No. S105908

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHN SAMUEL GHOBRIAL, Defendant and Appellant.	(Orange County Superior Ct. No. 98NF0906)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
for the County of Orange

HONORABLE JOHN J. RYAN, JUDGE

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APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

On June 29, 1998, a one-count information was filed in Orange County Superior Court charging appellant Ghobrial, an Egyptian national, with the March 1998, malice-murder of Juan Delgado in violation of Penal Code section 187, subdivision (a). (1 CT 87.) It was also alleged that this offense is a serious felony within the meaning of Penal Code section 1192.7, subdivision (c) (1). The information alleged as a special circumstance that the murder was committed while appellant was engaged in the commission and attempted commission of the performance of a lewd and lascivious act upon a child under 14, in violation of Penal Code section 288, within the meaning of Penal Code section 190.2, subdivision (a) (17)

(E). (*Ibid.*)

Jury selection in appellant's case began on September 10, 2001. The terrorist attack of the Twin Towers World Trade Center and Pentagon occurred the next day. When court resumed on September 13, defense counsel moved to continue the case based on counsel's belief that the attack and publicity surrounding it aroused anti-Arab sentiment that prevented appellant from receiving a fair trial. (2 CT 307; 2 RT 404.) The court denied the motion. (2 CT 307; 2 RT 414.) A motion to continue was again made, and denied, on September 17. (2 RT 507.) During voir dire that day, however, it became clear that a majority of the prospective jurors did not feel that they could be unbiased or give appellant a fair trial. Defense counsel renewed her motion to continue trial, the prosecutor joined in the motion, and the court granted it. (2 CT 313; 2 RT 536-539.)

Jury selection resumed on October 29, 2001. (2 CT 341; 3 RT 557.) Twelve jurors and four alternates were sworn to hear this case on November 28, 2001 (2 CT 367; 5 RT 1202-1203), and the prosecution case-in-chief began that same day (2 CT 370; 6 RT 1294). Both parties rested on December 6, 2001. Following submission of the evidence, defense counsel made a motion pursuant to Penal Code section 1118.1, asking the trial court to find the special circumstance allegation to be not true, which was denied. (8 RT 1888.)

The prosecutor gave his closing argument on December 6, 2001. (2 CT 394; 8 RT 1898.) The defense closing and prosecution rebuttal were made on December 10, 2001. (2 CT 433; 9 RT 1937.) The jury was instructed and began deliberations at 11:50 a.m. on December 10, 2001. (2 CT 433; 9 RT 2002, 2027.) The next day, December 11, the jurors returned their verdict, finding appellant guilty of first-degree murder and the special

circumstance to be true. (2 CT 473, 474, 502-A; 9 RT 2039-2040.)

The penalty phase of trial began on December 12, 2001, with the prosecution's case-in-chief. (2 CT 505.) The prosecution rested that same day (9 RT 2112), and the defense began its case-in-chief (9 RT 2115). The defense rested on December 19, 2001, and the prosecution presented no rebuttal. (2 CT 530; 11 RT 2653.) Closing arguments were presented to the jury and the jurors were instructed before they began their deliberations at 3:22 p.m. on December 19, 2001. (2 CT 530-531; 11 RT 2653-2807.) The jurors reached their verdict of death at 3:15 p.m. the following day. (2 CT 534, 560; 11 RT 2814-2816.)

Judgment was imposed on April 10, 2002, after the motion for new trial and motion for modification of sentence were denied. (2 CT 577, 3 CT 635, 640-647; 11 RT 2824-2851.)

STATEMENT OF APPEALABILITY

This appeal is from a final judgment imposing a verdict of death, and it is automatic. (Pen. Code, §1239, subd. (b); Cal. Rules of Court, rule 8.600.)

INTRODUCTION

Appellant Ghobrial's case should never have been sent to the jury. Ghobrial is a disabled Egyptian national who suffers from schizoaffective disorder, a severe mental illness that is accompanied by auditory hallucinations, paranoia, bizarre delusions, disorganized speech and thinking and significant social and occupational dysfunction. Ghobrial's mental incompetence and resulting inability to assist counsel in his defense should have been apparent to the trial court – if not at the beginning of trial, at least by the time a jail psychiatrist testified in open court that he had questioned Ghobrial's competence to stand trial or understand the nature of

the proceedings against him because of his psychotic illness. The trial court's failure to suspend trial and conduct a competency hearing was constitutional and statutory error requiring that Ghobrial's conviction and death judgment be reversed.

Notwithstanding this error, the special circumstance finding and death judgment must also be reversed because the prosecution failed to present legally sufficient evidence of a molestation. Ghobrial's killing and dismemberment of the victim in this case, Juan Delgado, were never contested. The sole issue at trial was whether Ghobrial did or attempted to molest Juan before he killed him. Rather than present evidence of a molestation, the prosecutor presented a tale of molestation built on "sound and fury, signifying nothing."[1] The prosecutor had no direct evidence of a molestation so posited possible theories of what *could* have happened, relying on circular arguments, illogical inferences and the incendiary nature of the offense and statements of this mentally disturbed defendant to create an inculpