greater offense rather than not convict defendant of any offense at all.

(*Id.* at p. 1470; see also *United States v. Warren* (9th Cir. 1993) 984 F.2d 325, 332 [instructions should have made clear to the jury that it was not required to reach a unanimous verdict of acquittal on the greater charge before reaching the lesser included offense].) The same considerations should have guided the trial court's instructions in the present case.

Accordingly, this Court should reconsider its previous opinions and find that the acquittal-first instruction given by the trial court was error.

C. The Error Requires Reversal

Because an acquittal-first instruction influences the jury's deliberative process and undermines both the fairness and the reliability of its verdict, it affects basic structural rights. (See, e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *People v. Cahill* (1993) 5 Cal.4th 478, 493, 501-502.) As the Court can only speculate about the jury's deliberation process, the giving of this instruction does not lend itself to harmless error analysis; reversal of appellant's first degree murder conviction is required. (*Ibid.*)

Assuming harmless error review, reversal of the first degree murder conviction is still required. The trial court had a duty to instruct on lesser included crimes that were supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149.) Here, the jurors were instructed on lesser counts to first degree murder that met this standard in the Campos case. (14 CT 3770 [second degree murder], 3773 [voluntary manslaughter], 3778 [involuntary manslaughter].) The note to the trial court makes it apparent that the jurors were having a difficult time reaching a verdict on the matter. (14 CT 3695a.) In particular, the jurors were wrestling with how much weight could be given to Ross's testimony. (29 RT 4402.) If some of the jurors had a reasonable doubt that he formed a plan to rob Campos and discussed it with appellant and Brightmon, the jurors could have reached a lesser verdict by finding that appellant was there to keep Ross from being robbed a second time. (22 RT 3423.) Indeed, Margie Escalera testified that Campos and appellant had been struggling before the shots were fired, which might have allowed the jurors to find that the homicide was not premeditated. (18 RT 2746, 2801.) Under these circumstances, at least

some of the jurors could have had a reasonable doubt about first degree murder.

After the jury deliberated for six days, a verdict was reached soon after this instruction was given. It is clear that this instruction was important to the deliberations. Appellant's first degree murder conviction therefore cannot be deemed "surely unattributable to the" erroneous acquittal-first instruction. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, citing *Rose v. Clark* (1986) 478 U.S. 570, 578.) Reversal of appellant's conviction is therefore required.

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XI.

THE TRIAL COURT'S DISMISSAL OF THE FIRST DEGREE MURDER CHARGE ON THE LOPEZ COUNT SKEWED THE VERDICT IN FAVOR OF FIRST DEGREE MURDER IN REGARD TO CAMPOS

After appellant's jurors asked for clarification about the meaning of transferred intent in first or second degree murder (14 CT 3696a), the prosecution proposed to dismiss the first degree charges in the Lopez case. (29 RT 4405.) The trial court treated this as a motion to dismiss the first degree murder allegation under Penal Code section 1385. (29 RT 4407.)

Appellant objected that the dismissal could have a coercive effect on the Campos case, implicitly emphasizing it as being first degree murder. (29 RT 4407.) The trial court rejected this argument and instructed the jurors that the first degree murder count would continue to apply in the Campos matter, but that they were no longer to consider first degree murder in regard to Lopez. The court emphasized that as to that count, first degree murder was no longer an issue. (29 RT 4412-4413; 14 CT 3832.)

The trial court's instructions to the jurors interfered with their deliberative process, which is protected by the Sixth Amendment and article I, section 16 of the California Constitution. (*People v. Collins* (1976) 17 Cal.3d 687, 693; *People v. Oliver* (1987) 196 Cal.App.3d 423, 429; *United States v. Thomas* (2d Cir. 1997) 116 F.3d 606, 618 [federal constitutional rights].) In so doing, the trial court lessened the prosecutor's burden of proof, implicated appellant's right to a full and fair jury trial on all issues, and violated appellant's rights to due process and a reliable verdict in a capital case. (U.S. Const., 6th, 8th, and 14th Amends.; Cal. Const, art. 1, §§ 7, 15.)

A. The Trial Court Improperly Removed the Charge from the Juror's Consideration

Penal Code section 1385 provides that a trial court may order an action to be dismissed "in the furtherance of justice." (Pen. Code, § 1385, subd. (a).) Under this section, the court must state the reasons for the dismissal in an order entered upon the minutes, carefully evaluating the circumstances by weighing the defendant's interests against those of society. This provision is mandatory and an order dismissing charges is not valid unless the trial court complies with this section. (*People v. Orin* (1975) 13 Cal.3d 937, 944-945.) Here, the trial court did not state its reasons for instructing the jurors not to consider the first degree murder as it related to the Lopez count. (See 29 RT 4410; 14 CT 3696.) Accordingly, any dismissal under this section was invalid.

In *People v. Bordeaux* (1990) 224 Cal.App.3d 573, the trial court dismissed a first degree murder count after the jury was unable to reach a verdict on that charge, directing the jury to consider second degree murder instead. (*Id.* at p. 579.) The reviewing court found that the trial court had authority to dismiss the count under section 1385. (*Id.* at p. 581.) It also found that the instruction was not coercive because there was no indication that the jurors' consideration of the second degree charge was affected by the action. (*Id.* at p. 583.) Ultimately, the court affirmed the conviction for second degree murder. (*Id.* at p. 584.)

The concurring opinion correctly emphasized that the order could not be considered a dismissal under section 1385 because the trial court failed to set forth its reasons. (*Id.* at p. 584 (conc. opn. of Wiener, J.).) Justice Wiener also found that the "notion that the court has the power to simplify the jury's task by dismissing lesser included offenses before the jury reaches

a verdict on any offense is rather startling" and contrary to the defendant's right to a jury verdict free from judicial interference. (*Id.* at p. 585.) However, Justice Wiener concurred in the result because there was no indication that the actual instruction coerced a verdict of second degree murder. (*Id.* at p. 586.)

In this case, the jurors did not state that they were deadlocked or that they needed any instruction beyond what they requested in their note to the trial court. The day before, the jurors had asked for help because they were unable to reach a verdict. The trial court answered their questions and instructed them to continue their deliberations. The jurors did so. (29 RT 4402-4404.) At the time the judge withdrew the first degree murder charge, the jurors had simply asked for a written instruction or clarification on transfer of intent relating to first and second degree murder. (14 CT 3693a.) Instead of limiting itself to answering this question, the trial court instructed the jurors that they were no longer to consider first degree murder in regard to Camerina Lopez. (29 RT 4412.)

Unlike *Bordeaux*, where the jurors clearly were unable to reach a verdict, there was certainly no compelling need for the trial court to have dismissed the first degree murder count. By seeking to simplify the jurors' deliberations, particularly in the absence of a valid order under Penal Code section 1385, the trial court interfered with the deliberations in violation of due process and Sixth Amendment standards. (See *People v. Bordeaux*, *supra*, 224 Cal.App.3d at p. 585 (conc. opn. of Wiener, J.).)

B. The Trial Court's Instruction Had a Coercive Effect on the Verdict in the Campos Case

When tried by a jury, a defendant is entitled to an uncoerced verdict from the jury. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 241.) The court must exercise its power without coercing or interfering with the jurors in any way. (*People v. Sandoval* (1992) 4 Cal.4th 155, 195-196; *People v. Carter* (1968) 68 Cal.2d 810, 817.) A court violates a defendant's due process right to an impartial jury and a fair trial when it gives an instruction that has an improperly coercive effect on the jury. (*Weaver v. Thompson* (9th Cir. 1999) 197 F.3d 359, 366.) Moreover, the greater degree of reliability required in capital cases under the Eight Amendment makes it particularly important that instructions do not coerce a jury. (*Lowenfield v. Phelps*, *supra*, 484 U.S. at p. 241.)

Coercion exists where a trial court's instructions or remarks, under the totality of the circumstances, "operate to displace the independent judgment of the jury in favor of considerations of compromise and expediency." (*People v. Carter*, *supra*, 68 Cal.2d at p. 817.) Whether the statements of a trial judge amount to coercion of a verdict depends upon the facts of each case. (*Jenkins v. United States* (1965) 380 U.S. 445, 446; *People v. Burton* (1961) 55 Cal.2d 328, 356.)

Here, the trial court's instruction that the jurors were no longer to consider first degree murder in regard to Lopez highlighted the fact that the court considered the Campos charge to be stronger. In effect, it told the jurors that the killing in Lopez did not qualify as first degree murder, but the killing in Campos did; that the prosecutor did not really mean it when he argued that the Lopez shooting was first degree murder, but he absolutely

meant it in regard to Campos. The trial court erroneously signaled the view that the verdict in each count was clear and simple.

Simplification of the deliberations is just what the instruction was intended to accomplish. However, it accomplished this at a significant cost to appellant. Indeed, after deliberating for six days, and indicating that they had been unable to reach a verdict on either count, the jurors returned their verdict the morning after the trial court withdrew the first degree charge in Lopez. This alone illustrates the coercive and prejudicial effect of the trial court's instructions. (See *Weaver v. Thompson*, *supra*, 197 F.3d at p. 366.) Accordingly, the independent judgment of the jurors was compromised in the name of expediency. This Court should find that the instruction was coercive. (See *People v. Crossland* (1960) 182 Cal.App.2d 117, 119 [trial court's view that verdict should be simple improperly coerced the jury].)

C Reversal is Required

This Court should reverse the first degree murder conviction in regard to the Campos shooting. In *Arizona v. Fulminante* (1991) 499 U.S. 279, the United States Supreme Court explained that there are certain errors that affect the framework within which a trial proceeds. (*Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 309-310.) These errors are defects in the trial mechanism that defy harmless error review. (*Id.* at p. 309.) They implicate fundamental protections provided a defendant in a criminal case.

> Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair. (*Ibid.*)

Such a structural error requires reversal per se because it infects the integrity of the trial itself. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 629-630.) Here, the trial court's instruction improperly interfered with the function of

the jury. Under these circumstances, the instruction was "akin to improper reasonable doubt instructions, a partial judge, or deprivation of the right to counsel, and therefore a "structural error" to which harmless error analysis is inapplicable." (*Smalls v. Batista* (S.D.N.Y. 1998) 6 F.Supp.2d 211, 222 -223 [coercive instruction is structural error].) Reversal of Count I (Campos) is therefore required. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280 [erroneous reasonable doubt instruction was structural error requiring reversal without harmless error analysis].)

Even assuming that the instruction was trial error, it cannot be deemed harmless. As discussed above (Argument X), there was evidence to support instructing the jurors on lesser charges in regard to Campos. The trial court's instructions undoubtedly affected the deliberations and the verdict on these issues. The error requires reversal under either the beyond-a reasonable-doubt test of *Chapman v. California* (1967) 386 U.S. 18, 24, or the reasonable-probability test of *People v. Watson* (1956) 46 Cal.2d 818, 836.)

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XII.

THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURORS ON THE ELEMENTS OF KIDNAPING SO THAT THE SPECIAL CIRCUMSTANCE MUST BE SET ASIDE.

The prosecutor alleged that on November 11, 1995, appellant committed the special circumstance of murder in the commission of a kidnaping in violation of either Penal Code section 207 or 209. (3 CT 647 [amended information].) The trial court erroneously instructed appellant's jurors on the definition of simple kidnaping under section 207, using the 1999 revision of CALJIC No. 9.50 that provided a broad definition of the asportation requirement. (14 CT 3796.) This definition was not in effect at the time appellant was alleged to have committed this crime. Therefore, the instruction violated appellant's federal and state due process rights, as well as his Sixth Amendment right to a trial by jury and his Eighth Amendment right to a reliable verdict. (U.S. Const., 6th, 8th & 14th Amends; Cal. Const., art. 1, §§ 7, 15, 16.)

At the time of the offense in this case, simple kidnaping under section 207 was governed by rulings of this Court that held that the victim must be taken a "substantial distance" and made the asportation standard dependent on the actual distance at issue. (See *People v. Caudillo* (1978) 21 Cal.3d 562, 572; *People v.Stanworth* (1974) 11 Cal.3d 588, 600-601.) Under this standard, CALJIC No. 9.50 required the jurors to find that "the movement of the other person was for a substantial distance, that is, a distance more than slight or trivial." (CALJIC No. 9.50, Sixth. Ed., 1996.)

In 1999, this Court overruled its previous cases and adopted a new standard for asportation based on the totality of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 235-238.) This definition was much

broader and more flexible than the previous standard. Accordingly, CALJIC No. 9.50 was revised in 1999 to reflect this substantial change in law. Appellant's jurors were instructed under the newer standard, which required them to find only that the movement of the other person was substantial in character, and made this finding dependent on a totality of circumstances that was not limited to the actual distance involved. (14 CT 3796-3797; CALJIC No. 9.50 (1999 Revision).)

In *Martinez*, this Court made clear that the change in law could not be applied retroactively: "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. [Citation.]" (*People v. Martinez*, *supra*, 20 Cal.4th at p. 238, quoting *In re Baert* (1988) 205 Cal.App.3d 514, 518.) *Martinez* emphasized that in overruling *Caudillo*, this Court had not only expanded the factual basis for making a determination that asportation was sufficient to support kidnaping, but in the process effectively overruled cases holding that specific distances failed to establish that element of the crime. (*Id.* at p. 239.) Accordingly, this Court held that the defendant was subject only to the standards in effect at the time the crime was committed. (*Id.* at p. 241.)

Here, appellant's jurors were instructed under the 1999 revision of the law that was not in effect at the time the alleged kidnaping occurred. Moreover, the prosecutor's closing argument suggested that the primary determination for kidnaping was whether the movement increased the risk of harm to Garcia or Campos, and was not a matter of the distance involved. (27 RT 4135-4138.) Accordingly, the jury reached its verdict based on an incorrect statement of the law. They did not determine the asportation standard as being "exclusively dependent on the distance involved." (*People*

v. Martinez, *supra*, 20 Cal.4th at p. 233.) This error violated appellant's federal and state due process rights to have the jurors consider the crime under the law that was in effect at the time the crime occurred. (*Id.* at pp 238-241; *Bouie v. City of Columbia* (1964) 378 U.S. 347, 352-354.)

The error requires reversal of the kidnaping special circumstance finding. "[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Green* (1980) 27 Cal.3d 1, 69.) In *People v. Guiton* (1993) 4 Cal.4th 1116, this Court reaffirmed that "if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, as in *Green*, the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." (*Id.* at p. 1129; see also *People v. Swain* (1996) 12 Cal.4th 593, 607 [erroneous instructions on implied malice required reversal because it could not be determined if jurors necessarily found defendant guilty based on proper legal theory].)

In *People v. Morgan* (2007) 42 Cal.4th 593, the defendant was convicted of simple kidnaping under section 207 and the special circumstance of kidnaping was found to be true. As in the present case, these charges were governed by the standards under *Stanworth* and *Caudillo* that made asportation dependent on the distance involved. The *Morgan* prosecutor's closing argument erroneously suggested that asportation could be determined based on the circumstances of the crime – that even a 40 foot distance crossed certain boundaries and increased the harm to the victim. (*Id.* at pp. 608-609.) This Court found that had the crime occurred after

1999, the argument would have been entirely proper. However, under the controlling law it was a legally inadequate theory. (*Id.* at p. 611.) Even though the prosecutor presented another theory of kidnaping, based upon a longer asportation, this Court could not determine from the record upon which theory the jury relied. It therefore reversed the kidnaping conviction and the related special circumstance. (*Id.* at p. 613.)

As in *Morgan*, the trial court's instruction here, coupled with the prosecutor's argument, was legal error. In order to find that the special circumstance was true, the jurors could have relied upon the incorrect instruction of simple kidnaping under section 207. Even if the jurors could also have based the special circumstance finding upon kidnaping in the course of a robbery under section 209, it cannot be determined which section provided the basis for their finding. Indeed, given the weakness in establishing that the movement of either Garcia or Campos was incidental to the robbery (see Argument XV [insufficient evidence supported the special circumstance]), it is likely that the jurors relied on the broad definition of simple kidnaping to find that the special circumstance was true. But at bottom, there is no basis to determine from the record the theory that the finding ultimately rested upon. Accordingly, this Court must reverse the kidnaping special circumstance. (*People v. Green*, *supra*, 27 Cal.3d at p. 69; *People v. Morgan*, *supra*, 42 Cal.3d at p. 613.)

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XIII.

THE TRIAL COURT FAILED TO INSTRUCT APPELLANT'S JURORS THAT THEY HAD TO UNANIMOUSLY AGREE ON WHICH ACT CONSTITUTED KIDNAPING IN ORDER TO FIND THAT THE SPECIAL CIRCUMSTANCE WAS TRUE

In making a special circumstance finding, the jurors must reach a unanimous decision about whether the allegation is true. (Pen. Code, §§ 190.1-190.4.) This verdict requires the same standards of unanimity, proof, fairness, and reliability that is afforded a conviction for the underlying crime. (*People v. Green* (1980) 27 Cal.3d 1, 49; *People v. Davenport* (1985) 41 Cal.3d 247, 273.)

In this case, appellant was charged with the special circumstance of murder in the commission of a kidnaping, but the jurors were instructed only that they had to reach a decision about whether *some* kidnaping occurred. They did not have to come to a unanimous decision about which factual and legal theory supported such a finding. Accordingly, the prosecutor argued that a kidnaping could have occurred when Brightmon stopped Garcia and brought him 30 or 40 feet back to the area of the U-Haul (27 RT 4133-4135) or when Campos or Garcia were taken into the back of the truck itself (27 RT 4136-4138.) Thus, some jurors may have found that a simple kidnaping occurred under section 207 when Garcia was first brought back while others may have found that a kidnaping under section 209 occurred when Campos was placed in the back of the truck. Since the prosecutor alleged that there was more than one movement supporting kidnaping, involving more than one victim, the trial court's failure to require the jurors to unanimously agree on the specific act constituting kidnaping was error, in violation of his state and federal constitutional rights to have a unanimous jury determine every

issue before it, and implicated the requirements for due process, and a reliable verdict. (U.S. Const., 6th, 8th, and 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16.)

It has long been settled that when more than one possible act is alleged to support a criminal charge, the prosecutor must either elect which act forms the basis for the charge or the jurors must be instructed that they have to unanimously agree beyond a reasonable doubt that the defendant committed a specific criminal act. (*People v. Gordon* (1985) 165 Cal.App.3d 839, 854; see *People v. Jones* (1990) 51 Cal.3d 294, 321 [citing *Gordon* with approval]; *People v. Diedrich* (1982) 31 Cal.3d 263, 280-282 [jurors must be agree about the specific act that forms that basis for a conviction].)

These principles apply to a special circumstance finding. Indeed, this Court has recognized that because the special circumstance finding renders a defendant subject to the death penalty, "particularized verdicts on each special circumstance are essential." (*People v. Davenport*, *supra*, 41 Cal.3d at p. 275.) This is because a special circumstance is more than an aggravating factor, it is "a fact or set of facts, found beyond reasonable doubt by a unanimous verdict" that makes a crime eligible for death. (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 903.) Unanimity for a special circumstance finding is therefore essential "to ensure that jurors agree upon a particular act where evidence of more than one possible act constituting a charged criminal offense is introduced." (*People v. Mickle* (1991) 54 Cal.3d 140, 178.)

Here, the prosecutor did not elect one particular act to support the kidnaping special circumstance. Indeed, during the course of the trial, appellant objected that the prosecutor had never made clear to whom the

special circumstance applied: whether the kidnaping allegation applied to Martin Campos, the murder victim, or Jose Garcia. (21 RT 3265.) The prosecutor maintained that no election was required – no one had to be named in a special circumstance so that all that the state had to show was that some kidnaping occurred in the course of a murder. (21 RT 3265-3267.) The trial court erroneously adopted this rationale. (21 RT 3267.)

Even assuming that the trial court did not have to compel the prosecutor to elect a particular theory, it had a *sua sponte* duty to instruct the jurors that they had to agree as to the specific act that formed the basis of their finding. (*People v. Gordon*, *supra*, 165 Cal.App.3d at p. 854.) Appellant's jurors were instructed only that they had to agree unanimously about whether a special circumstance was true. (14 CT 3730 [CALJIC No. 8.80.1 (1997 Revision).] Accordingly, appellant's jurors only had to determine that appellant was a principal to the kidnaping of *some* victim under *some* legal theory. This was not sufficient to render a unanimous, particularized verdict on whether the special circumstance was true.

Because a special circumstance operates as a functional equivalent of a criminal offense, appellant had a Sixth Amendment right to have the jury make every determination necessary to support the charge. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 494; *Ring v. Arizona* (2002) 536 U.S. 584, 603-605.) When the right to a jury verdict applies, it must be unanimous. (Cal. Const., art. 1, § 16.) This right is protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488). A unanimous verdict is also necessary to ensure the accuracy and reliability of the verdict (see *Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14

Cal.3d 338, 352), particularly in light of the heightened requirements for reliability in a capital case. (See *Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

In *Arizona v. Fulminante* (1991) 499 U.S. 279, the United States Supreme Court explained that there are certain errors that affect the framework within which a trial proceeds. (*Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 309-310.) These errors are defects in the trial mechanism that defy harmless error review. (*Id.* at p. 309.) They implicate fundamental protections provided a defendant in a criminal case:

> Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.

(*Ibid.*) Such a structural error requires reversal per se because it infects the integrity of the trial itself. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 629-630; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280 [lack of proper reasonable doubt instruction could not be harmless because there was no valid jury verdict].)

Here, the lack of a unanimity instruction was structural error because it eliminated a finding by the jury on a material issue in the case. This finding was required under both California law and federal constitutional principles. It defies traditional harmless error review because this Court cannot determine what the jury concluded, nor can it substitute its opinion for a valid jury verdict. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.) Therefore the special circumstance finding against appellant must be reversed. (*Ibid.*)

Even assuming that the lack of a unanimity instruction was "trial error" that does not require reversal *per se*, it would have affected the juror's

deliberations. The acts alleged here to support the kidnaping rested on very thin evidence (see Argument XV, *infra* [insufficient evidence supported the kidnaping special circumstances].) Without agreeing on what act might have constituted kidnaping, jurors could easily have concluded that appellant must have been guilty of *something* and found the special circumstance to be true. In the absence of a unanimity instruction, this Court cannot determine that the jurors made a proper finding and that the error did not contribute to the verdict. Under these circumstances, reversal is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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XIV.

THE DEFINITION OF SIMPLE KIDNAPING WAS UNCONSTITUTIONALLY VAGUE AT THE TIME OF APPELLANT'S OFFENSE

The possibility that appellant had kidnaped either Jose Garcia or Martin Campos in violation of subdivision (a) of Penal Code section 207 influenced the jury's decisions at both stages of the trial. At the guilt phase, the jury found the kidnaping special circumstance allegation to be true based on either a violation of section 207 or a violation of section 209. (14 CT 3868.) At the penalty phase, the jury was instructed that the kidnaping special circumstance was one of the factors it must consider in deciding whether appellant should live or die.

In 1994, when the kidnaping allegedly occurred, subdivision (a) of Penal Code section 207 provided that, "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnaping." Here, the statutory language prohibiting the forcible movement of a non-consenting victim "into another part of the same county" was at issue. Thus, asportation was an essential element of the crime of kidnaping charged against appellant. (*People v. Rayford* (1994) 9 Cal.4th 1, 14; *People v. Camden* (1974) 16 Cal.3d 808, 814) That term, as construed by this Court at the time of the charged crime, was unconstitutionally vague.

A. The Constitutional Requirement of Reasonable Specificity

To satisfy the due process requirements of the state and federal Constitutions (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 & 15), penal statutes must provide reasonably precise definitions of the criminal conduct

they prohibit. (*Coates v. City of Cincinnati* (1971) 402 U.S. 611, 614; *Williams v. Garcetti* (1993) 5 Cal.4th 561, 567.) "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. [Citation.]" (*Connally v. General Construction Co.* (1926) 269 U.S. 385, 391.)

"Under both Constitutions, due process of law in this context requires two elements: a criminal statute must '"'be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt.'" (*Williams v. Garcetti*, *supra*, 5 Cal.4th at p. 567, quoting *Walker v. Superior Court* (1988) 47 Cal.3d 112, 141; see also *Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

In death penalty cases, additional specificity requirements are imposed by the state and federal Constitutions. (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17; see *Maynard v. Cartwright* (1988) 486 U.S. 356, 361-363 [holding that the Eighth Amendment imposes stricter requirements than the Due Process Clause of the Fourteenth Amendment]; see also *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 806 [finding a special circumstance unconstitutionally vague under the Due Process Clauses of the state and federal Constitutions].)

Special circumstances, which determine whether or not a defendant is eligible for the death penalty, must provide both "clear and objective standards" and "specific and detailed guidance" for the jury. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.) Sentencing factors, which are used to determine whether a death-eligible defendant will actually be sentenced to death, must have a common-

sense core meaning that juries can understand. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.)

B. The Vagueness of the Statutory Definition

In determining whether a statute is sufficiently certain to comply with due process and Eighth Amendment standards, the courts "'look first to the language of the statute, then to its legislative history, and finally to California decisions construing the statutory language.' [Citation.]" (*People v. Estrada* (1995) 11 Cal.4th 568, 581.) Therefore, it is necessary to consider both "the relevant and decidedly nonlinear history of the simple kidnaping [and] kidnaping for robbery . . . statutes" (*People v. Rayford*, *supra*, 9 Cal.4th at p. 14) and the judicial decisions that resulted in the courts "not having an articulable standard for the meaning of" the crucial statutory language at the time of the crime at issue here (*id.* at p. 19, fn. 10).

1. The Decidedly Nonlinear History of this Court's Interpretation of the Asportation Element in Penal Code Section 207

The language at issue here – "into another part of the same county" – was added to subdivision (a) of Penal Code section 207 in 1905 in response to this Court's decision in *Ex parte Keil* (1890) 85 Cal. 309, which held that a forcible movement of 20 miles from San Pedro to Santa Catalina Island, both in Los Angeles County, was not kidnaping within the meaning of the statute as it existed at that time. (*People v. Rayford*, *supra*, 9 Cal.4th at p. 8, fn. 3.) Thus, it is reasonable to assume that the Legislature intended miles-long movements like those involved in *Keil* to constitute simple kidnaping. Beyond that, however, the statute's language and history give no indication of whether movement of inches, feet, or miles is required.

That fact did not escape the defendant in *People v. Loignon* (1958) 160 Cal.App.2d 412, who argued that the reference to another part of the

same county was "vague, indefinite, and uncertain" because it was impossible to determine if it meant "a few inches away, across the street, around the corner, or into another political subdivision of the county." (*People v. Loignon*, *supra*, 160 Cal.App.2d at p. 421; cf. *Connally v. General Construction Co.*, *supra*, 269 U.S. at p. 395 [finding the terms "locality" and "neighborhood" vague because "[b]oth terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles. [Citations.]"])

The *Loignon* court rejected that challenge on the authority of *People v. Chessman* (1951) 38 Cal.2d 166, 192, and *People v. Cluchey* (1956) 142 Cal.App.2d 563, 565, two cases dealing with *aggravated* kidnaping in violation of Penal Code section 209, which had held that "[i]t is the fact, not the distance, of forcible removal which constitutes kidnaping in this state." (*People v. Loignon*, *supra*, at p. 421.) Thus, under *Loignon*, a forcible movement of *any* distance was sufficient to constitute a violation of Penal Code section 207.

Shortly thereafter, the defendant in *People v. Phillips* (1959) 173 Cal.App.2d 349 argued that *Loignon* had been wrongly decided because *Chessman* and *Cluchey*, the cases it had relied on, involved Penal Code section 209, rather than Penal Code section 207. In addition, he argued that because section 207 as originally enacted had been interpreted as expressive of the common law, "the Legislature, by its 1905 amendment to section 207, must have envisaged 'movements over considerable distances.'" (*People v. Phillips*, *supra*, 173 Cal.App.2d at p. 352.)

Both arguments were rejected. The *Phillips* court held that *Loignon* had properly relied on *Chessman* and *Cluchey* because the distinction between Penal Code section 207 and Penal Code section 209 was "a

distinction without a substantial difference in relation to the specific question now under inquiry." (*People v. Phillips*, *supra*, at p. 352.) It also concluded that an interpretation of section 207 that required movements over a considerable distance "would import into the statute a hazardous element of uncertainty. What is a 'considerable' distance?" (*Ibid.*)[61/]

If judicial construction of Penal Code section 207 had ended with *Loignon* and *Phillips*, appellant would have to contend with the fact that those decisions had upheld the statute in the face of vagueness challenges similar to the one made here. However, much more was to come. Within a few years, the reasoning of those two Court of Appeal decisions was completely undermined by subsequent decisions of this Court, and the law remained in a state of flux for many years thereafter.

First, this Court impliedly disapproved application of *Chessman*'s "any distance" rule to cases involving simple kidnaping in violation of Penal Code section 207. In *Cotton v. Superior Court* (1961) 56 Cal.2d 459, 465, the Court concluded that the Legislature had not intended to allow every assault to be prosecuted as a kidnaping so long as movement over some slight distance was involved. It ruled that a movement of 15 feet incidental to an assault would not constitute a violation of Penal Code section 207.

Then *Chessman* itself was overruled. In *People v. Daniels* (1969) 71 Cal.2d 1119, this Court rejected *Chessman*'s holding that any movement at

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[61/] *Phillips* affirmed a kidnaping conviction in which the victim had been transported an unspecified distance along a corridor inside a home, down 14 steps, then 15 feet outside. The *Phillips* court cited other kidnaping cases involving similarly minimal distances, including *People v. Cook* (1937) 18 Cal.App.2d 625 [victim was moved from a sidewalk into the adjacent house] and *People v. Hunter* (1942) 49 Cal.App.2d 243 [one victim was carried merely across the railroad tracks].)

all would suffice to establish kidnaping for robbery in violation of Penal Code section 209. Instead, the *Daniels* court held, "the asportation required for kidnaping for robbery consisted of a movement of the victim that is not merely incidental to the commission of the robbery, and which substantially increases the risk of harm over and above that necessarily present in the crime of robbery itself." (*People v. Rayford*, *supra*, 9 Cal.4th at p. 16, citing *People v. Daniels*, *supra*, at p. 1139.)

Daniels represented a tectonic shift in the law of kidnaping in this state, but despite the changes, some things stayed the same. The reasoning of *Loignon* and *Phillips* was echoed in the decision of *People v. Williams* (1970) 2 Cal.3d 894, which again suggested that the test for asportation under Penal Code section 209 (this time the new *Daniels* test, rather than the *Chessman* test applied by *Loignon* and *Phillips*) was also the test for asportation under section 207. "Although *Daniels* was directed toward a construction of the statute defining aggravated kidnaping (Pen. Code, § 209)," the *Williams* court held, "it is clear that the considerations therein enunciated are applicable as well to simple kidnaping (Pen. Code, § 207)." (*People v. Williams*, *supra,* 2 Cal.3d at p. 901.)

That convergence was short-lived. In *People v. Stanworth* (1974) 11 Cal.3d 588, this Court retreated from the position it had taken in *Williams* and held that the *Daniels* test was applicable *only* in prosecutions for kidnaping for robbery in violation of Penal Code section 209, and not to prosecutions for simple kidnaping in violation of Penal Code section 207. (*People v. Stanworth*, *supra*, 11 Cal.3d at pp. 598-600.) *Stanworth* also articulated a new test to use in determining what *was* a sufficient asportation under section 207, and that test was the one that applied at the time of the kidnaping charged herein.

According to *Stanworth*, the statutory requirement of movement into another part of the same county "implies that the determining factor in the crime of [simple] kidnaping is the actual distance of the victim's movements." (*People v. Stanworth*, *supra*, at p. 601.) Relying on prior cases which had held that the distance of the asportation must be more than "slight" or "trivial," the *Stanworth* court also held that the distance "must be substantial in character to constitute kidnaping under section 207." (*Ibid.*) Although *Stanworth*'s reference to "the actual distance of the victim's movements" strongly implied a quantitative test for sufficient asportation under Penal Code section 207, this Court refused to fix a specific numerical limit on the distance an unwilling victim could be moved without violating the statute. Noting that "the Legislature did not provide a definition of kidnaping that involves movements of an exact distance" (*People v. Stanworth*, *supra*, 11 Cal.3d at p. 600), the Court stated that "'to define the phrase, "another part of the same county," in terms of a specific number of inches or feet or miles would be open to a charge of arbitrariness'" (*id.* at p. 601, quoting *People v. Daniels*, *supra*, 71 Cal.2d at p. 1128).

People v. Caudillo (1978) 21 Cal.3d 562, 572, affirmed *Stanworth*'s "substantial distance" test and "made the asportation standard exclusively dependent on the distance involved." (*People v. Martinez* (1999) 20 Cal.4th at 225, 233.) It specifically rejected the Attorney General's claim that considerations other than actual distance should be considered in determining whether the movement was substantial. "Neither the incidental nature of the movement, the defendant's motivation to escape detection, nor the possible enhancement of danger to the victim resulting from the movement is a factor to be considered in the determination of substantiality of movement for the offense of [simple] kidnaping." (*People v. Caudillo*,

supra, at p. 574.) However, *Caudillo* did not specify the actual distance that would be sufficient.

Thus, "Although purportedly no particular distance was controlling, distance nevertheless became the sole criterion for assessing asportation [at the time of the kidnaping alleged herein], with only 'more than slight [citation] or "trivial" [citation]' as guidance in assessing when movement was 'substantial in character.' (*People v. Stanworth*, *supra*, 11 Cal.3d at p. 601.)" (*People v. Martinez*, *supra*, 20 Cal.4th at p. 234, first bracketed material added.)

Martinez changed the rule once more. It overruled *Caudillo* and held that whether the asportation was substantial in character should be determined by considering "the totality of the circumstances," including the scope and nature of the movement, the changed environment, any increased risk of harm to the victim, and whether the movement was merely incidental to an associated crime. (*People v. Martinez*, *supra*, 20 Cal.4th at pp. 235-240.)

The new test established by *Martinez* does not apply to the instant case. (*Id.* at pp. 238-241.) However, *Martinez* is relevant here to illustrate the differing constructions to which the crucial phrase "substantial distance" is susceptible. (See *Connally v. General Construction Co.*, *supra*, 269 U.S. at p. 393 ["The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions"].)

2. The Lack of an Articulable Standard for What Constituted a "Substantial Distance" Under Penal Code Section 207

As previously noted, under the construction of Penal Code section 207 that applied at the time of the kidnaping charged in this case, the actual distance of the victim's movement was the sole criterion for assessing the sufficiency of the asportation, and the requirement that the movement be more than slight or trivial was the only guidance provided by the case law as to whether the movement was substantial in character. (*People v. Martinez*, *supra*, 20 Cal.4th at p. 234.)

However, "substantial" is an inherently subjective term, and what seems substantial to one person may seem moderate or insignificant to another. (Cf. *Connally v. General Construction Co.*, *supra*, 269 U.S. at p. 395 [noting that the terms "locality" and "neighborhood" were "elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles"].)[62/] Trial jurors and the intermediate appellate courts have recognized this fundamental uncertainty, and this Court has essentially agreed.

The jurors in *People v. Daniels* (1993) 18 Cal.App.4th 1046, for example, sent the trial court a written request which stated: "[N]eed clarification on what is substantial distance, that is, a distance more than

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[62/] Although the word "substantial' has been found sufficiently certain in some contexts (e.g., *People v. Serrano* (1992) 11 Cal.App.4th 1672, 1676 ["substantial likelihood of death"]), it has been found unacceptably ambiguous in others (e.g., *People v. Belous* (1969) 71 Cal.2d 954, 970 ["substantially or reasonably necessary to preserve the life of the mother"]; *State v. Liuzza* (La. 1984) 457 So.2d 664, 666 ["substantial part of support and maintenance"]; *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 392 ["substantial history of serious assaultive criminal convictions"].)

slight or trivial." The trial court responded by instructing the jury to use the common, ordinary meaning of the term, prompting the jury to request a dictionary. The next day, the jurors sent the trial court another request which read:

> It appears we have a hang-up with some people of the jury who interpret kidnaping as taking a person a [ ] few miles in order for him (the defendant) to be charged with kidnaping. We need a clarification on what constitutes kidnaping. Does the distance the victim is taken (miles) and the nature of the route have any bearing on a person being kidnaped? It seems we are hung up on the interpretation of the word kidnaping.

The jurors were not able to reach a verdict until the trial court erroneously instructed them that a distance of 500 feet was substantial as a matter of law. (*Id.* at pp. 1051-1052.)

The intermediate appellate courts have also struggled with the concept of "substantial distance." In *Martinez* this Court quoted with approval two decisions in which the courts of appeal had expressly stated that the "substantial distance" test applicable to this case did not provide a meaningful standard for the determination of guilt. (*People v. Martinez*, *supra*, 20 Cal.4th at pp. 234-235, citing *People v. Stender* (1975) 47 Cal.App.3d 413, 422.) Perhaps most significantly, this Court itself has recognized the lack of clarity in the definition of simple kidnaping that prevailed at the time of the kidnaping charged in this case. It has twice characterized the "substantial distance" test for asportation under Penal Code section 207 as "less clear" than the test for asportation under section 209 (*People v. Martinez*, *supra*, 20 Cal.4th at p. 233; *People v. Rayford*, *supra*, 9 Cal.4th at p. 14), even though the section 209 test has itself been criticized as confusing (*People v. Daniels*, *supra*, 202 Cal.App.2d at pp. 673-683).

In addition, this Court has admitted that the "substantial distance" test applicable to this case provided "little guidance" (*People v. Rayford, supra*, 9 Cal.4th at p. 14) and "scant assistance" (*People v. Martinez* (1999) 20 Cal.4th 225, 234) to those charged with determining whether an asportation was sufficient to constitute a violation of Penal Code section 207. Indeed, in *Rayford,* this Court noted the frustration that other courts had experienced in not having an articulable standard for the meaning of "substantial distance." (*People v. Rayford, supra*, 9 Cal.4th at p. 19, fn. 10.) This absence of such a standard made the definition of simple kidnaping in effect at the time of the crime charged herein unconstitutionally vague.

Moreover, the inconsistent application of the "substantial distance" test noted by *Rayford* is further evidence of constitutional infirmity.[63/] (*Connally v. General Construction Co., supra*, 269 U.S. at p. 393.) "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109, fn. omitted.) A test that

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[63/] *Rayford* cited *People v. Bradley* (1995) 15 Cal.App.4th 1144, *People v. Daly* (1992) 8 Cal.App.4th 47, and *People v. Williams* (1990) 220 Cal.App.3d 1165, as examples of decisions that had used reasoning arguably inconsistent with the holding of *Caudillo*. Dramatic evidence of inconsistency in result can be found by comparing the decision in *People v. Stender, supra*, 47 Cal.App.3d at p. 423, which held that an asportation of 200 feet was sufficient under the circumstances to establish simple kidnaping in violation of section 207, with the decision in *People v. John* (1983) 149 Cal.App.3d 798, 807-810, which held that an asportation of 465 feet was *not* sufficient. The reasoning of *Stender* was criticized in *Caudillo* for relying on factors other than actual distance. (*People v. Caudillo, supra*, 21 Cal.3d at p. 574.)

cannot be uniformly applied, even by appellate courts, will inevitably result in arbitrary and discriminatory application by trial judges and lay juries.

Apparently attempting to forestall a vagueness challenge to its new "substantial distance" standard, the *Stanworth* court quoted from *People v. Daniels*, *supra*, 71 Cal.2d 1119, and declared: "'[Nonetheless] [t]he law is replete with instances in which a person must, at his peril, govern his conduct by such nonmathematical standards as "reasonable," "prudent," "necessary and proper," "substantial," and the like.' (*Daniels*, 71 Cal.2d at pp. 1128-1129.)" However, the *Stanworth* court ignored an important qualification to the language it quoted from *Daniels*. After noting a variety of situations in which "nonmathematical" standards like "reasonable" and "prudent" were employed, the *Daniels* court stated, "Yet standards of this kind are not impermissively vague, *provided their meaning can be objectively ascertained by reference to common experiences of mankind.*" (*People v. Daniels*, *supra*, 71 Cal.2d at p. 1129, italics added.)

The problem here is that there is nothing in community standards or the "common experiences of mankind" that specifies how far a person must be moved before the length of the asportation can be characterized as "substantial." The standard established by *Stanworth* and *Caudillo* was not a normative test, dependent on how the circumstances of the case were evaluated with reference to personal or community values or the shared experiences of the jurors. Instead, it was a purely numerical test, entirely dependent on the actual distance of the victim's movements, but with no "bright line" numerical limit to distinguish asportations that were substantial from those that were not. (*People v. Sheldon* (1989) 48 Cal.3d 935, 953; see *People v. Stanworth*, *supra*, 11 Cal.3d at pp. 600-601.)

Opinions as to the actual distance an asportation must be before it can be characterized as substantial can vary widely. The jury in *People v. Daniels*, *supra*, 18 Cal.App.4th 1046, included some jurors who believed that a movement for several miles was necessary to constitute kidnaping (*id.* at pp. 1051-1052), whereas the jury in *People v. Daly* (1992) 8 Cal.App.4th 47, convicted the defendant of kidnaping for an asportation that measured no more than 40 feet (*id.* at pp. 50-51).

Therefore, the term "substantial distance," as it was construed by this Court in 1994, suffers from the same constitutional infirmity as the term "annoy" at issue in *Coates v. City of Cincinnati*, *supra*, 402 U.S. 611. The statute was "vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." (*Coates v. City of Cincinnati*, *supra*, at p. 614, citation omitted.)

C. The Special Circumstance Must be Set Aside

A special circumstance based on an unconstitutional statute cannot stand. Therefore, because Penal Code section 207, as construed by this Court at the time of the alleged kidnaping in this case, was unconstitutionally vague (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, §§ 7, 15, & 17), the kidnaping special circumstance must be reversed.

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XV.

INSUFFICIENT EVIDENCE SUPPORTED THE SPECIAL CIRCUMSTANCE OF MURDER IN THE COURSE OF A KIDNAPING

Appellant was charged with the special circumstance of murder in the course of a kidnaping or attempted kidnaping under Penal Code section 207 (simple kidnaping) or 209 (kidnaping for robbery). The trial court denied appellant's motions to set aside the allegation under Penal Code sections 995 (2 RT 124) and 1181. (21 RT 3267). Although the jurors found the special circumstance to be true, there was insufficient evidence to support the asportation requirement under section 207 and the prosecutor failed to establish that the alleged kidnaping was not incidental to a robbery under section 209. Accordingly, this Court should find that the special circumstance of kidnaping must be set aside.

A conviction that is not supported by sufficient evidence is a denial of due process under both the state and federal Constitutions. (U.S. Const., Amend. 14; Cal. Const., art. I, § 15; *People v. Rowland* (1992) 4 Cal.4th 238, 269.) The same standard applies to a special circumstance finding as does to a conviction. (*People v. Valencia* (2008) 43 Cal.4th 268, 90.) Under the federal Constitution, the test is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, italics omitted.) Likewise, under the state Constitution, the test is whether a "reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

In both cases, the latter portion of the formulation is crucial. The test is not whether the evidence was sufficient to show that the defendant "might" be guilty or even whether it was sufficient to show that the defendant is "probably" guilty. A conviction or special circumstance finding cannot stand if the evidence does no more than make the existence of an element of the crime "slightly more probable" than not. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320.) The test is whether the evidence is sufficient to convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. (*Id.* at p. 319; *People v. Johnson*, *supra*, 26 Cal.3d at p. 576.) "Evidence to be 'substantial' must be 'of ponderable legal significance . . . reasonable in nature, credible, and of solid value.' [Citations.]." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 576; accord, *People v. Raley* (1992) 2 Cal.4th 870, 891.) Under these standards, the special circumstance finding in this case must be set aside.

A. Factual and Procedural Background

Oscar Ross believed that Martin Campos had set up a robbery, during which marijuana, money, and household items had been taken from him while he and other people living on his property were held at gunpoint. (19 RT 2861-2863.) Ross devised a plan to arrange to buy cocaine from Campos, but take it instead. (19 RT 1869.) According to Ross, he enlisted Todd Brightmon and appellant to help him carry out this plan. (19 RT 2871.)

On November 11, 1995, Martin Campos and Jose Garcia went to the Ross property in order to deliver cocaine and drove near an old U-Haul truck that was parked there. (19 RT 2889.) Soon afterwards, Garcia saw that appellant had a gun and ran towards the gate. Brightmon ran after him, tackled him, and brought him back. (15 RT 2441; 19 RT 2891 - 2895.)

Garcia testified that he had gone about 19 feet; Ross estimated the distance at 40 feet. (15 RT 2442; 19 RT 2895.)

Garcia testified that he did not understand what anybody was saying, but it was clear that Ross wanted him to go inside the back of the U-Haul truck. He did not want to do this, but Brightmon hit him and forced him into the truck. Campos was already there. (15 RT 2445-2446.) Ross denied that anybody hit Garcia or forced them into the truck. (19 RT 2896.) Campos ran and was shot, while Garcia escaped. (15 RT 2446, 2452; 19 RT 2896-2898.)

Before trial, the district attorney amended the information, over appellant's objection that the amendment was untimely, to include the special circumstance of murder in the commission of a kidnaping, in violation or attempted violation of Penal Code sections 207 (kidnaping) and 209 (kidnaping to commit robbery). (1 RT 89; 3 CT 647.)[64/] Appellant asked the trial court to set aside the kidnaping allegation under Penal Code section 995. (1 RT 116; 3 CT 652.) The trial court denied this motion, finding that there was substantial movement that increased the risk to the victims. (1 RT 124.)

At the conclusion of the prosecutor's case, appellant asked the trial court to set aside the kidnaping special circumstance under Penal Code section 1181, arguing that there was insufficient evidence to support the asportation element of kidnaping and that the prosecutor had failed to elect or allege whether Campos or Garcia was the kidnap victim. (21 RT 3257-3258, 3265) The trial court denied the motion, finding that the evidence was

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[64/] The Information cited the Penal Code sections for kidnaping but mislabeled the underlying crime as "robbery."

sufficient to support the allegation.[65] (21 RT 3267.) Appellant's jurors found the special circumstance allegation to be true. (29 RT 4417; 14 CT 3868.)

B. The Evidence was Insufficient to Support Simple Kidnaping under Penal Code section 207

Under Penal Code section 207, a defendant who carries another victim into a another part of the same county, through force or fear, is guilty of kidnaping. In *People v. Stanworth* (1974) 11 Cal.3d 588, 601, this Court held that simple kidnaping required the forcible movement of a non-consenting victim for a substantial distance. *People v. Caudillo* (1978) 21 Cal.3d 562, 572, the controlling case at the time the kidnaping charged in this case allegedly occurred, affirmed *Stanworth*'s "substantial distance" test and "made the asportation standard exclusively dependent on the distance involved." (*People v. Martinez* (1999) 20 Cal.4th at 225, 233.) Under *Caudillo*, distance was "the sole criterion for assessing asportation." (*Id.* at p. 234.)[66]

None of this Court's cases ever specified exactly where the line between substantial and insubstantial distance was to be drawn. (*People v.*

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[65] The trial court made its decision after reviewing the elements of kidnaping "as stated" under CALJIC No. 9.54. (21 RT 3267.) As discussed in Argument XII, this instruction was erroneously applied to appellant's case since it was based on a legal standard that significantly altered the asportation requirement in effect when the crime was allegedly committed. (See *People v. Martinez* (1999) 20 Cal.4th 225, 238 [change to kidnaping law does not apply retroactively].)

[66] As discussed in Argument XII, *Caudillo* was overruled on this point in *People v. Martinez*, *supra*, 20 Cal.4th at p. 237, fn. 6, but the *Caudillo* standard is the law that is applicable to cases, like appellant's, which involve alleged kidnapings committed before *Martinez* became final. (*Id.* at pp. 238-241.)

Martinez, *supra*, 20 Cal.4th at p. 234; *People v. Stanworth*, *supra*, 11 Cal.3d at p. 601.) Nevertheless, the decisions issued by this Court and the courts of appeal in the course of reviewing sufficiency of the evidence claims on a case-by-case basis did provide some indication of what was *not* a sufficiently long distance to qualify as a "substantial distance" under the *Stanworth* test.

In *People v. Brown* (1974) 11 Cal.3d 784, for example, the victim was moved from room to room within her house and then taken outside for an additional distance estimated to be not greater than 75 feet. (*Id.* at pp. 788-789.) The length of the movement within the house was not specified, but it was probably more than 90 feet (see *People v. Martinez*, *supra*, 20 Cal.4th at p. 239), making the total length of the movement at issue about 165 feet. *Brown* held that "the evidence is insufficient to show that the movements were substantial." (*People v. Brown*, *supra*, 11 Cal.3d at p. 789.)

In *People v. Green* (1980) 27 Cal.3d 1, the defendant parked his car near a river and took the victim 90 feet, to a spot where she was killed. (*Id.* at p. 65.) The Court relied on *Brown* to find that this distance was insufficient to support a kidnaping conviction:

> It is apparent that the asportation of the victim in *Brown* was at least equal to, if not greater than, the distance that defendant herein compelled his wife to walk at the scene of the crime. For the reasons stated in *Brown*, therefore, we conclude that the latter brief movement did not amount to a taking "into another part of the same county" and hence would be insufficient as a matter of law to support the verdict of guilt.

(*Id.* at p. 66.)

People v. Martinez, *supra*, 20 Cal.4th 225, involved facts similar to *Brown* – movement through several rooms within a house and then for an

additional 65 feet outside.[67] Finding this distance likewise insufficient, this Court stated:

> Even if more than the 90 feet in *Green*, we can reasonably infer the movement within the house was no greater than the movement within the house in *Brown*. Since the 65-foot movement outside is also less than the 75 feet in *Brown*, a reviewing court would be compelled to reverse for insufficiency of the evidence under prior law.

(*People v. Martinez*, *supra*, 20 Cal.4th at p. 239.) Thus, *Martinez* held that a distance slightly over 155 feet was too short to qualify as a substantial distance under the law that applies to this case.

In *People v. Morgan* (2007) 42 Cal.4th 593, the prosecutor presented two different theories to support simple kidnaping, which this Court considered under its holdings in *Caudillo* and *Green.* One theory was based upon a 45-foot movement to a building, followed by a 37-foot distance to the area where the victim was killed. The Court found that the 45-foot movement was a legally inadequate theory since the distance was too short to constitute kidnaping. (*Id.* at p. 611.) On the other hand, the Court found that a 245-foot movement could constitute kidnaping. (*Id.* at pp. 611, 615-616.) The 245-foot distance in *Morgan* is the shortest movement that this Court has approved under the law that was in effect at the time of appellant's crime.

In light of *Morgan*, the very short asportation in this case is too brief to constitute simple kidnaping in violation of Penal Code section 207.

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[67] Although *Martinez* established a new test for substantial distance in simple kidnaping cases, it applied the test established by the prior law that applies to this case because it found that its new standard constituted an unforeseeable expansion of criminal liability. (*People v. Martinez*, *supra*, at pp. 239-241.)

Garcia testified that Brightmon tackled him and brought him back to the area of the U-Haul truck. He believed he was taken about 19 feet; Ross estimated the distance at 40 feet. (15 RT 2442; 19 RT 2895.) Garcia was taken into the back of the truck, which would have been only a few feet away. He testified that Campos was already in the back of the truck, although there was no evidence to establish how or why Campos was there. (15 RT 2445-2446.) As a matter of law, these facts did not establish kidnaping at the time of the alleged offense. (See *People v. Daly* (1992) 8 Cal.App.4th 47, 57 [40-foot distance insufficient].) Accordingly, the special circumstance finding cannot be supported under section 207. (*People v. Morgan, supra*, 42 Cal.4th at p. 611.)

C. The Evidence was Insufficient to Support a Kidnap for Robbery Finding Under Penal Code section 209

Penal Code section 209 is violated by "any person who kidnaps or carries away any individual to commit robbery." (Pen. Code, § 209, subd. (b).) In *People v. Daniels* (1969) 71 Cal.2d 1119, 1139, this Court held that kidnaping under this section involves more than trivial or incidental movement: the section does not apply to "movements of the victim [that] are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself." Under this test, the measured distance is relevant, but no minimum distance is required to satisfy the asportation requirement. Instead, each case must be considered in the totality of the circumstances to determine if the movement is substantial. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152.)

In *Daniels*, the defendant entered the victims' homes with the intent to rob them and forced them to move to various locations within the houses.

This Court held that such brief movement, made for the purpose of the underlying robbery, was not sufficient to support kidnaping:

> [T]he brief movements which defendants Daniels and Simmons compelled their victims to perform in furtherance of robbery were merely incidental to that crime and did not substantially increase the risk of harm otherwise present. Indeed, when in the course of a robbery a defendant does no more than move his victim around inside the premises in which he finds him – whether it be a residence, as here, or a place of business or other enclosure – his conduct generally will not be deemed to constitute the offense proscribed by section 209.

(*People v. Daniels*, *supra*, 71 Cal.2d at p. 1140.)

This Court has followed this reasoning in other cases. In *In re Crumpton* (1973) 9 Cal.3d 463, a defendant forced a gas station attendant to move away from the service island and lie down behind a parked truck that was on the station property, about 20 to 30 feet away. He then robbed the attendant. (*Id.* at p. 466.) This Court found that the station was similar to an enclosure or place of business under *Daniels* so that the movement was insufficient under section 209. (*Id.* at p. 466.) Moreover, it found that the movement to the truck did not increase the risk of harm inherent in a robbery. (*Id.* at p. 467.) Accordingly, this Court held that no reasonable jury could have convicted the defendant of kidnaping for robbery. (*Id.* at p. 468.)

In *People v. John* (1983) 149 Cal.App.3d 798, the reviewing court considered a kidnaping conviction under Penal Code section 209 based on an asportation of about 465 feet. The victim lived among a cluster of buildings on an eight acre compound that shared that same address and were connected by driveways, stairs, or open-air causeways. He was taken from the pool house where he lived, through a causeway and into the main building where he was bound, blindfolded, and robbed. (*Id.* at pp. 802-804.)

Although the kidnapers did not use violence to move the victim, the key fact that brought this case under *Daniels* was that the victim was not moved out of the residential area. (*Id.* at p. 805.) The court set aside the conviction under Penal Code section 209, emphasizing that the movement was an integral part of the underlying burglary and robbery. (*Id.* at p. 806.)

Here, each movement of either Campos or Garcia involved a very short distance on the same property and was part of the robbery itself. After Campos and Garcia arrived, they went to the area behind the U-Haul truck to make a supposed drug deal. Ross wanted to see the cocaine. Campos told Garcia to get it from his car, but Garcia saw a gun and ran instead. (19 RT 2890-2891.) Brightmon caught him and brought him back to the area around the U-Haul truck, somewhere between 19 and 40 feet away. (15 RT 2442; 19 RT 2895.)

Brightmon's action cannot be separated from the robbery. The cocaine was in Garcia's car. Bringing him back to area of the U-Haul did not increase the risk of danger over and above that which was inherent in the robbery itself.

Garcia testified that Brightmon forced him into the back of the truck and that Campos was already there. (15 RT 2445-2446.) The truck itself was used for hauling trash and was visible enough so that Margie Escalera could see Garcia in the back.[68/] (18 RT 2750.) Garcia had just run away. Placing him in the truck was a way to keep him contained as part of the robbery itself. Indeed, when Brightmon was interviewed by the investigators, he stated that when he brought Garcia back, he was just trying

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[68/] Both Escalera and Ross stated that Campos was not in the truck. (18 RT 2802; 19 RT 2896.)

to make sure that everyone would be calm. (2 CT 460). Moreover, neither Garcia nor Campos were any more at risk after being brought to the U-Haul trailer. They were on the Ross property in any event and outside of public view. Whatever might happen would occur regardless of whether they waited in the truck. The murder occurred only when Campos tried to run and Garcia was able to escape from the truck at that time. Under these circumstances, any movement of Campos or Garcia was incidental to the robbery itself and was not substantial enough to support the special circumstance finding under Penal Code section 209. Accordingly, the kidnaping special circumstance must be set aside. (*People v. Daniels*, *supra*, 71 Cal.2d at p. 1140; *Jackson v. Virginia*, *supra*, 443 U.S. at 319.)

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XVI.

THE TRIAL COURT IMPROPERLY PERMITTED THE JURORS TO CONSIDER ALLEGED THREATS TO TINA JOHNSON AND JARAH SMITH AS EVIDENCE IN AGGRAVATION DURING THE PENALTY RETRIAL

Incidents that do not amount to a crime are irrelevant to the sentencing process and should not be considered by a jury. (See *People v. Phillips* (1985) 41 Cal.3d 29, 73, fn. 25.) Accordingly, this Court has found that "a threat of violence, which is not in itself a violation of a penal statute, is not admissible under factor (b)." (*People v. Pennsinger* (1991) 52 Cal.3d 1210, 1259.) In this case, the trial court erroneously allowed evidence of "telephone threats" to Tina Johnson and Jarah Smith to be considered in aggravation. (30 RT 4469; 57 RT 8500.) These incidents did not rise to the level of criminal threats and were nothing more than an expression of appellant's frustration over the affair his wife was having with Smith. Accordingly, they were not admissible as an incident in aggravation under Penal Code section 190.2, factor (b), and violated appellant's rights to due process and a reliable sentencing verdict. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15.)

A. Factual and Procedural Background

In November, 1999, while in jail awaiting trial on the present charge, appellant learned that his wife, Tina Johnson, was having an affair with Jarah Smith. (47 RT 7115.) Tina testified that appellant was angry, heartbroken, and upset. (47 RT 7115, 7119.) Appellant told her that he "could" blow up the school where she worked if she did not stop seeing Smith. (47 RT 7116.) He did not say there was a bomb on campus and Tina was certain that it was not possible for him to do such an act from jail. She

did not report his words to anyone. (47 RT 7118, 7120, 7123.) She knew that his words were directed to her and that they did not have any meaning other than that he was heartbroken and upset. (47 RT 7119.) Even after appellant spoke to her, she continued to see Smith on an intimate basis for several months. (47 RT 4120.)

Appellant also spoke to Jarah Smith two to three times on the telephone from the county jail.[69/] (47 RT 7138.) Smith testified that the first conversation was polite; appellant simply asked Smith to stop seeing Tina. (47 RT 7138.) Appellant grew more insistent in a later conversation, and was agitated when they last spoke. (47 RT 7143, 7149-7150.) Appellant said that he knew where Smith lived, but did not make a direct threat against him. (47 RT 7141, 7150.) Smith believed that appellant was simply trying to "punk him out" and he did not take appellant seriously or feel threatened by the phone calls. (47 RT 7142-7144.) Smith told investigator Silva that appellant did not make a straight threat and that a person can say whatever he wants. (26 CT 7206-7207.)

Chaka Coleman listened in on the conversation between Smith and appellant. She heard appellant say that he could "have something done." (47 RT 7158.) Smith was listening to every word and sounded scared. (47 RT 7161.) Appellant was serious, like he meant business, but did not use offensive language or make a direct threat. (47 RT 7174.) Coleman told investigator Silva that Smith was terrified and that appellant said something "harsh," but she did not know whether it involved a death threat or fighting. (27 CT 7203-7205.) She knew appellant said something harsh because

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[69/] Appellant tried to call several other times when he was not able to speak with Smith. (47 RT 7137.)

Smith promised not to see Tina again. (47 RT 7162.) However, she also believed that it did not matter what appellant had said because Smith continued to have a relationship with Tina. (47 RT 7172; 2 CT 7204.)

Before trial, appellant filed an in limine motion to exclude this evidence, arguing that evidence of a threat alone is inadmissible under factor (b).[70] (4 CT 834; see also 30 RT 4465 [citing *People v. Boyd* (1985) 38 Cal.3d 762, 777].) The prosecution argued that appellant's words violated Penal Code sections 422 (criminal threats), 653m (telephone calls with intent to annoy), and 148.1, subdivision (c) (false report of placing bomb or intention to place bomb in a public place). (30 RT 4468-4469.) The trial court allowed the evidence under Penal Code section 653m. (30 RT 4469.) During the second penalty trial, the trial court ruled that its decision would remain the same. (38 RT 5603.) It instructed appellant's jurors that they could consider "telephone threats" to Tina Johnson and Jarah Smith as criminal activity in aggravation under factor (b)[71]. (57 RT 8500, 26 CT 7226.)

B. Appellant's Words to His Wife Did Not Violate Any Criminal Statute and Were Not Admissible under Factor (b)

Tina Johnson understood that appellant's words to her were not to be taken as a threat. Rather, appellant was expressing his heartbreak in a conversation between a husband and wife about a highly emotional situation.

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[70] The trial court also ruled that appellant did not have to make an objection at trial if the matter had already been litigated and that it would treat in limine motions as standing objections. (2 RT 338.)

[71] The trial court did not find appellant falsely reported a bomb, nor did it instruct the jurors that appellant had committed this crime.

(47 RT 7119.) She was right. Under these circumstances, this Court should find that appellant did not violate a criminal statute.

1. Appellant did not violate Penal Code section 653m

The trial court found that appellant's words were admissible under Penal Code section 653m. At the time of the telephone call, this section provided, "Every person who, with intent to annoy, telephones . . . any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor." The provision did not apply to telephone calls made in good faith. Appellant objected that his actions did not rise to the level prohibited by this statute. (30 RT 4469.) The trial court erroneously allowed the prosecutor to use appellant's statements, finding that this section "does talk about threats to inflict injury upon the person of another or their property or members of their family and so on." (30 RT 4469.)

Section 653m was intended to prohibit harassment and stalking by telephone or other electronic communication. (Stats.1998, c. 825, § 1; see West's Ann.Cal.Penal Code, § 653m.) Under its terms, there must be a specific intent to annoy. (*People v. Hernandez* (1991) 231 Cal.App.3d 1376, 1381.) In other contexts, the term "annoy" has referred to conduct specifically designed to disturb or irritate, particularly by continued or repeated acts. (*People v. Thompson* (1988) 206 Cal.App.3d 459, 464.) In *People v. Cooper* (Ill.App. 1975) 32 Ill.App.3d 516, [336 N.E.2d 247], a defendant was convicted of violating that state's disorderly conduct statute, which similarly makes it a crime to telephone with an intent to annoy. The defendant called his brother to discuss a business dealing, but his brother was ill and his sister-in-law did not let the defendant speak to him. The defendant used extremely vulgar and profane language and hung up the

phone. (*Id.* at p. 517) The reviewing court reversed the judgment, finding that the defendant called to discuss a business matter and the language used by him "emanated from an isolated emotional outburst of a frustrated brother-in-law" rather than an intent to annoy. (*Id.* at p. 519.)

The trial court should have found the same in the present case. Appellant was talking to his wife about matters sensitive to their marital relationship. He did not call to annoy or harass Tina. He called to deal with a subject affecting his marriage – an affair that his wife was having. His words were nothing more than an emotional outburst stemming from the call. He did not have the specific intent required under the statute.

Moreover, section 653m requires that a person make an actual threat to injure another. Appellant stated that he would blow up the school where she worked unless Tina broke off the relationship, but his words did not rise to the level of a true threat.

A threat is an "expression of an intent to inflict evil, injury, or damage on another." (*United States v. Orozco-Santillan* (9th Cir. 1990) 903 F.2d 1262, 1265.) A threat is made when a reasonable person would believe that the context and importance of the words produce a fear that the threat would be carried out. (*Ibid.*) There must be a "true threat" that goes beyond an intemperate outburst or exaggerated rhetoric. (*Watts v. United States* (1969) 394 U.S. 705, 708 (per curiam) [context in which language was used showed defendant's statement was hyperbole, not a true threat].) Not every outburst constitutes a true threat, only those that "according to their language and context conveyed a gravity of purpose and likelihood of execution." (*United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1026 [interpreting 18 U.S.C, § 875, prohibiting communication of threats to kidnap or injure].) Thus, a true threat is made when the "speaker means to communicate a serious

expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." (*Virginia v. Black* (2003) 538 U.S. 343, 359.)

This Court has explained that violence and threats of violence fall outside the protection of the First Amendment because they coerce by unlawful conduct, rather than persuade by expression. (*In re M.S* (1995) 10 Cal.4th 698, 714.) Thus, a threat may be prosecuted as long as it "reasonably appears to be a serious expression of intention to inflict bodily harm [citation] and its circumstances are such that there is a reasonable tendency to produce in the victim a fear the threat will be carried out [citation]." (*Ibid.*) Under this standard, the trial court erred in instructing the jury that it may consider appellant's statements to his wife.

Appellant was in jail. He had never used a bomb in any previous activity. There was no evidence that either he or an associate could have carried out a threat. He was angry and hurt that Tina was seeing another man. She reasonably understood his statements to be nothing more than an emotional outburst – a matter between a husband and wife. Tina did not take the threat seriously enough to report the threat to the school or to stop seeing Smith. There was neither a serious intent to bomb the school nor an apparent ability to carry out the threat. Accordingly, the statement did not rise to the level of a criminal threat under Penal Code section 653m. (See *People v. Boyd*, *supra*, 38 Cal.3d at p. 777 [defendant locked in room at juvenile hall and could not carry out threat against counselors].) The trial court erred in allowing the incident to be used against appellant under this section.

2. Appellant's Statements Did not Violate Penal Code section 422

The prosecutor also cited Penal Code section 422, which prohibits threats that have an immediate and grave likelihood that they will be carried out and cause the victim to be in sustained fear. The trial court cited only section 653m in allowing the evidence to be admitted. (30 RT 4469.) However, even assuming that the jury instruction that referred to "telephone threats" encompasses this statute, this Court has enumerated five elements that must be met:

> (1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat – which may be "made verbally, in writing, or by means of an electronic communication device" – was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances."

(*People v. Toledo* (2001) 26 Cal.4th 221, 227.) This section "was not enacted to punish emotional outbursts." (*People v. Felix* (2001) 92 Cal.App.4th 905, 913.) Rather, "the surrounding circumstances must be examined to determine if the threat is real and genuine, a true threat." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137, citing *People v. Bolin* (1998) 18 Cal.4th 297, 339-340.)

In *In re Ricky T.*, *supra*, 87 Cal.App.4th 1132, a minor became angry at his teacher for accidentally hitting him with a door when the teacher opened it. He told the teacher, "I'm going to get you" or "I'm going kick your ass." (*Id.* at pp. 1135-1136.) The reviewing court found insufficient evidence to support a finding that the minor had violated section 422. The Court noted that, other than the actual words spoken, there were no circumstances that indicated that the statement had a gravity of purpose and an immediate prospect of execution. (*Id.* at p. 1137.) The police were not called until the next day and there was no show of physical force to back up the words. (*Id.* at p. 1138.)

For similar reasons, the reviewing court found the statutory element of sustained fear was not supported by sufficient evidence. The teacher sent the minor to the school office and there was no indication that any fear he had was sustained beyond the momentary encounter. (*In re Ricky T.*, *supra*, 87 Cal.App.4th at pp. 1140-1141.) The Court concluded:

> It is this court's opinion that section 422 was not enacted to punish an angry adolescent's utterances, unless they otherwise qualify as terrorist threats under that statute. Appellant's statement was an emotional response to an accident rather than a death threat that induced sustained fear.

(*Id.* at p. 1141.)

Here, there is similarly no evidence that appellant's words were anything other than an emotional outburst. As discussed above, appellant was being held in jail and responding to a very heart-felt and difficult situation when he made the statement. His wife understood that it was a disagreement between a husband and wife rather than a true threat. She was not afraid of the threat and did not even stop seeing Smith in response to it. Moreover, there is no evidence that appellant made any effort to follow

through on his outburst. (Compare *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1221 [defendant's activities after the threat gave meaning to the words and implied that he meant serious business].) Accordingly, appellant's statements were not a true threat that caused sustained fear under section 422. (See *In re M.S.* (1995)10 Cal.4th 698, 714 [interpreting section 422.6 under constitutional standards that require a serious expression of intent to inflict harm and a reasonable tendency for the victim to fear the threat will be carried out].) The evidence was not admissible under this section to support allegations of uncharged criminal conduct under factor (b).

C. Appellant's words to Jarah Smith were not a Criminal Threat

The trial court found that the incident with Jarah Smith was admissible under factor (b) as a violation of Penal Code section 653m. (30 RT 4469.) As discussed above, this section requires both an intent to annoy or harass and an actual threat against another. Although appellant called the Smith residence numerous times, there was no evidence that appellant called with the intent to annoy. He was able to speak with Smith on only two or three occasions and called only to ask Smith to end his relationship with Tina. Smith testified that appellant was friendly and polite when they first spoke, but grew more agitated in the last conversation. Even assuming that appellant made some kind of "threat," it was an emotional outburst rather than a call made with an intent to annoy. (See *People v. Cooper*, *supra*, 32 Ill.App.3d at p. 519.)

Moreover, appellant's words did not rise to the level of a true threat, one made with the "serious expression of intention to inflict bodily harm" under circumstances that reasonably "produce in the victim a fear the threat

will be carried out." (*In re M.S*, *supra*, 10 Cal.4th at p. 714.) According to Smith, appellant did not make a direct theat, but only tried to "punk" him so that Smith would stop seeing his wife. Coleman stated that appellant spoke harshly or more directly. But under either version, the statements were an emotional outburst from someone in jail, talking about a relationship with his wife, rather than a serious expression of intent to inflict harm.

Assuming that the trial court's instruction referring to "telephone threats" also encompassed section 422, there was no evidence that appellant's words conveyed an immediate prospect that the threat would be carried out so that Smith was in sustained fear for his safety. (*People v. Toledo*, *supra*, 26 Cal.4th at p. 227.) Appellant was in jail waiting a capital trial. His words evidently did not create sustained fear because he did not cause Smith to end the relationship. At most, appellant's words were an emotional outburst that this section was not designed to punish. (*People v. Felix, supra,* 92 Cal.App.4th at p. 913.)

D. Appellant's Words Were Not the Type of Conduct That Factor (b) Was Meant to Address

Factor (b) encompasses criminal acts that contain an express or implied threat to use force or violence. This factor is relevant to a defendant's moral culpability under the Eighth Amendment because it tends to demonstrate a defendant's propensity for violence, which is an appropriate consideration for the penalty determination. (See, e.g. *People v. Ray* (1996) 13 Cal.4th 313, 349-350, and authorities cited therein.) In accordance with this purpose, this Court has emphasized that conduct that amounts to nothing more than a "trivial incidents of misconduct and ill temper," should not "influence a life or death decision." (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 774, 776.) Thus, even conduct that might violate a statute is only applied to

this factor "by looking to the facts of the particular case." (*People v. Mason* (1991) 52 Cal.3d 909, 955.)

Tina understood that appellant's words were not directed to her or any other person. They were simply an expression of anger or heartbreak in a conversation between a husband and wife. Similarly, appellant's words to Jarah were simply words that he had no intention of carrying out – as Jarah said, something meant to "punk" him so that he would break off the relationship with appellant's wife. These words should not have made appellant more worthy of death. At bottom, these incidents simply did not have the requisite degree of gravity and moral relevance that they should have been permitted to influence the jury's decision to put another human being to death. (See *Enmund v. Florida* (1982) 458 U.S. 782, 801 [capital punishment tailored to a defendant's "personal responsibility and moral guilt"]; *Payne v. Tennessee* (1991) 501 U.S. 808, 838 (conc. opn. of Souter, J.) [aggravating evidence must have direct moral relevance].)

E. The Error was Prejudicial

Consideration of irrelevant aggravating evidence deprived appellant of his right to due process under California's statutory scheme (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [due process entitles defendant to verdict rendered within statutory discretion]); implicated federal due process guarantees (*Johnson v. Mississippi* (1988) 486 U.S. 578, 585-586); and introduced arbitrary factors into the sentencing process in violation of the Eighth Amendment. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gregg v. Georgia* (1976) 428 U.S. 153, 192 [Eighth and Fourteenth Amendments demand that aggravation be "particularly relevant to the sentencing decision"].) This Court should therefore strictly scrutinize the effect of the error in this case. (See *Irving v. State* (Miss. 1978) 361 So.2d

1360, 1363 ["what may be harmless error in a case with less at stake becomes reversible error when the penalty is death"].)

The penalty decision in this case was particularly close. Appellant's first penalty jury could not reach a determination. The second penalty phase jury deliberated for three days before reaching a verdict. (*Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163 [three days of deliberations indicates a close case].) Thus, any substantial error in the penalty phase was likely to have affected the juror's decision, requiring reversal. (*People v. Robertson* (1984) 33 Cal.3d 21, 54.)

Here, the alleged threats were used by the prosecutor to argue that appellant would continue to be a danger even if he were sentenced to life in prison – that he could terrorize others even from within prison. (57 RT 8417, 8451.) This argument alleged that appellant could somehow reach out from behind the walls of prison to harm either his wife or Smith and that he intended to do so. But it also suggested that the death penalty was the only way that society could be free from fear and menace. (57 RT 8417.) Such an argument is particularly powerful. (*People v. Murtishaw* (1981) 29 Cal.3d 733, 773 [prejudicial effect of speculating on future violence or crimes].) Either considered separately or as cumulative error affecting other crimes evidence (see Argument XVIII), the error cannot be found to have been harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, the judgment of death must be reversed.

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XVII.

THE TRIAL COURT FAILED TO INFORM APPELLANT'S JURORS OF THE SPECIFIC CRIMINAL ACT AT ISSUE INVOLVING THE SHOOTING OF ERIC DAWSON

The trial court instructed the jurors that under Penal Code section 190.3, factor (b), they could consider a criminal act involving "the incident occurring at the American Motel on January 9, 1992, involving the shooting of Eric Dawson and the striking of Anita Smith." (57 RT 8500; 26 CT 7226.) The trial did not inform the jury which specific crime appellant allegedly committed. This took the issue of whether appellant had violated any criminal statute out of the jurors' hands and left them free to speculate about what crime appellant may have committed. The instruction violated appellant's federal and state constitutional rights to due process and a reliable penalty verdict. (U. S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 15, 17.)

A. The Incident

At trial, Anita Smith testified that she and her husband were living in room 206 of the American Inn, which is upstairs from the parking area. (46 RT 6964-6965.) When she arrived at the motel, her husband, Earl Smith, was arguing with Reginald Robinson. She stated that appellant was not there during the argument. (46 RT 6968, 6970.) Appellant may have been standing away from the argument by a brick wall near his car. (46 RT 6984.) Smith went to the room, but Earl and Eric Dawson soon rushed in. One of them told her to go into the bathroom. She started to move toward the bathroom and heard a shotgun go off. (46 RT 6969.) She saw that Eric's arm was bleeding and stood there in shock until an ambulance arrived. (46 RT 6970-6971.)

Shortly after the shooting, Smith went downstairs and saw Robinson leaving in appellant's car.[72/] She yelled that she had the license number of the car. (46 RT 6873, 49 RT 7421.) Robinson got out of the car and pointed the gun at her. Appellant then got out and stood between the two of them. Robinson may have told appellant to get out of the way "so I can shoot the bitch." (46 RT 6982.) Appellant told Robinson not to shoot her. (46 RT 6974.) Robinson hesitantly backed off. Appellant turned around and slapped Smith in the face. (46 RT 6985.) They left in appellant's car. (46 RT 6977.) Smith believed that appellant saved her life. (46 RT 6978.)

B. The Trial Court Erred by Instructing the Jury about the Incident without Enumerating a Specific Crime

Evidence admitted under factor (b) must establish that a defendant is guilty of an actual crime. (*People v. Phillips* (1985) 41 Cal.3d 29, 72.) In keeping with this, the jury should be told which crimes are alleged so that the jury does not consider any other crimes in determining the appropriate penalty. (*Id.* at p. 72, fn. 25; *People v. Robertson* (1984) 33 Cal.3d 21, 55, fn. 19.) Here, the particular crime that appellant was alleged to have committed in relation to the shooting of Eric Dawson was not specified and jurors were left to consider any possible crime, including that appellant was liable for the shooting itself.

This Court has recognized that "the reasonable doubt standard ensures reliability of factor (b) evidence." (*People v. Balderas* (1985) 41 Cal.3d 184, 205, fn. 32.) To this end, the purpose of enumerating the crimes

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[72/] She testified at trial that Robinson was driving the car (46 RT 6971), but at the time of the incident she told an officer that appellant was driving and that he slapped her face before Robinson pointed the gun at her. (49 RT 7421.)

that are alleged to be violated is to ensure that the jury does not consider incidents that are not at issue. (See *People v. Robertson*, *supra*, 33 Cal.3d at p. 55, fn. 19.) That purpose is defeated when a juror is permitted to speculate about which crime a defendant may have committed – in this case, escalating appellant's involvement in the incident to a point where he would share responsibility for the shooting itself.

Without an instruction performing the minimal task of informing the jury on the particular charge or allegation, a defendant's due process right to a jury determination "is little more than a matter of constitutional theory." (*Cole v. Young* (7th Cir. 1987) 817 F.2d 412, 425.) When the jury is told that an offense is criminal, without naming the criminal offense that a defendant allegedly committed, "the matter is in effect taken out of its hands entirely" and "[t]he result is the same as if the trial court had directed a verdict, which would be constitutionally impermissible." (*Ibid.*)

Moreover, the jurors were left to speculate about what crime appellant may have committed. In the hearing on the admissibility of the incident, the prosecutor maintained that appellant was guilty either as an aider and abettor or an accessory in the shooting.[73] (30 RT 4462.) The trial court agreed that appellant "was somehow involved as an aider and abettor, as an accessory, or intimidating, or whatever number of other things you think." (30 RT 4464.) The argument of the prosecutor did nothing to clarify the issue. The prosecutor simply told the jurors that while he did not know who fired the gun, it arrived with appellant in his car. (57 RT 8433.)

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[73] Appellant did not contest the proprietary of the evidence relating to striking or intimidating Anita Smith. (30 RT 4464.)

Certainly, this argument implied that appellant was at least an accessory to the shooting but that he also may have been guilty of the shooting itself.

Appellant's moral and criminal liability were far different depending on the nature of the criminal act. An aider and abetter is a principal who shares culpability with the perpetrator because he has acted with "knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) An accessory commits a separate crime from the underlying felony, which occurs only if the defendant has knowledge of the crime after it has been committed and intends to aid the perpetrator. (*People v. Purdo* (1977) 67 Cal.App.3d 267, 273.) An allegation of a specific crime therefore was important for determining appellant's moral responsibility and to ensure that appellant's sentence was not based upon an arbitrary decision by a juror about which crime appellant committed. Accordingly, it was not sufficient to simply instruct the jury that appellant's actions constituted an undefined criminal act; more should be required than simply stating that appellant must have been guilty of some crime relating to Dawson.

The trial court's instruction effectively nullified the reasonable doubt standard and violated appellant's Sixth Amendment right to have the jury determine every factual issue. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [Sixth Amendment requires more than a jury determination that a defendant is probably guilty].) It violated appellant's due process rights to have the jury find that appellant was guilty of an enumerated crime beyond a reasonable doubt. (*Hicks v. Oklahoma* 1980) 447 U.S. 343, 346.) It separately violated federal due process, led to arbitrary standards used to impose the death penalty, and rendered the evidence unreliable under Eighth

Amendment standards. (*Saffle v. Parks* (1990) 494 U.S. 484, 493 (capital sentencing must be "reliable, accurate, and nonarbitrary"). The trial court committed constitutional error in not defining the particular criminal act that appellant was alleged to have committed.

C. The Error was Prejudicial

In the penalty phase of a capital trial, a juror is called to make normative and moral decision about whether the death penalty is appropriate. (See *People v. Sanchez* (1995) 12 Cal.4th 1, 81.) The nature of an alleged aggravating incident is important for determining the moral weight that is assigned to any particular action. Here, that weight increased significantly to the extent that a juror found that appellant was implicated in the Dawson shooting rather than assisting a friend as an accessory after the shooting took place.

This case was particularly close on penalty, given that appellant's first penalty jury could not reach a determination and the second jury deliberated for three days before reaching a verdict. (*Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163 [three days of deliberations indicates a close case].) Accordingly, considered either separately or cumulatively to other penalty phase errors involving this incident and other crimes (see Argument XVIII), this Court cannot consider the error to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *People v. Robertson* (1984) 33 Cal.3d 21, 54 [any significant error in penalty phase requires reversal].)

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XVIII.

THE TRIAL COURT ERRED IN INSTRUCTING APPELLANT'S JURY THAT THE ACTS ALLEGED UNDER FACTOR (B) WERE CRIMINAL

Penal Code section 190.3, factor (b), allows a jury to consider as an aggravating factor any "criminal activity" that involved "the use or attempted use of force or violence or the express or implied threat to use force or violence." The trial court in this case instructed appellant's jurors that evidence had been introduced to show that appellant had committed "the following criminal acts and activity" as listed by the court. (57 RT 8499; 26 CT 7226.) This instruction defined the incidents alleged against appellant as "criminal," leaving as the only issue for appellant's jurors to decide whether appellant "did in fact commit the criminal acts or activity." (57 RT 8500; 26 CT 7227.) Accordingly, the instruction created a mandatory presumption and was improperly argumentative in violation of appellant's federal and state constitutional rights to a trial by jury, due process, and the requirements for a reliable penalty verdict. (U.S. Const., 6th, 8th, and14th Amends.; Cal. Const., art. I, §§ 7 and 15.)

A. The Instruction Improperly Directed the Jury to Find that Appellant's Acts were Criminal

A juror may consider aggravating evidence of violent criminal activity offered under Penal Code section 190.3, factor (b), only if he or she concludes that the prosecution has proven the alleged offense beyond a reasonable doubt. (*People v. Robertson* (1984) 33 Cal.3d 21, 53-54.) Here, the prosecutor introduced evidence of 13 different incidents under this factor. The trial court's instruction identified each act as being "criminal." The *only* question the jurors were told to decide, beyond a reasonable doubt, was whether appellant "did in fact commit the criminal acts." (26 CT 7227;

see also 57 RT 8435 [prosecutor states that the jurors only need to determine if an act occurred for it to be considered in aggravation].) In effect, once the jury found that appellant had committed a certain act, they were to presume that it was criminal. This created a mandatory presumption that improperly directed the jury to apply the evidence against appellant. (See *Francis v. Franklin* (1985) 471 U.S. 307, 314 ["mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts"]; *People v. Figuera* (1986) 41 Cal.3d 714, 734 [trial court improperly removed issue from the jury and directed a finding].)

When evidence of uncharged crimes is introduced as aggravation, the defendant is in effect being tried for the prior crimes. (*People v. Robertson*, *supra*, 33 Cal.3d at pp. 53-54; see *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 952-955; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276, 280-281.) Although a trial court may make a preliminary determination of whether there is substantial evidence to support the allegations under factor (b), the issue of whether such criminal activity has been proven beyond a reasonable doubt is for the jury to decide. (*People v. Phillips* (1985) 41 Cal.3d 29, 73, fn. 25.) This determination involves more than finding that a defendant committed an act. It is up to the jury to determine that the actions of a defendant amounted to a crime. Thus, in *Phillips*, this Court found that had the jury been properly instructed about the reasonable doubt standard, the defendant could have argued that his actions did not constitute a crime under factor (b). (*Id.* at p. 84.) Even if the jury could have found that the defendant was guilty of the crime, he "was at least entitled to have the issue properly presented to the jury." (*Ibid.*)

If the reasonable doubt standard required by *Robertson* and *Phillips* is to have any true meaning, then the jury must be able to determine whether a

particular action amounted to a crime. This is the type of decision that juries make every day in determining whether a defendant is guilty of a crime. (See *United States v. Johnson* (5th Cir. 1983) 718 F.2d 1317, 1321 (en banc) ["Juries are always judges of the law in the sense that juries must pass on the manner and the extent in which the law expounded by the judge fits the facts brought out in the evidence. This process requires juries to perform the legal function of interpretation and application."].) It is no less important in the context of factor (b).

The trial court's instruction lightened the prosecutor's burden of proving each allegation beyond a reasonable doubt in violation of appellant's due process rights under the 14th Amendment. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 520-521.) Moreover, it deprived appellant of his Sixth Amendment right to have the jury decide all aggravating facts used to impose a sentence. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Ring v. Arizona* (2002) 536 U.S. 584, 609.) Indeed, "[t]he constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly. [Citation.]" (*United States v. Spock* (1st Cir. 1969) 416 F.2d 165, 182.) Accordingly, this Court should find that the trial court erred in instructing the jury that the incidents it enumerated constituted criminal acts or activity.

B. The Trial Court's Instruction Took the Issue of Whether the Alleged Criminal Activity Involved Requisite Force or Violence Away from the Jurors

The trial court instructed appellant's jurors that factor (b) encompassed the presence or absence of other crimes "which involved the use of force or violence or the express or implied threat to use force or violence." (26 CT 7223; Pen. Code, § 190.2, factor (b).) However, it also

instructed the jurors that the only finding that they needed to make in order to apply this factor was whether appellant "did in fact commit the criminal acts or activity." (26 CT 7227.) The court did not instruct the jurors that they were to find that the crimes involved the use of force or violence or the express or implied threat to use it. This issue was therefore taken out of the jurors' hands. Accordingly, it violated appellant's Sixth Amendment right to a trial by jury on every issue material to the case; his state and federal rights to due process of law; and his right to a reliable penalty verdict. (U.S. Const., 5th, 6th, 8th, 14th, Amends; Cal. Const., art. I, §§ 7, 15.)

Appellant acknowledges that this Court has rejected similar contentions, but submits that the issue should be reconsidered. In *People v. Nakahara* (2003) 30 Cal.4th 705, 720, this Court stated although the jury had to determine the truth of a factual allegation under factor (b), its characterization as an incident involving force or violence was a matter of law for the trial court to decide. However, this Court has found that the issue of whether "a particular instance of criminal activity involved the express or implied threat to use force or violence [citation] can only be determined by looking to the facts of the particular case." (*People v. Mason* (1991) 52 Cal.3d 909, 955.) Thus, a defendant may raise a defense under factor (b) that criminal activity does not involve force or violence. Such a defense creates "an ordinary evidentiary conflict for the trier of fact." (*Id.* at p. 957.) Accordingly, the jury must determine both that a particular act occurred and that the act involved the requisite force or violence. (See *People v. Lucas* (1995) 12 Cal.4th 415, 466-467 [jury must determine the existence of preliminary facts]; *People v. Figueroa* (1986) 41 Cal.3d 714, 734 [factual determinations are for the jury to decide].) This Court should reconsider *Nakahara* to the extent that it implies otherwise.

The trial court's instruction particularly affected the jury's determination of the allegation involving appellant's possession of stabbing instruments in his cell at San Quentin State Prison. (27 CT 7226, incident 2.) Although this Court has found that possession of a stabbing instrument in prison is an implied threat of violence (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187), it has also emphasized that the jury may consider any innocent explanation for weapons in prison that does not involve force or violence. (*People v. Tuilaepa* (1992) 4 Cal.4th. 569, 589; see also *People* v. *Roberts* (1992) 2 Cal.4th 271, 332 [expressing doubt about whether a prisoner possessing a weapon in his cell involved conduct rising to the level of an aggravating factor]; *People v. Mason*, *supra*, 52 Cal.3d at p. 957 [innocent explanation of prison weapon raises ordinary evidentiary conflict for trier of fact to decide].) However, the jury instruction precluded any defense to whether the alleged criminal acts involved a threat or implied use of force or violence.

Here, Officer David Smith testified that he found two shanks, sharpened pieces of metal, concealed behind the sink in the rear of appellant's cell. (45 RT 6785.) He did know not who occupied the cell before appellant or when it was last searched. (45 RT 6789.) Such weapons were common in prison and he found them because he knew where to search. (45 RT 6788.) Accordingly, the jury could have found that appellant was not aware of the weapons or that the crime involved conduct that did not rise to the level of force or violence required under the statute. (*People v. Roberts*, *supra*, 2 Cal.4th at p. 332.)

The trial court took the issue out of the jury's hand by limiting consideration of this factor to whether appellant had committed criminal activity, without determining whether the activity involved force or violence.

This Court should find that the instruction violated appellant's constitutional Sixth Amendment right to have the jury decide every factual issue. (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490; *Ring v. Arizona*, *supra*, 536 U.S. at p. 609.)

C. The Trial Court's Instruction was Prejudicial

The trial court's instruction affected the basic framework of the entire penalty phase by denying appellant his right to have the jury determine whether his actions were criminal beyond a reasonable doubt. In considering guilt phase error, the United States Supreme Court has considered such error to be structural, requiring reversal without showing prejudice. (See *Sullivan v. Lousiana* (1993) 508 U.S. 275, 280 ["There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless."].) Given that the reasonable doubt standard applies to evidence of other crimes in the penalty phase, the same result should be applied here.

Even assuming that harmless error analysis should be applied to the instruction at issue, the trial court's instruction improperly diluted the reasonable doubt standard and affected the juror's use of all the enumerated incidents. (See *People v. Phillips, supra,* 41 Cal.3d at p. 83 [failure to give reasonable doubt instruction tainted consideration of all the crimes alleged under factor (b)].) As discussed above, the jurors could have found that the shanks in appellant's cell did not rise to the level required under factor (b). Moreover, some of the allegations against appellant were not necessarily criminal acts. Even assuming that there was sufficient evidence to bring these incidents before the jury under factor (b), the instruction was

particularly prejudicial because it precluded a defense to the underlying criminality of the incidents enumerated by the trial court.

1. The fight with Frank Stevens

According to Stevens, his "fight" with appellant (26 CT 7226, incident 4) involved an incident during which appellant looked at him in the wrong way on the prison yard. Stevens regarded this as some kind of challenge. (45 RT 6830.) He stated that when a prisoner looks at another like that, "you approach them and see what the problem is." Stevens walked up to appellant and said, "What's up?" but did not give appellant a chance to respond. Instead, he immediately swung at appellant. (45 RT 6840.) Stevens threw the first blow. (45 RT 6844.) Appellant punched "at him" and the two tussled until they were ordered to stop. (45 RT 6842.)

A correctional officer testified that he observed both prisoners fighting and exchanging blows. The fight stopped after he fired a warning shot and ordered them down. (44 RT 6684.)

The trial court allowed the evidence to be introduced under factor (b) as a violation of Penal Code section 415, which prohibits unlawful fighting in a public place or using offensive words to provoke violence. (30 RT 4460.) Since Stevens struck the first blow, without giving appellant a chance to say anything or to resolve the problem, the jurors could have found that appellant was not unlawfully fighting because he was acting in self-defense. (See *People v. Coleman* (1978) 84 Cal.App.3d 1016, 1022 [approving instruction that a prisoner may lawfully use reasonable force to defend himself].)

Moreover, section 415 criminalizes "fighting words" that are inherently likely to produce a violent response. (*In re John V.* (1985) 167 Cal.App.3d 761, 769.) These are words "which by their very utterance

inflict injury or tend to incite an immediate breach of the peace." (*In re Alejandro G.* (1985) 37 Cal.App.4th 44, 47-48.) Appellant is not aware of any case that has applied this section in a way that would render appellant's acts criminal. At most, appellant looked at Stevens in a way that compelled some sort of response. However, Stevens testified that it did not require a violent reaction. Stevens could have approached appellant to resolve the problem. He chose to fight instead, and appellant defended himself. The jurors could have found that neither appellant's conduct nor his words rose to the level of a criminal act or activity.

2. The fight with Freddie Aguero

The "fight with Freddie Aguero" (26 CT 7226, incident 9) occurred when Aguero was released on a yard at Corcoran State Prison with 15 black inmates and immediately attacked appellant. Aguero stated that he attacked the first person he saw when he was released from the sally port to the prison yard. (46 RT 6938, 6945.) He believed that the officers set up the fight because he should not have been released to that yard. (46 RT 6940.) Appellant may not have even seen him since it happened so fast. (46 RT 6941.)

Aguerro told Martin Silva, the prosecutor's investigator, that he had exchanged words with appellant before the fight. (51 RT 7750-7751.) He also told Silva that he believed the officers had set up the situation. (51 RT 7756.) Under these circumstances, the jurors could have found that appellant was the victim of the attack and that he was not criminally liable. The trial court erred in instructing the jurors in such a way that they could not consider this possibility.

3. The Shooting of Eric Dawson

The trial court instructed the jurors that appellant committed an unspecified criminal act during "the incident occurring at the American Motel on January 9, 1992, involving the shooting of Eric Dawson and the striking of Anita Smith." (26 CT 7226, incident 10.) Appellant did not shoot Eric Dawson. At the hearing on whether this evidence would be presented to the jury, the trial court found that appellant "was somehow involved as an aider and abettor, as an accessory, or intimidating, or whatever number of other things you think." (30 RT 4464.[74]) But the jury had no way to determine whether appellant committed a crime and if that crime was related to Dawson. The instruction simply defined the entire incident as "criminal." (See Argument XVII.)

Anita Smith testified that appellant was not a part of the argument that led to the shooting. (46 RT 6980. 6984.) The shooting itself occurred in or near a motel room that was upstairs from the parking area. (46 RT 6969-6971.) There is no evidence that appellant participated in the shooting of Mr. Dawson, knew who shot Dawson, or acted with the specific intent to aid the perpetrator of the crime. Appellant's jurors could have found that he was not involved with the crime as a principal since there was no evidence that he aided or abetted the crime. (Pen. Code, § 31.)

Moreover, they also could have found the prosecutor did not establish the specific intent necessary for appellant to be found guilty of acting as an accessory after the fact, i.e., that he acted with knowledge that Reginald Robinson had committed a felony. (Pen. Code, § 32) Even Anita Smith did

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[74] Appellant did not challenge the evidence pertaining to the striking of Anita Smith, although she credited him with saving her life by stopping the perpetrator from shooting her. (46 RT 6978.)

not specifically see who shot Mr. Dawson (46 RT 6969), and there was no direct evidence that appellant might have known who shot Dawson. The most that was established was that Robinson had a gun and left in appellant's car, although it was uncertain whether appellant was the driver. (46 RT 6971, 49 RT 7421.) Had it not been for the trial court's instruction, the jurors could have found that appellant was not acting as an accessory to the crime and that he did not otherwise bear criminal liability for Dawson's shooting.

4. The telephone threat to Jarah Smith

The alleged telephone threats against Jarah Smith (26 CT 7226, incidents 11) also did not necessarily rise to a level of a criminal act. The trial court admitted the evidence under Penal Code section 653m, which prohibits threatening telephone calls that are made with the specific intent to annoy. (30 RT 4469.) Smith testified that appellant was polite in his first call or two. Appellant only grew agitated during the third call because the affair was continuing. He did not make a direct threat, but told Smith that he knew where he lived. Appellant tried to "punk" Smith, who did not take him seriously. (47 RT 7141-7144; 26 CT 7206-7207.) Chaka Coleman stated that appellant used harsh words and Smith was scared, but also that Smith continued to see Tina so that appellant's words were not serious enough to dissuade him. (47 RT 7161; 27 CT 7203-7205.)

Even assuming that appellant's words violated Penal Code section 653m (see Argument XVI), the issue was for the jury to determine. Appellant's jurors could have found that his purpose was to speak to Smith about the affair rather than annoy him. Or they could have found that appellant did not make a true threat against him, one that reflected a serious

intent to inflict harm. (*In re M.S* (1995) 10 Cal.4th 698, 714.) Under these circumstances, his acts were not necessarily criminal.

The prosecutor also alleged that the conversation may have violated Penal Code section 422, which prohibits criminal threats that result in an immediate, sustained, and reasonable fear. (*People v. Toledo* (2001) 26 Cal.4th 221,227.) Even assuming that the evidence was sufficient to bring the incident before the jury (see Argument XVI), this was a factual question that was subject to conflicting testimony. Smith stated that appellant was simply trying to "punk him" and that he was not concerned. Coleman portrayed the event in stronger terms. But under the evidence admitted at trial, the jurors could have found that appellant's words did not rise to the level of a criminal act, that his words were not a true threat against Smith or that Smith had the kind of sustained fear contemplated under the statute. Again, all of these were matters for the jurors to determine. (See *People v. Dunkle* (2005) 36 Cal.4th 861, 920 [issue of whether defendant made a true threat under factor (b) was one that was open to question for the jurors to decide].)

5. The telephone threat to Tina Johnson

The telephone threats to Tina Johnson (26 CT 7226, incident 12) also involved her affair with Jarah Smith. After appellant learned about the affair, he was angry, heartbroken, and upset. (47 RT 7115, 7119.) Appellant told her that he would blow up the school where she worked if she did not stop seeing Smith. (47 RT 7116.) He did not say there was a bomb on campus, and she did not report his words to anyone. She knew it was not possible for him to blow up the school. (47 RT 7123.) She knew the words were directed to her, that they did not have any meaning other than that appellant was heartbroken and upset. (47 RT 7118.) Appellant's words

were not a criminal threat under either Penal Code section 422 or 653m. (See Argument XVI.)

Even assuming that the evidence was admissible under factor (b), the jurors could have found that his acts were not criminal. Under section 653m, the jurors could have found that blowing up a school was not a true threat or that the call was not intended to annoy his wife, but simply reflected his frustration over the affair. They could have found that appellant's words were not an actual threat or that they did not cause immediate fear under section 422. The instruction defining the words as "criminal" improperly took these issues out of the jurors' hands.

6. The individual and cumulative effect of the error requires reversal

This Court has recognized the overriding importance of "other crimes" evidence to the jury's life-or-death determination. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54.) Here, the trial court's instructions precluded a defense to the underlying criminality of the incidents alleged by the prosecution. This error affected all of the allegations against appellant and specifically escalated the allegations of appellant's criminal conduct to include fights, a shooting incident, and threats while in jail.

By identifying each of the incidents as criminal, the trial court invited the jury to apply the weight of the aggravation against appellant. Indeed, the prosecutor argued that the prison offenses and threats showed that there was "no place that he can be sent where he can't hurt anybody." (RT 57 8451.) As this Court has stated, evidence of future dangerousness is particularly powerful because it "implants in the mind of each juror the message that the death penalty, promptly carried into effect, is the only way to protect society from the defendant the only way to forestall another

instance in which defendant responds to frustration with deadly violence." (*People v. Murtishaw* (1981) 29 Cal.3d 733, 773.) Accordingly, the trial court's instruction may very well have tipped the balance in favor of death. Under these circumstances, this Court should find that the error was so substantial that reversal is required. (*Ibid.* [substantial penalty phase error requires reversal]; *People v. Phillips*, *supra*, 41 Cal.3d at p. 84 [finding factor (b) instructional error to be prejudicial].)

Moreover, the penalty decision in this case was a close one. Appellant's first penalty jury could not reach a determination. The second penalty phase jury deliberated for three days before reaching a verdict. (*Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163 [three days of deliberations indicates a close case].) Given the close nature of the penalty decision, the error in the instruction cannot be said to be harmless. There is at least a reasonable possibility that the error contributed to the penalty verdict so that the judgment against appellant must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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XIX.

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY THAT A WITNESS HAD HEARD THAT APPELLANT WAS "VERY LETHAL"

Chaka Coleman testified in the penalty retrial that she had told Detective Silva, "I know [appellant's] past, and I've heard he's very lethal around here. He's one person you don't want to mess with." (47 RT 7170.) This statement was irrelevant hearsay (Evid. Code, § 1200); it was more prejudicial than probative under Evidence Code section 352; and, it violated appellant's constitutional rights to due process and a reliable penalty verdict (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15).

A. The Prosecutor Took the Statement Out of Context

Chaka Coleman was interviewed by Investigator Silva about telephone calls that she had arranged between appellant and Jarah Smith. (47 RT 7156-7157.) During the interview, Coleman stated that she overheard a conversation during which appellant spoke harshly to Smith and threatened that he could have something done. (14 CT 3905; 27 CT 7205.) She understood that appellant was making a threat against Smith in large part because of what she had heard about him:

Coleman:	It could have been a threat you know I'm saying like as far as I'm you know, have somebody whip your butt, but that's what I'm saying I didn't take it as you know, you know. . . . I have somebody kill you or something like that.
Silva:	Okay.
Coleman:	Because I know, I know you know what I'm saying? I know his past and I've heard he's very lethal around here.
Silva:	Uh-huh.

Coleman: I heard. I did hear that and that's one person you don't wanna mess with.

Silva: Okay.

Coleman: I did hear that and see that's what I'm saying, as far as that, I you know what I'm saying. I 'don heard all the things he have done. I have heard about it.

Silva: Okay.

Coleman: And see that's what I'm saying I'm not really, you know, I can't remember that far. I know < > it was a lotta talking you know what I'm saying.

(14 CT 3903-3004.[75])

At the penalty retrial, Coleman testified that appellant told Smith to "quit messing with my wife." (47 RT 7156.) She said that appellant told Smith that he could have something done to him, which she took to be a threat against him. (47 RT 7158.) She thought that Smith sounded scared. (47 RT 7160.) The prosecutor then introduced statements she had given to Investigator Silva which described the conversation in somewhat stronger terms. (See 47 RT 7159, 7162.)

Most importantly, the prosecutor asked Coleman if she was scared to testify against appellant. The trial court allowed the question over appellant's objections to show her state of mind. She denied being afraid. (47 RT 7163.) The prosecutor then questioned Coleman about her statement that she heard appellant was lethal, arguing that Coleman was softening her

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[75] This portion of the taped interview was edited out of the excerpts of the interview that were admitted into evidence during the penalty retrial. (People's Exhibit 158; 26 CT 7203-7206.) It is presented here simply to give context to the statement that was used at trial so that this Court can better understand the issue that was before the trial court.

previous statements in order to "shade things" for appellant. (47 RT 7165.) The trial court allowed the prosecutor to impeach Coleman by asking:

> Do you remember telling Detective Silva when you spoke with him about the defendant, "I know his past, and I've heard he's very lethal around here. He's one person you don't want to mess around with"?

(47 RT 7169-7170.) Coleman acknowledged saying this to Silva, but stated that she was not concerned about testifying against him. (*Ibid.*)

B. The Statement was Irrelevant to Show Coleman's State of Mind

Appellant objected that the Coleman's statement, that she had heard appellant was lethal, was hearsay and irrelevant. (47 RT 7164, 7165.) Indeed, the statement could not have been admitted for the truth of the matter since it constituted hearsay if used for that purpose.[76/] (Evid. Code, § 1200.) Therefore, its only possible relevance was to show that Coleman was afraid to testify in order to strengthen her credibility or explain inconsistencies in her testimony. (See *People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Ortiz* (1995) 38 Cal.App. 4th 377, 389-390.)

When evidence of threats is admitted on the issue of credibility, the focus of the inquiry is properly on the witness' state of mind, not the defendant's conduct. (See *People v. Yeats* (1984) 150 Cal.App.3d 984, 986.) Thus, in *Burgener*, a witness explained that she had been afraid to tell the truth at an earlier hearing because threats had been made against her and her children. The credibility of the witness had been put into issue because she

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[76/] If admitted to establish that appellant actually threatened Smith, the statement would also have been inadmissible opinion about what Coleman thought appellant must have meant, based upon what she had heard about his reputation. (Evid. Code, §§ 800 [opinion evidence], 1101 [character evidence].)

had testified in the first hearing that she was not able to remember certain things. This Court found that the threats were relevant to explain her earlier testimony. (*People v. Burgener*, *supra*, 29 Cal.4th at pp. 868-869.) In such circumstances it does not matter if the danger was real, it only matters if the witness believed it was real and testified accordingly. (*Id.* at p. 870; *People v. Ortiz*, *supra*, 38 Cal.App. 4th at p. 390.)

Here, however, Coleman testified that she was not afraid of appellant. (47 RT 7163.) The statement that was admitted did not bring this testimony into doubt or explain why her statements to Silva would be more credible as a result. Indeed, Coleman did *not* tell Silva that she was afraid to testify because she had heard that appellant was lethal. Instead, she stated that she understood appellant's statements to Jarah Smith to be a threat because she knew about his past and heard that he was lethal. (14 CT 3903.) There was no indication that she took the information that she had heard and considered that she herself was in danger. It is speculative at best to say that the statement, given in a completely different context, impeached her testimony about whether she was afraid to testify against appellant.[77] (47 RT 7167.)

The trial court had no discretion to admit irrelevant evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 14.) Without a nexus between the statement and Coleman's testimony, there was no relevance for this testimony.

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[77] As appellant suggested, the trial court could have conducted a hearing under Evidence Code section 402 to determine whether the information that Coleman heard caused her to be afraid to testify. This section grants the trial court discretion to hold a hearing on the admissibility of evidence outside the presence of the jury. (*People v. Scherr* (1969) 272 Cal.App.2d 165, 169.) If used in this case, the matter could have been decided without placing the statement before the jurors.

Accordingly, this Court should find that the trial court erred in allowing the statement to be introduced against appellant.

C. The Statement was More Prejudicial than Probative

Appellant objected that the statement was more prejudicial than probative under Evidence Code section 352. (47 RT 7164, 7165, 7169.) Under this section, the court has discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.) It applies to evidence that uniquely tends to evoke an emotional bias against defendant as an individual and that has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588.)

The probative value of the statement was minimal. Coleman denied being afraid of appellant. The statement that she had heard appellant was lethal was taken out of context and was not made in reference to her being afraid to testify. To weigh this evidence for the intended purpose – to establish Coleman's state of mind when she testified – the jurors would have had to infer that anyone who had heard this about appellant would be scared to testify.[78] However, there was nothing in the record to make this link. The probative value of the statement was tenuous at best.

Evidence is prejudicial under section 352 if it inflames the emotions of the jury, motivating them to use the information to reward or punish one side because of the jurors' emotional reaction. (*People v. Branch* (2001) 91

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[78] The prosecution argued to the trial court that "people are scared to death" by appellant. (47 RT 7167.) Yet, the issue was whether Coleman was afraid or that it affected her testimony. On that issue, the statement shed no light.

Cal.App.4th 274, 286.) Most importantly, prejudice occurs where there is a "possibility" that the evidence will be used "by the trier of fact for a purpose for which the evidence is not properly admissible." (*People v. Hoze* (1987) 195 Cal.App.3d 949, 954; see also *People v. Edelbacher* (1989) 47 Cal.3d 983, 1016.)

Such a possibility was raised in the present case. The statement indicates that appellant had a particular reputation for being "lethal," at least to the extent that Coleman had heard that this was the case. The jurors could have used it to bolster the allegations that appellant had shot Nigel Hider. They could have assumed that appellant must have been involved, in some way, in the Dawson shooting. They could have used it to erase any lingering doubt about whether appellant intended to shoot Alvarez in the Lopez homicide, or had participated in the Campos killing. They could have believed that she had heard about other incidents, not brought out at trial, that went beyond the aggravation offered in this case. Moreover, they could have used it to assume, as did Coleman, that appellant must have been very harsh or threatening to Smith simply because he was reputed to be lethal. Any of these uses went beyond the limited purpose of establishing that Coleman was afraid to testify.

Even if the statement had some relevance as circumstantial evidence to establish why Coleman might have been afraid, it has long been recognized that it is difficult to separate evidence of a witness's fear from the truth of the assertions. (See *People v. Hamilton* (1961) 55 Cal.2d 881, 896 ["... [I]t must be inferred that the declarant had this mental state of fear only because of the truthfulness of the statements contained in the assertion. . . . Logically it is impossible to limit the prejudicial and inflammatory effect of this type of hearsay evidence."].) In this case, it would have been

impossible for the jury not to believe that what Coleman heard was true – that if she had any fear of appellant it was because appellant was "lethal." As the prosecutor argued to the jurors, "The people who know the defendant know enough about him to fear him, and so should you." (57 RT 8418.)

This kind of emotional and speculative hearsay is the kind of evidence that section 352 was designed to prevent. The trial court erred in allowing it to be admitted.

D. The Error Violated Constitutional Standards and Requires Reversal

Appellant objected that the statement violated appellant's constitutional rights to due process and a reliable penalty verdict. (47 RT 7169.) Due process protects against matters that render a trial fundamentally unfair. Accordingly, due process is implicated when the probative value of evidence is outweighed substantially by its prejudicial effects. (*Lesko v. Owens* (3rd Cir. 1989) 881 F.2d 44, 52; *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 972.) As discussed above, the prejudice in this case is apparent. That Coleman heard that appellant was known to be lethal had an emotional impact that far exceeded any probative value of the statement. This alone violated due process standards

The due process requirement for fundamental fairness also extends to the way it was used to place appellant in an untenable position. Coleman testified about things she had heard, without anything to link it to her mental state – either in the original statement to Silva or at trial. Appellant was faced with the choice of either cross-examining her on the statement (bolstering the prosecutor's case in the process) or letting the statement stand before the jury. Either way, the use of a statement that was not directly relevant to Coleman's state of mind – or was hearsay if considered for the

`truth of the matter – implicated due process concerns. (*Wigglesworth v. State of Oregon* (9th Cir. 1995) 49 F.3d 578, 581 [choice of cross-examination or foregoing challenge to testimony creates twin due process dangers of a "Catch-22" situation].)

The resulting testimony deprived appellant of his right to a reliable adjudication of the death verdict. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) Even assuming that the statement was introduced only for the purposes of Coleman's state of mind, no juror could have ignored its broader implications.[79/] After the jurors were told that appellant must have threatened Smith because he was known to be "lethal" it would be impossible for jurors to limit the statement to whether Coleman herself had any fear in testifying. As the United States Supreme Court has noted:

> Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed.

(*Shepard v. United States* (1933) 290 U.S. 96, 104.) Accordingly, even if the statement had some relevance to show that Coleman was afraid of appellant, the testimony allowed the jurors to make assumptions that went far beyond this and rendered the penalty trial unreliable.

Under federal standards, this Court must reverse the penalty verdict unless the error can be found harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under state standards, reversal similarly is required if there was a reasonable possibility that the

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[79/] The jurors were not given an instruction identifying the purpose that the statement served and limiting its consideration to that specific issue.

error affected the penalty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 437.)

The trial court permitted the prosecutor to introduce a statement that Coleman knew appellant had threatened Smith because she had heard that he was lethal. Even if this was used only in connection with the specific incident, it bolstered the prosecutor's case in aggravation. Its use strengthened the prosecutor's argument that appellant would remain a danger, even in prison, and that the jurors should fear him. The error was substantial. Accordingly, the judgment against appellant must be reversed. (*People v. Robertson* (1982) 33 Cal.3d 21, 54 [substantial error affecting penalty decision requires reversal].)

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XX.

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY THAT APPELLANT BRAGGED ABOUT RUNNING A GANG OUT OF THE AREA

The prosecution presented evidence that Duane Beckman, a Riverside police officer, spoke to appellant in 1999. Appellant stated that he single-handedly ran the Gardena Payback Crips out of the Casa Blanca area. (51 RT 7721.) Appellant objected that the statement was more prejudicial than probative under Evidence Code section 352. (49 RT 7409.) The trial court erred in admitting this statement in violation of appellant's rights under this statute as well as his constitutional rights to due process and a reliable verdict. (Cal. Const., art. 1, §§ 7, 15; U.S. Const., 8th & 14th Amends.)

Under Evidence Code section 352, the trial court has discretion to exclude evidence that is more prejudicial and probative. This section applies to evidence that uniquely tends to evoke an emotional bias against defendant as an individual and that has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) Evidence is substantially more prejudicial than probative if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14.)

Here, the prosecutor introduced this statement to bolster aggravating evidence that appellant shot Nigel Hider on a street in the Casa Blanca area. (49 RT 7411.) During his testimony Hider had stated that he was a member of the Gardena Payback Crips, but testified that appellant was not the one who shot him. (46 RT 6993.) The prosecution linked appellant to the shooting through statements that Hider had given a police officer (47 RT

7101) and a statement by another witness, Angela McCurdy, that the shooting was done by man meeting appellant's description (46 RT 7025).

Under these circumstances, the probative value of appellant's statement to Beckman was minimal. It did not establish that appellant shot anyone. It did not provide any details about what appellant might have done, when he did it, or how he accomplished driving the Crips out of town. The statement might raise a suspicion, but "suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

In contrast, the prejudicial impact of this statement was enormous. As appellant argued, the testimony invited the jurors to speculate about why appellant committed the shooting, such as if he were in a rival gang and shot Hider because of the drug trade. (49 RT 7411.) Indeed, the prosecutor argued to the jurors that the statement showed that appellant had an animosity towards Hider's gang, that he did not like the gang and was willing to do whatever it took to get them out of the area. (57 RT 8430.) This could only fuel speculation about why appellant had focused on the Crips. Any speculation along these lines was extremely prejudicial, raising the possibility that appellant was involved with some kind of gang or drug-related war. Appellant could not prove a negative or effectively defend himself from this kind of speculation. (49 RT 7412.)

Moreover, by transforming the shooting into a gang-related incident, the prosecutor was able to extend its range beyond the incident with Hider. He argued before the jurors that the statement showed that appellant was not dominated by gangs, he was the dominator, so that even in Corcoran State Prison his actions promoted his reputation and fear. (57 RT 8431.) The statement had no relevance to what appellant might have faced in the

Corcoran segregated housing unit – the instances raised in aggravation from appellant's incarceration at Corcoran were not specifically gang-related. But in making this leap, the prosecutor showed the kind of speculation that the statement engendered. If the prosecutor used it far beyond the incident or context to which it allegedly applied, the jurors certainly would have done the same. (See *United States v. Sherlock* (9th Cir. 1989) 865 F.2d 1069, 1080 [prosecution's improper use of evidence removed "any reasonable expectation" that the jury would limit their consideration to proper purposes].) Accordingly, the statement was more prejudicial and probative and should have been excluded by the trial court.

Appellant had a federal due process right to the protection afforded under section 352. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [state law gives rise to due process interest].) Moreover, his rights to due process and a reliable penalty verdict were implicated by admitting evidence that was substantially more prejudicial than probative.[80/] (*Lesko v. Owens* (3rd Cir. 1989) 881 F.2d 44, 52; *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 972.)

Under either state or federal law, reversal is required if there is a reasonable possibility that the error affected the penalty verdict. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 [state law requiring penalty reversal for

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[80/] Although appellant did not make a specific objection under constitutional grounds, this Court may consider the constitutional effect of the trial court's ruling on appeal. (See *People v. Partida* (2005) 37 Cal.4th 428, 438-439 [legal consequence of error under section 352 gives rise to due process claim]; *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6 [due process and Eighth Amendment claim properly considered on appeal as alternative legal theories after an objection under section 352].)

substantial error has the same substance and effect as the federal standard]; *Chapman v. California* (1967) 386 U.S. 18, 24.) Here, the first penalty jury, that did not hear this evidence, could not reach a verdict. The second penalty jury, which heard this evidence, reached a verdict only after lengthy deliberations. This was a close case where an error, such as this, that invited speculation and inflamed the jury against appellant could have had a profound effect upon the verdict. (*Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163 [three days of deliberations indicates a close case].) Accordingly, reversal is required.

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XXI.

THE TRIAL COURT FAILED TO INSTRUCT THE JURY SUA SPONTE ON THE APPROPRIATE USE OF THE VICTIM IMPACT EVIDENCE IN THIS CASE

It is settled law that the trial court is responsible for ensuring that the jury is correctly instructed on the law. (See *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The trial court must instruct sua sponte on the principles which are openly and closely connected with the evidence presented and necessary for the jury's proper understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Defense counsel did not request an instruction regarding the appropriate use of the extensive victim impact evidence that was admitted at trial. However, that did not relieve the trial court of its responsibility to provide the jury with the guidance it needed to properly consider the victim impact evidence in this case. An appropriate limiting instruction was necessary for the jury's proper understanding of the case, and therefore should have been given on the court's own motion. (See generally *People v. Murtishaw*, *supra*, 48 Cal.3d at p. 1022; *People v. Koontz*, *supra*, 27 Cal.4th at p. 1085; *People v. Breverman*, *supra*, 19 Cal.4th at p. 154; see also *People v. Stewart* (1976) 16 Cal.3d 133, 138-140 [defendant's request for an instruction that was an incomplete statement of the law was sufficient to alert the trial court to give, sua sponte, a correctly worded instruction on defendant's theory].)

"Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim impact evidence." (*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.)

The highest courts of Oklahoma, New Jersey, Tennessee and Georgia have held that whenever victim impact evidence is introduced the trial court must instruct the jury on its appropriate use, and admonish the jury against its misuse. (*Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829; *State v. Koskovich*, *supra*, 776 A.2d at p. 181;[81/] *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State*, *supra*, 486 S.E.2d 839, 842.) The Supreme Court of Pennsylvania has recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.)

Although the language of the required cautionary instruction varies in each state, depending on the role victim impact evidence plays in that state's

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[81/] In *State v. Koskovich*, *supra*, 776 A.2d at p. 177, the New Jersey Supreme Court stated:

> We are mindful of the possibility that some jurors will assume that a victim-impact witness prefers the death penalty when otherwise silent on that question. To guard against that possibility, trial courts should instruct the jury that a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

statutory scheme, common features of those instructions include an explanation of how the evidence can properly be considered, and an admonition not to base a decision on emotion or the consideration of improper factors. An appropriate cautionary instruction would read as follows:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Finally, a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

(See *Commonwealth v. Means*, *supra*, 773 A.2d at p. 159; see also *State v. Koskovich*, *supra*, 776 A.2d at p. 177.)[82/]

In *People v. Ochoa* (2001) 26 Cal.4th 398, 455, this Court addressed a different proposed limiting instruction, and held that the trial court properly refused that instruction because it was covered by the language of

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[82/] The first four sentences of this instruction come from the instruction suggested by the Supreme Court of Pennsylvania in *Commonwealth v. Means*, *supra*, 773 A.2d at p. 159. The last sentence is based on the decision of the New Jersey Supreme Court in *State v. Koskovich*, *supra*, 776 A.2d at p. 177.

CALJIC No. 8.84.1, which was also given in this case (26 CT 7221.).[83/] However, CALJIC No. 8.84.1 does not cover any of the points made by the instruction proposed here. For example, it does not tell the jury why victim impact evidence was introduced, and does not caution the jury against an irrational decision.

CALJIC No. 8.84.1 does contain the admonition: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings," but the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow that victim impact evidence is likely to produce. The jurors would not recognize those entirely natural emotions as being covered by the reference to bias and prejudice. Nor would they understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions of the victims' relatives.

In every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) The limiting instruction appellant proposes here would have conveyed that message to the jury; none of the instructions given at the trial did that. Consequently, there

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[83/] CALJIC No. 8.84.1 reads in relevant part:

> You must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

was nothing to stop raw emotion and other improper considerations from tainting the jury's penalty decision. Indeed, that victim impact evidence was introduced in this case pertaining to both the first degree murder of Campos, that was the basis for the penalty trial, and the second degree murder of Lopez indicates the importance of the evidence to the prosecution's case and the likely far-reaching effect of the evidence.

The failure to deliver an appropriate limiting instruction violated appellant's right to a decision by a rational and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

The violations of appellant's federal constitutional rights require reversal unless the prosecution can show that they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The violations of appellant's state rights require reversal if there is any reasonable possibility that they affected the penalty verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 447-448.) In view of the sheer volume and inflammatory nature of victim impact evidence admitted in this case and the manifest closeness of the case, the trial court's instructional error cannot be considered harmless, and therefore reversal of the death judgment is required.

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XXII.

THE PROSECUTOR'S IMPROPER ARGUMENT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND A RELIABLE PENALTY VERDICT

During the penalty phase, the prosecutor told the jurors that they should fear appellant, used lack of remorse to aggravate the crime, and attacked appellant for an allegedly "unspoken theme" of his defense. These comments went beyond the limits of acceptable advocacy by playing to the jurors' fears and emotions. The errors diverted the jury from making a reasoned moral response to the appellant's background, his character, and the crime itself. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 328.)

It has long been established that a prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones." (*Berger* v. *United States* (1935) 295 U.S. 78, 88.) This Court has long held that prosecutors are held to such a high standard "because of the unique function he or she performs in representing the interests, and exercising the sovereign power, of the State." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) The prosecutor's ethical obligation reaches its apex at the penalty phase of a capital case, in which the accused's life hangs in the balance. (See *State v. Ramseur* (N.J. 1987) 524 A.2d 188, 290 [characterizing prosecutor's ethical obligations in capital cases as "particularly stringent"].) Accordingly, prosecutorial misconduct need not even be intentional in order to constitute reversible error. (*People v. Bolton* (1979) 23 Cal.3d 208, 214.)

Prosecutorial misconduct violates state law if it involves the use of "deceptive or reprehensible methods" to attempt to persuade the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) It also violates federal due process standards if it infects a trial with fundamental unfairness. (*Donnelly*

v. DeChristoforo (1974) 416 U.S. 637, 642-643; *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *People v. Hill, supra,* 17 Cal.4th at p. 819.) Moreover, the Eighth Amendment guarantees of reliability in capital sentences requires exacting scrutiny of a prosecutor's conduct and a trial court's errors. (*Beck v. Alabama* (1980) 447 U.S. 625, 638 [constitutional demands for reliability in capital case].) Accordingly, this Court should find that the prosecutor's argument in this case violated federal and state due process guarantees and the requirements for a reliable death judgment. (U.S. Const., 8th and14th Amends.; Cal. Const., art 1, §§ 7, 15, 17.)

A. The Prosecutor Improperly Argued that the Jurors Should Fear Appellant

It has long been settled that a prosecutor cannot simply appeal to the jurors' "senses of fear and anger." (*People v. Criscione* (1981) 125 Cal.App.3d 275, 292.) Here the prosecutor appealed directly to their personal fears: "The people who know the defendant know enough about him to fear him, and so should you." Appellant objected that this was prejudicial and improper. (57 RT 8418.)

During the sentencing process, a juror is called upon to make a "reasoned moral response" to the defendant and the crime. (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328.) Personal fear diverts a juror from this function. Indeed, a defendant in any capital case who has been convicted of at least one murder with a special circumstance, who is subject to one of the two highest punishments that can be imposed upon a criminal, might cause a juror to be afraid under many circumstances. Using this fear as a basis to sentence appellant to death is improper.

In *Tucker v. Zant* (11th Cir. 1964) 724 F.2d 882, the prosecutor improperly played upon the fears of the jurors:

> Ladies and gentlemen, I submit to you that this man is not the type of man you're going to want to take a chance on living. After the deeds he's done, after the deeds he's done, we cannot afford to give him the chance to do what he's done again.... [I]f he is executed, and if you bring in a verdict of guilty [sic], I'll sleep just as good, or I'll sleep better knowing that one of them won't be on the street. Knowing that one of them will be gone. It's not all of them, but it's better than none.

(*Id.* at p. 889.) The federal court of appeal held that this argument served "only to arouse the generalized fears of the jurors and divert the focus of their attention." (*Ibid.*; see also *Com. of Northern Mariana Islands v. Mendiola* (9th Cir. 1992) 976 F.2d 475, 486 [improper comments "plainly designed to appeal to the passions, fears, and vulnerabilities of the jury"].)

Here the prosecutor's argument was similar in nature to that in *Tucker*, telling the jurors that after what appellant has done, there is only one verdict that can free society from the fear – that it is time to stop the fear and threats. He also went beyond the argument in *Tucker* by arguing that the jurors themselves should be afraid. (57 RT 8417-8418.)

That the argument of the prosecutor pointed to the jurors' fear and stated that fear a proper consideration of particular importance. Indeed, jurors likely would have believed that if they feared appellant, they should sentence him to death. One study concluded that fear is one of the primary elements that motivates jurors in capital cases:

> Two emotions appear to influence how a juror votes: fear and sympathy. . . . Fear of the defendant tends to work its greatest influence on the minds of undecided jurors, nudging them toward death. Jurors who at the outset of the jury's deliberations cast their first vote for death tend to be no more afraid of the defendant than are jurors who cast their first vote for life. But among jurors who are undecided at the first vote, fear appears to play a distinct role in the decision of those who cast their final ballot for death.

(Garvey, *The Emotional Economy of Capital Sentencing,* (2000) 75 N.Y.U. L. Rev. 26, 31.) Of the emotions studied, only fear of the defendant correlated significantly with the verdict that jurors imposed. Garvey concluded that "undecided jurors who finally voted for death were substantially more afraid of the defendant than any other group. Thus when undecided jurors hold the balance, the defendant's fate might well depend on the undecided juror's fear.[84/] (*Id.* at p. 67.)

Moreover, the prosecutor asserted that appellant engendered a universal fear. Although "vigorous arguments" may be allowed, this Court has emphasized that they must be based on the evidence. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1251.) In this case, the prosecutor introduced aggravating evidence concerning prison altercations and threats, and built his argument around those instances. (27 RT 8417-8418.) Yet, there is no evidence to support the prosecutor's assertion that *all* those who knew appellant feared him. Certainly, his wife did not fear him or feel threatened by anything that appellant said. (47 RT 7118-7119.) Even if Chaka Coleman believed that Jarah Smith was afraid when appellant spoke to him on the phone, it was not enough to induce Smith to break off the relationship with appellant's wife. (47 RT 7151-7153.) Another prosecution witness, Anita Smith testified that appellant struck her after Reginald Robinson threatened to shoot her, but credits appellant with saving her life. (46 RT 6978.) There is no evidence that she feared appellant.

[84/] The effects of fear may be increased when a defendant is black. As Professor Erwin Chemerinsky noted, "Juries subconsciously may be less likely to sympathize with black defendants and more likely to fear them." (Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty* (1995) 35 Santa Clara L. Rev. 519, 524.)

The in-prison offenses introduced by the prosecutor were part of a violent atmosphere in the prison system that went beyond an inmate's personal fear of appellant. For instance, Freddie Aguero testified that when he was released on the yard at Corcoran he knew that he had to fight and attacked appellant because he was the first person he saw. (46 RT 6938.) Ruben Davis stated that younger prisoners must show they are as tough as an older prisoner in order to survive. (46 RT 6815.) Frank Stevens testified that the prison system was violent, fights happened all the time because it was the only way to resolve problems, and there was no particular problem with appellant after the fight was over. (46 RT 6844-6846.) All of this pointed to prison conditions rather than a particular factor causing others to fear appellant.

Moreover, appellant presented substantial mitigation evidence that discounted the prosecutor's implication that all of the people who know appellant fear him. Tina Johnson testified about her love for appellant. (52 RT 8002.) Appellant worked hard at his job and was proud to be "employee of the month." (52 RT 7974.) Earlane Hall stated that appellant was a model tenant when he rented a home from her. (52 RT 7951.) Estella Coachman, Tina Johnson's mother, testified that appellant loved Tina and would not have hurt her. (54 RT 8241-8242.) Reginald Brimmer requested appellant for a cellmate. (55 RT 8111.) Kevin Smith testified that appellant helped him spiritually while they were cellmates and that he did not fear him. (56 RT 8313, 8319.)

By arguing that appellant was universally feared and that the jurors should fear appellant as well, the prosecutor sought to go beyond the actual evidence and reduce this case to the most basic emotion possible. In effect, he stated that the jurors need not base their decision on a reasoned response

or even a moral weighing of the evidence, but that they should have a personal fear of defendant and use this as a reason to impose the death penalty. This Court should find that this argument violated state and federal constitutional guarantees of due process and a reliable penalty verdict.

B. The Prosecutor Improperly Argued That Appellant Did Not Show Remorse

Before closing arguments in the penalty phase, appellant objected to any argument of the prosecutor concerning lack of remorse. (57 RT 8412.) Appellant argued that he had not made remorse an issue in this case and that it was improper to rebut an argument that was not being made. (57 RT 8413.) Moreover, appellant objected that there was no direct evidence about remorse, so that the evidence that the prosecutor was using called for the jury to speculate and, in effect, made it a factor in aggravation. (57 RT 8414.) The prosecutor argued, "In [*People v. Crittendon* (1994) 8 Cal.4th 83], it said, `The prosecutor's argument of lack of remorse did not amount to given error, did not suggest that remorse was a nonstatutory aggravating factor, and did not suggest that the absence of remorse is a mitigating factor was an aggravating factor.'"[85] (57 RT 8415.) He concluded that he was free to comment on the absence of remorse as a mitigating factor as long he did not argue it was aggravating. (57 RT 8415.) The trial court allowed the prosecutor to proceed before the jurors. (57 RT 8415-8416.)

The prosecutor urged the jury to juxtapose how the crimes affected the victims and their families with the life that appellant was able to lead.

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[85] The specific quotation cited by the prosecutor was not made in *Crittendon*, although the case held that a prosecutor may argue that an absence of evidence of remorse weighs against using remorse as a mitigating factor. (*People v. Crittendon, supra*, 9 Cal.4th at p. 148.)

He argued that after shooting Lopez, appellant fled the scene and was able to resume a happy family life, enjoying Thanksgiving with his family. Although the prosecutor briefly stated that absence of remorse cannot be a separate aggravating factor, he argued the lack of remorse in vivid terms. The prosecutor told the jurors that appellant had shown no remorse after killing Norberto Estrada; did not feel bad after allegedly shooting Nigel Hider; rather than deciding never to be put in that situation again, he stormed off a porch with a shotgun and ended up shooting Lopez. The prosecutor reminded the jury that appellant allegedly told Oscar Ross, "Its easy to kill" and then killed Campos. He stated that violence comes easy to appellant and remorse is not mitigating. (57 RT 8426-8427.)

Appellant acknowledges that this Court has allowed prosecutors to argue that an absence of evidence of remorse weighs against using it as a mitigating factor as long as it is not identified an aggravating factor. However this Court must consider this issue in light of the facts of this case, in which appellant did not attempt to establish that he was remorseful.

Allowing a prosecutor to set up a "straw man" to rebut an argument that has not been made and evidence that was not presented violates fundamental fairness, which is the essence of due process. (See *Brecht v. Abrahamson* (1993) 507 U.S. 619, 629.) It places a defendant in a "Catch-22" situation where he is faced with the choice of arguing a defense he has chosen not to pursue or to ignore matters argued by the prosecutor that are important to the jury's penalty decision.

Here, that danger was compounded because there was no direct evidence of remorse one way or the other. That appellant went to Oklahoma after the Lopez homicide, and enjoyed Thanksgiving with his family, did not indicate whether or not he was remorseful. That appellant was involved

with shootings after the Estrada manslaughter – or even said that it was easy to kill – did not mean that he was not remorseful. Yet, it was virtually impossible to defend against the kind of speculation inherent in the prosecutor's argument without having decided to pursue remorse as a mitigating factor.

As this Court has noted, remorse is universally deemed to be relevant to the jury's penalty determination. (*People v. Crittenden, supra*, 9 Cal.4th at p. 146.) Although appellant did not claim remorse, the prosecutor was certainly able to make appellant more death-worthy by arguing that he lacked it. (See Garvey, *The Emotional Economy of Capital Sentencing, supra*, 75 N.Y.U. L.Rev. at p. 59 [finding that jurors' fear toward the defendant tends to recede in the face of his remorse]; Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* (1998) 98 Colum. L.Rev. 1538, 1560-1561 [finding lack of remorse is "highly aggravating . . . second only to the defendant's prior history of violent crime and future dangerousness."]; Sundby, *The Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty* (1998) 83 Cornell L.Rev. 1557, 1560 [finding that 69% of the 78 California jurors interviewed pointed to the defendant's lack of remorse as a reason, and often the most compelling reason, they voted for the death penalty]; Eisenberg, Garvey & Wells, *But Was he Sorry: The Role of Remorse in Capital Sentencing* (1998) 83 Cornell L.Rev. 1599, 1631 [finding that jurors' belief that the defendant is remorseful makes a difference when they do not think the crime is extremely vicious].)

In effect, the argument used by the prosecutor in this case allowed the prosecutor to suggest that a defendant may only be worthy of life if he matches a hypothetical situation where remorse was expressly demonstrated.

This diminishes other aspects of mitigation that should be properly considered. Indeed, the prosecutor argued that appellant's family life should be juxtaposed against his lack of remorse. Thus, aspects of appellant's life that should have been considered as mitigating were used to aggravate the crime because appellant allegedly did not show the proper remorse.

It has long been established that the absence of mitigating factors cannot be used as aggravation. (*People v. Davenport* (1985) 41 Cal.3d 247, 289.) In *People v. Ainsworth* (1988) 45 Cal.3d 984, 1034, this Court found error where the prosecutor did not argue that mere absence of a mitigating factor constituted aggravation, but set up a series of hypotheticals that created further aggravation in the way that it characterized mitigation. (See *id.* at p. 1034, fn. 27 [asking if the defendant were crazy, was he under pressure, was he trying to feed his family, was he young].) The prosecutor in this case reached this same result by using appellant's alleged lack of remorse to effectively increase the weight of the aggravation. Under these circumstances, the jury's sentencing decision was improperly skewed in favor of death in violation of due process and the Eighth Amendment's requirements for reliability in a capital case.

C The Prosecutor Improperly Argued that Appellant Had an Unspoken Theme Denigrating the Victims

Over appellant's objections, the prosecutor argued, "One of the unspoken themes of the defense throughout this trial is that these victims Martin and Candy aren't worthy enough." (57 RT 8443.) After the trial court allowed the argument, the prosecutor stated that information introduced about Martin Campos, which pertained to the circumstances of the crime, was simply to suggest that he was not "worthy enough to be punished by death." (57 RT 8443-8444.) Moreover, he suggested that

information about Jose Alvarez, that he was convicted of a shooting incident in Iowa, was part of this unspoken theme, as well as the autopsy report about Camerina Lopez having amphetamine in her system. (57 RT 8444.) Finally the prosecutor argued that the defense had introduced facts to indicate that Norberto Estrada, the victim in the earlier voluntary manslaughter case, was drunk and had marijuana in his pocket. He concluded, "I would submit to you that it was to make them less, to get you looking away from the defendant, and away from the acts that he committed, and that's not right." (57 RT 8444.)

By attacking an argument that had not been made and ascribing it to appellant, the prosecutor effectively set up a straw-man that denigrated appellant's defense and argued something that was not in evidence. Most importantly, the prosecutor was able to divert the jury from considering the evidence for the purpose for which it was relevant and instead inflame the jury against appellant, making it appear that he was simply trying to attack the victims. This argument effectively violated appellant's due process right of fundamental fairness and a reliable capital trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15. 17.)

There was no evidence that appellant had ever had an "unspoken theme" relating to Camerina Lopez being an unworthy victim. From all accounts, she was liked and respected throughout the community, including by appellant. (See, e.g. 22 RT 3395 [appellant liked Lopez]; 43 RT 6580 [Lopez was well-liked].) Her death, and the effect it had upon her children, was particularly tragic. Despite this, the prosecutor argued:

> And what did the defense ask Dr. Choi, the coroner? They specifically asked him about Camerina Lopez having amphetamines in her system at the autopsy. Why? What was the point of that? What was the point of all that evidence?

(57 RT 8444.)

This argument was particularly pernicious because the prosecutor fully knew the reason for all of the evidence that had been introduced at trial. That Lopez had amphetamines and alcohol in her system (48 RT 7240) was relevant because she made a dying declaration that was used against appellant, as the prosecutor himself recognized when he withdrew his objection to this evidence during the guilt phase of the trial.[86/] (14 RT 2255.) The prosecutor, then, knew the answer to his question, knew that it was not part of an "unspoken theme" of the defense, but chose to make the argument any way that he could.

The evidence pertaining to Jose Alvarez similarly was *not* introduced so that the jury would believe that the crime was not worthy of being considered. In 1998, Alvarez was convicted of aggravated assault in Iowa. (45 RT 6727.) When he testified during the penalty trial, appellant asked if there had been an incident similar to the present crime in Iowa, where Alvarez did not like the way that someone was looking at him and ended up shooting at him. Alvarez stated that he was scared, so he fired his gun in the air, was arrested, and served his sentence. (44 RT 6723.) This evidence was relevant to the credibility of Alvarez's testimony in this case and the prosecutor did not object to the questions, indicating that he understood its proper use and importance. It was not introduced to create an unspoken

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[86/] It should be noted that appellant was *not* being sentenced to death for the murder of Camerina Lopez, since this was a second degree murder. Although appellant did not argue she was not "worthy" as a human being, her death was not legally sufficient to impose the death penalty. (See Argument XXIII.)

theme that either Alvarez or Lopez was not worthy of the jury's consideration.

The prosecutor also faulted appellant for introducing evidence that Norberto Estrada was drunk and had marijuana with him. Appellant had been convicted of voluntary manslaughter after he shot and killed Estrada. (51 RT 7717.) During the penalty trial, he introduced evidence that Estrada's group had been drinking and that Estrada had been shot during an argument after making racial slurs. (51 RT 7785.) A police officer testified that the incident had occurred in an area where fights and drunkenness were common, and that he had found marijuana on Estrada's property. (45 RT 6740-6741.) Because appellant had been found guilty of voluntary manslaughter, rather than murder, the circumstances of the crime were important for the penalty jury to understand so that they could weigh the incident in its full perspective. Again, the prosecutor did not object to this evidence being introduced, indicating that he understood it had a proper purpose.

Most importantly, the prosecutor attacked appellant for his portrayal of Martin Campos. The victim impact evidence introduced by the prosecutor indicated that Campos was loved by his family and missed very much. (See, e.g., 48 RT 7197 [testimony of Gladys Felipe].) Appellant did not cross-examine the victim impact witnesses or challenge the way that the family portrayed him. But the prosecutor specifically asked why appellant took "so much time" to establish that Ross and Campos had made 20 drug deals together, ran through hundreds of thousands of dollars of drugs; that they had traveled to Los Angeles to sell guns; that Campos had a big drug connection in Los Angeles; and, that Ross thought Campos set up the robbery that led to the crime. (57 RT 8443-8444.)

These examples were drawn in part from testimony that the prosecutor himself had introduced. Ross testified *on direct-examination* that he knew Campos through "illegal dealings" and had bought kilos of cocaine from him at least 25 to 30 times. (50 RT 7629-7630.) He also testified that he suspected Campos of setting up the robbery. (50 RT 7631.) On cross-examination, Ross testified that he and Campos had dealt about a half-million dollars of cocaine. (50 RT 7661.) Campos had asked Ross to help rob other drug dealers on several occasions. (50 RT 7663.) On one occasion, Campos and Ross drove to Los Angeles to exchange guns for cocaine. (50 RT 7664-7665.) Ross stated that one of Campos's own family members told him that Campos was a dangerous man and Ross described Campos as a "rip off artist" when he was interviewed by the police. (50 RT 7667.) Ross believed that Campos had sent people to rob him. (50 RT 7680.) For these reasons, Ross was always on his guard with Campos and wanted to run him out of town. (50 RT 7668.,7670, 7680.)

The testimony that the prosecutor attacked certainly was relevant to the circumstances of the crime and Ross's own credibility. Ross's knowledge about Campos bolstered his reasons for believing that Campos had set up the robbery on the Ross property. The extent to which Ross had been tied to Campos gave him motive to orchestrate more than a robbery, but the murder as well. That Campos was experienced in dealing drugs and guns, and involved with the robbery of Ross, would have created a general level of tension at the time of the crime. It gave a reason for Ross to want help with his plan and to ensure that Campos would never set up a situation to rob him again. It was not simply that Campos was murdered in the course of a common robbery, but that events were set in motion that led to his tragic death. The prosecutor made no objection to any of the questions.

Accordingly, the evidence was not introduced to belittle the worth of Campos as a human being, who was loved by his family, but to place the crime into a context that accounted for the reasons that led to the events at the Ross property. It was not part of an "unspoken theme" to suggest that the victim was not worthy, but rather part of appellant's basic defense to the crime charged and the role that he was alleged to have played. Under these circumstances, the prosecutor again fully knew the answer to the questions that he posed before the jurors, but ignored this in order to raise the specter of impropriety.

Trial counsel's "unspoken theme" of defense was not an issue in this case. Appellant was being tried for one of the two highest punishments the law can impose following a homicide, indicating that taking any life is viewed with the utmost importance. The prosecutor introduced extensive victim impact evidence pertaining to both the first degree murder of Campos and the second degree murder of Lopez that emphasized how the loss of their lives affected their families, and appellant chose not to rebut it or cross-examine the witnesses about the victims' character. Although the prosecutor undoubtedly could have argued that the facts about Campos's livelihood did not make him any less deserving of the jurors' full consideration, it is one thing to make this point and quite another to ascribe these facts to an unspoken and improper theme that trial counsel used to "get you looking away from the defendant and away from the acts that he committed, and that's not right." (57 RT 8444.)

Portraying appellant's defense as an attack upon the victims undoubtedly inflamed the jury against appellant. It has long been recognized that "it might not be prudent for the defense to rebut victim impact evidence." (*Payne v. Tennessee* (1991) 501 U.S. 808, 823.) The reasons for

this are obvious. As a society we regard any loss of life to be tragic. As individuals, we can take into account the pain and loss suffered by a victim's family. Jurors should be able to see "the victim is an individual whose death represents a unique loss to society and in particular to his family." (*Id.* at p. 825.) By attacking the victim's character in a penalty trial, a defendant risks attacking these basic values, further indicating that he is not remorseful or respectful of the harm that he has caused. The prosecutor achieved this same end by portraying appellant as having attacked the victims for no apparent reason.

The prosecutor's argument, then, served to make it appear that appellant had done something wrong in raising issues that were important to his defense. It improperly denigrated appellant's defense by suggesting that counsel was using the evidence and cross-examining witnesses for an improper purpose. (See *People v. Hill* (1998) 17 Cal.4th 800, 832 [denigrating defense is "never excusable"]; *People v. Sandoval* (1992) 4 Cal. 4th 155, 183 [denigrating counsel directs jury's attention away from the evidence and is therefore improper]; *United States v. Young* (1985) 470 U.S. 1, 8-9 [unethical to make unfounded attacks against counsel].) It improperly penalized appellant for introducing evidence as part of his constitutional right to rebut the case against him, by erroneously telling the jury that it had no proper purpose and was being used simply to make the victims less worthy of justice. (See *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363 [defendant cannot be penalized for exercising constitutional rights]; *Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1411 (en banc), vacated (1986) 478 U.S. 1016, reinstated (11th Cir. 1987) 809 F.2d 700 [improper for prosecution penalty phase argument to disparage defendant based on exercise of rights to trial, counsel, and kindred rights]; *People v. Thompson*

(1988) 45 Cal.3d 86,124 [improper to argue lack of remorse based on exercise of constitutional privilege against self-incrimination].)

Faced with this argument, a juror would believe that the evidence attacked by the prosecutor was not worthy of any consideration because it was part of an improper attempt to shift the blame to the victim. A juror would believe that appellant was improperly introducing evidence for the sole purpose of diverting them from their duty, making him more death worthy. Under these circumstances, this Court should find that the argument was erroneous.

D. The Penalty Judgment Must Be Reversed

This Court has interpreted both the federal and state Constitutions to require reversal for prosecutorial error if there is a "reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable manner." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) Here, the individual and cumulative effect of the prosecutor's conduct pervaded the trial. Even if this Court concludes that a single instance of misconduct, standing alone, might have been harmless, it must find that the cumulative impact of misconduct was prejudicial. (See *People v. Hill*, *supra*, 17 Cal.4th 800 844-848 [cumulative impact of misconduct warranted reversal]; *People v. Purvis*, *supra*, 60 Cal.2d at p. 353 [combination of "relatively unimportant misstatements" required reversal]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1076-1077 [cumulative effect of closing argument prejudicial].)

A prosecutor's words carry great weight. (See *People v. Talle* (1952) 111 Cal.App.2d 650, 677.) The words here were directed to establishing that the jurors should fear appellant and that appellant had improperly tried to blame the victim. Appellant's alleged lack of remorse improperly was used

to strengthen both arguments. This "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) In so doing, it violated the Eighth Amendment standard for heightened reliability that is found in all capital cases. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340.) In a close case such as this, the error cannot be held to be harmless. Reversal is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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XXIII.

THE TRIAL COURT ERRONEOUSLY INSTRUCTED APPELLANT'S JURY THAT THEIR SENTENCING DECISION ENCOMPASSED BOTH THE FIRST DEGREE AND SECOND DEGREE MURDERS SO THAT APPELLANT WAS SENTENCED TO DEATH FOR BOTH CRIMES

Although appellant had been convicted only of second degree murder for the Lopez homicide, the penalty retrial was conducted as if appellant were being sentenced for death for *both* of the crimes in this case. During voir dire for the penalty phase retrial, the trial court instructed the jurors that appellant had been convicted of both first degree murder with special circumstances and second degree murder with special circumstances – that a defendant who has been found guilty of these crimes faces the death penalty. (43 RT 6524.) The prosecutor introduced significant testimony and victim impact evidence relating to both crimes. Ultimately, the trial court instructed the jurors that appellant had been found guilty of murder as charged in the prosecutor's second amended information and that the penalty determination encompassed both murders. (57 RT 8512; 26 CT 7236.) Consequently, the jury specifically imposed death for *both* the Campos and Lopez murders. (57 RT 8530; 26 CT 7258.) After the jurors imposed death, the trial court sentenced appellant to death for both crimes. (58 RT 8616; 26 CT 7316 [abstract of judgment stating that appellant was "sentenced to death on Counts 1 [Campos Homicide] and 2 [Lopez Homicide]"].)

The instructions and verdict form in this case were erroneous in providing for a death judgment against appellant for the second degree murder of Lopez. That the jurors thought that appellant was eligible for death for both the Campos and the Lopez homicides profoundly affected their deliberations, denied appellant's Sixth Amendment right to a proper

jury verdict, and rendered the entire death judgment unfair and unreliable under federal and state constitutional standards. (Cal. Const., art. 1, §§ 15, 16, 17; U.S. Const., 6th, 8th & 14th Amends.)

A. The Sentence of Death for Second Degree Murder Must be Reversed

The verdict form used by the jury in this case imposed death for both the capital crime (Count I) and second degree murder (Count II). (26 CT 7258.) The trial court in turn sentenced appellant to death for both counts charged against appellant. (58 RT 8616; 26 CT 7306.) No other sentence was imposed for Count II.

The proper sentence for second degree murder is as follows:

> Except as provided in subdivision (b), (c) or (d), every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life.

(Pen. Code, § 190, subd. (a), ¶2.)

The trial court's death sentence on Count II was therefore an unauthorized sentence. When the trial court pronounces a sentence that it is not authorized to impose, the sentence is void. (*Wilson v. Superior Court* (1980) 108 Cal.App.3d 816, 819.) Such an unauthorized sentence must be vacated and a proper sentence imposed. (*People v. Massengale* (1970) 10 Cal.App.3d 689, 693.) In *People v. Rogers* (2009) 46 Cal.4th 1136, 1174, this Court vacated a sentence of death for second degree murder and ordered the judgment be modified to reflect the appropriate sentence for that count, which is a state prison term of 15 years to life. The same result should be applied here.

B. Appellant's Death Judgment must Be Reversed Because the Jurors and the Trial Court Erroneously Determined That Appellant Should Be Sentenced to Death for the Second Degree Murder of Lopez

Appellant was convicted of only a single capital crime. He could not be sentenced to death for second degree murder, which carries a penalty of imprisonment for 15 years to life. (Pen. Code, § 190, subd. (a).) That the case included a multiple-murder special circumstance allegation did not change the punishment that could be imposed for the crime. The special circumstance was "a legislative choice to treat as deserving of the most severe punishment a murderer convicted of more than one murder." (*People v. Garnica* (1994) 29 Cal.App.4th 1558, 1563.) A special circumstance itself does not "impose punishment." (*People v. Harris* (1984) 36 Cal.3d 36, 65.) Properly framed, the issue before the penalty jury in the present case would have been whether to impose a sentence of life or death for the first degree murder of Martin Campos, made worse by the aggravating facts that the prosecution presented, including the Lopez homicide. Whatever verdict the jury reached, appellant then would have faced sentencing by the court for a term of 15 years to life on the non-capital second degree murder. Accordingly, the jury could have considered the multiple-murder special circumstance as a factor in making the penalty decision for the Campos murder (§190.3, factor (a)), but sentencing appellant to death for the second degree murder conviction was a separate and erroneous matter.

The instructions and verdict form misled the jurors by including death as a sentencing determination for second degree murder and diverted them from their proper sentencing function. Indeed, from the beginning of the penalty retrial, the charges against appellant were blurred together. The jurors were informed that appellant had been found guilty of first degree

murder with special circumstances, of second degree murder with the further special circumstance of multiple murder, and that "the penalty for a defendant found guilty of the crimes I have just outlined shall be death" or life without possibility of parole. (43 RT 6524.) The jurors were told and undoubtedly understood that appellant was subject to death for the second degree murder of Lopez. The trial court's final instruction told the jury that appellant had been found guilty of both counts, as charged against him, and that the jury was to consider whether to fix the "penalty for the murder of Martin Campos *and* Candy Camerina Lopez" as death or life in prison. (27 CT 7236, emphasis added.) The judgment of death that they reached specifically encompassed both crimes and affixed the judgment as death, making both crimes part of the sentence itself. (27 CT 7258.) Accordingly, this Court can have no doubt that the jurors not only sentenced appellant for the murder of Campos, but also for the second degree murder of Lopez.

In *People v. Rogers*, *supra*, 46 Cal.4th 1136, the defendant was found guilty of two first degree murders and a second degree murder. The penalty verdict form did not distinguish these crimes. The jury simply determined that the "penalty shall be death." (*Id.* at p. 1173, fn. 22.) This Court found that the jurors were not misled because both the instructions and prosecutor's argument put the crimes in their proper context. As the prosecutor argued in that case, the defendant deserved the death penalty for the two first degree murders and the multiple-murder special circumstance finding. He then went on to state "that if this was not enough for the jury to vote for death, then there was another murder to consider. (*Id.* at p. 1174.) It was clear that the jurors understood that their sentencing function was focused on the first degree murders and imposed the sentence accordingly. (*Ibid.*)

The instructions and verdict form in this case went far beyond that in *Rogers*. Unlike in *Rogers,* the Lopez homicide was identified as a specific crime for which appellant was being sentenced. Neither the argument of the prosecutor nor the trial court's instruction made any kind of distinction between the two crimes – they were both generally considered under factor (a), argued in the same way, and identified in the verdict form as being part of the capital equation. Thus, appellant's death sentence rested, in major part, upon a second degree murder – he was sentenced to death *for* Lopez as well as the Campos murder. The jurors in this case would not have understood their proper sentencing function in light of the specific inclusion of the Lopez murder.

The instruction and verdict form raised a particular problem in this case. In *People v. Coddington* (2000) 23 Cal.4th 529, the jury returned a death verdict using a single form that did not specify the counts for which death was the appropriate punishment. This Court noted that it had upheld this procedure, but that it "could be troublesome in a case in which conviction on one of several murder counts is reversed." (*Id.* at p. 566, fn. 7.) The trial court in the present case created a "trouble" similar to that anticipated in *Coddington* by erroneously allowing the jury to impose a death sentence for second degree murder. It made it impossible for a reviewing court to determine if the death penalty rested on an improper count or an invalid legal theory that death could be imposed for a second degree murder. (See *People v. Green* (1980) 27 Cal.3d 1, 69 [where verdict rests upon an improper theory, and reviewing court cannot determine whether the ensuing verdict rested on that theory, the verdict cannot stand.)

The errors violated appellant's rights to a proper jury verdict, to due process and a reliable penalty determination under the federal and California

constitutions. The court's failure to properly guide the jury in its sentencing decision created a risk of arbitrary and capricious infliction of the death penalty in violation of the Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia* (1976) 428 U.S. 153, 188-189; see *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740 [absence of instructions on a proper theory of the case violates Sixth and Fourteenth Amendments].) Moreover, the verdict forms and the instructions deny meaningful appellate review under the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 426 U.S. at pp. 195.)

In *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310, the United States Supreme Court explained that there are certain errors that affect the framework within which a trial proceeds. These errors are defects in the trial mechanism that defy harmless error review. (*Id.* at p. 309.) They implicate fundamental fairness and the protections provided a defendant in a criminal case. (*Ibid.*) This kind of structural error requires reversal per se because it infects the integrity of the trial itself. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 629-630.) In particular, structural error occurs when there is no valid jury verdict within the Sixth Amendment. Under these circumstances, "there is no object, so to speak, upon which the harmless-error scrutiny can operate." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280)

As discussed above, appellant cannot be sentenced to death for second degree murder. This Court cannot speculate how the second degree murder affected the jury's consideration. It can only know that it was a specific part of the sentence imposed against appellant. Accordingly, there is no valid penalty verdict. The Court should find that the error was structural and reverse the death penalty. (*Ibid.*)

But even assuming harmless error analysis could be used, the difference between the verdict allowed by law and that imposed by appellant's jury was enormous. At the very least, it blurred the distinction between first degree and second degree murder, effectively elevating the Lopez homicide into a capital crime with its own special circumstance.

The error was particularly significant because the Lopez murder was very distinct from the Campos murder. Undoubtedly, the Lopez shooting raised far more sympathetic factors. By all accounts, Lopez was an innocent victim, a well-loved mother who was trying to make a good life for herself and her children. The victim impact evidence presented about her was extremely touching and tragic. In contrast, Campos was involved heavily with the sale of large amounts of drugs, he unlawfully sold guns, and was said to have been involved with robbery. Indeed, the crime occurred in the context of a drug deal set up by Oscar Ross, based on his suspicions that Campos was involved in an earlier armed robbery of Ross. Although any death is a deep loss to all those who are concerned, Campos had embarked upon a dangerous path and the consequences were not unforeseen. Given this, one of the major hurdles that the prosecutor faced was whether the circumstances of the crime and the perception of the victim would affect the jury's view about whether death was warranted for the crime. This hurdle was overcome in large part because the capital sentencing process was directly linked to the Lopez crime.

Although in a properly-conducted trial, the jurors would have heard about the Lopez crime as a special circumstance that could be considered in aggravation, there is a distinct difference between sentencing appellant to death for the Campos offense and considering both crimes to be part of the sentencing equation. Even with the Lopez crime being directly considered

as part of the death judgment, the penalty determination was extremely close – the first penalty jury could not reach a verdict; the second penalty jury returned a death judgment only after lengthy deliberations. This Court can have no assurance that death would have been the verdict if the jurors had considered only the penalty for the Campos murder. Under these circumstances, the trial court's erroneous instructions and the verdict form that specifically allowed the jury to impose punishment *for* the Lopez homicide was likely to have affected the penalty verdict. This Court must find that the error was not harmless beyond a reasonable doubt. Reversal of the death judgment is required. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Robertson* (1982) 33 Cal.3d 21, 54 [any substantial error affecting the penalty phase of a capital trial must be deemed prejudicial].)

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XXIV.

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

Many features of California's capital-sentencing scheme violate the United States Constitution and international law. This Court consistently has rejected a number of arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges 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 right to present supplemental briefing.[87/]

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher*

[87/] These claims of error are cognizable on appeal under section 1259, even when appellant did not seek the specific instruction or raise the precise claim asserted here.

(1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313, conc. opn. of White, J.) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the capital offense charged against appellant, Penal Code section 190.2 contained nineteen special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 26 CT 7223.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts

such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court never has applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) Instead, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As 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 the particular set of circumstances surrounding the instant murder were sufficient, by themselves and without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) He urges the Court to reconsider this holding, particularly in light of this case where factor (a) encompassed both the first degree murder of Martin Campos and the second degree murder of Camerina Lopez in the penalty retrial. This allowed for a particularly broad interpretation of the circumstances of the crime that undoubtedly contributed to the confusion the jury would have

experienced regarding the particular crime at issue during their sentencing. (See Argument XXIII.)

C. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

1. Appellant's Death Sentence is Unconstitutional Because it is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; see *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (CALJIC No. 8.85; 26 CT 7223; CALJIC No. 8.88; 26 CT 7235.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, 280-282, 294, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, Appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an

appropriate punishment. (CALJIC No. 8.88; 26 CT 7223.) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi, Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court's failure to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). This Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court previously has rejected the claim that either the Fourteenth Amendment due process or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that

death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.)

Appellant requests that the Court reconsider this holding, particularly under the circumstances of this case. The first penalty jury in this case could not reach a unanimous decision. The jurors reached a verdict in the penalty retrial only after three days of deliberation, indicating that the verdict was a very close decision. Without a standard identifying that death had to be the appropriate penalty beyond a reasonable doubt, this Court can have no confidence in either the strength or the reliability of the ultimate verdict. Accordingly, the judgment must be set aside.

2. Some Burden of Proof is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore Appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jurors 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.

CALJIC Nos. 8.85 and 8.88, the instructions given here (26 CT 725, 787; 8 RT 1425-1426, 1468), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional

minimum standards and consequently violate the Sixth, Eighth, and Fourteenth Amendments. 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* (2004) 32 Cal.4th 1107, 1136-1137.) This Court also has rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that fact to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict was Not Premised on Unanimous Jury Findings

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance that the jury, or even a majority of the jury, ever found a single set of aggravating circumstances warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. 584. (See *People v. Prieto, supra*, 30

Cal.4th at p. 275.) Appellant asserts that *Prieto* was incorrectly decided, and that application of *Ring*'s reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the Equal Protection Clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the

federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

In light of the circumstances of this case, appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution. Indeed, this Court can have no confidence that appellant's jurors unanimously agreed that any particular aggravating factor was a criminal act. Accordingly, a unanimity instruction was necessary to ensure that the constitutional requirements for due process, a reliable verdict, and a trial by jury were met.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; 26 CT 7223.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant asks this Court to reconsider that opinion in light of the closeness of the penalty determination in this case.

5. The Instructions Failed to Inform the Jury that the Central Determination is Whether Death is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Penalty Jury Should be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed

as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated Appellant's right to due process of law (U.S. Const., Amend. XIV), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., Amends. VIII, XIV), and his right to the equal protection of the laws. (U.S. Const., Amend, XIV.)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, California's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required in all cases.

The need for such an instruction, and the prejudice from its omission, was particularly acute in this case. That the first penalty jury could not reach a verdict and the jurors in the penalty retrial deliberated for a substantial period of time indicates that the decision was very close. Under these circumstances, the presumption of life instruction was vital and its omission violated Appellant's Eighth and Fourteenth Amendment rights.

D. Failing to Require That The Jury Make Written Findings Violates Appellant's Right To Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.)

Appellant urges the court to reconsider its decisions on the necessity of written findings. Written findings in this case would have allowed this Court to determine if the death verdict was the result of erroneous aggravating factors or the improper way that the second degree murder was linked to the capital decision. If this Court is to affirm the judgment in this case, it must find that these errors were harmless. This Court cannot and should not do so without written findings allowing meaningful review the basis of the penalty determination.

E. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. The trial court failed to omit those factors from the jury instructions (27 CT 7223-7224), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights.

Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, Appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. California's Capital-Sentencing Scheme Violates The Equal Protection Clause

The California death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's

sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider its ruling.

H. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms

This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency (*Trop v. Dulles* (1958) 356 U.S. 86, 101)." (*People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges this Court to reconsider its previous decisions.

Moreover, even if the death penalty as a whole does not violate international law, appellant submits that this trial violates specific provisions that are applicable to his trial. These rights include the right to a an impartial tribunal that demands each of the decision-makers, including the jury be unbiased. (*Collins v. Jamaica* (1991) IIHRL 51, Communication No. 240/1987 [impartial juries]; see also International Covenant on Civil and

Political Rights [ICCPR] (June 8, 1992) 999 U.N.T.S. 171, article 14(1) [criminal defendants entitled to fair hearing by impartial tribunal].) It also encompasses standards that require prosecutors to "perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system." (*Guidelines on the Role of Prosecutors*, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (1990).) Finally, international law encompasses a right to a fair trial that includes specific rights but is broader than any one provision that is provided by national or international law. (Article 10 of the Universal Declaration; Article 14(1) of the ICCPR,; Article 6(1) of the European Convention; Article XXVI of the American Declaration; Article 8 of the American Convention.)

Here, appellant's right to an impartial tribunal was violated by a jury selection that excluded minority jurors for racial reasons (Argument II). The prosecutor violated his duty to uphold human rights by introducing improper considerations into the penalty decision. (Argument XXII.) The trial court's refusal to sever the two unrelated charges (Argument I) led to appellant ultimately being sentenced to death for both the capital and the non-capital homicides in violation of appellant's right to a fair trial. (Argument XXIII.) Appellant submits that the individual and combined effect of each claim of error raised in this case violated his right to a fair trial under international standards. Under these standards, this Court should reverse the judgment in this case.

XXV.

CUMULATIVE ERRORS REQUIRE THAT THE JUDGMENT IN THIS CASE BE REVERSED

Even assuming that none of the errors identified by appellant is prejudicial standing alone, the cumulative effect of these errors undermines the confidence in the integrity of the guilt and penalty phase proceedings. (*Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

Courts have recognized that "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." (*Irving v. State* (Miss.1978) 361 So.2d 1360, 1363.) Accordingly, even if the individual errors are harmless on their own, the cumulative effect of these errors must be examined with special caution. (See *Burger v. Kemp* (1987) 483 U.S. 776, 785 ["duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"].)

This Court has also long recognized that errors in the penalty phase are subject to exacting standards:

> [I]n determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Robertson* (1982) 33 Cal.3d 21, 54 [substantial error in penalty phase requires reversal].)

Even assuming that the individual errors in this case were harmless when considered separately, they built upon each other and led to the judgment of guilt and ultimately to the death verdict. The trial court's denial of appellant's motion to sever (Argument I) led to appellant being convicted and sentenced to death for second degree murder. (Argument XXIII.) Evidentiary errors that increased the weight of prejudice in the guilt phase (Arguments III, IV, V, VI) added to the inflammatory effect of similar errors in the penalty phase. (Arguments XIX, XX.) The improper kidnaping allegation and instructions combined to allow the jury to find that the special circumstance was true, which increased the weight of the aggravating evidence introduced against appellant. The trial courts instructions and improper aggravating evidence combined to contribute to the death verdict. (Arguments XVI, XVII, XVIII.)

By the end of the trial, the jurors knew that Camerina Lopez had accused appellant of pointing the shotgun at Jose Alvarez so that she thought appellant would shoot him. They considered that appellant dominated others, whether it be that Brightmon was his "henchman," that he drove gangs out of the area, or that he fought others on the prison yard. The prosecutor urged jurors to fear appellant– and this fear was fed by a detective who believed that he needed to get appellant off the streets and by a witness who heard that appellant was "very lethal." Appellant's outburst about his wife's affair was defined as a criminal act, along with fights in prison that appellant did not start, or a shooting incident that went beyond appellant's personal guilt. The prosecutor reduced appellant's defense to

nothing more than an attack upon the victims in this case, even as he knew full well the legal basis for the evidence that he attacked appellant for using.

Even under these circumstances, appellant's trial was particularly close in both the guilt and penalty phases. The guilt verdict was reached after seven days of deliberations. The original jury could not reach a penalty verdict and the jurors took three days to deliberate in the retrial. This Court, then, should have no doubt that the cumulative effect of the errors played an important role in both the guilt and penalty phases of appellant's trial. The errors cannot be said to be harmless beyond a reasonable doubt. The entire judgment must be set aside. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *Chapman* standard to the totality of the errors].)

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CONCLUSION

For all the reasons stated above, the guilty and penalty verdicts in this case must be reversed.

DATED: August 2, 2010

Respectfully submitted,

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Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36 (b)(2))

I, Arnold Erickson, am the Deputy State Public Defender assigned to represent appellant Lumord Johnson in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is approximately 80186 words in length.

ARNOLD ERICKSON

Attorney for Appellant

DECLARATION OF SERVICE

Re: *PEOPLE v. LUMORD JOHNSON*

Riverside County Superior
Court No. CR-66248
Supreme Ct. No. S-105857

I, GLENICE D. FULLER, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

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Each said envelope was then, on August 2, 2010, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 2, 2010, at San Francisco, California.

Glenice Fuller

DECLARANT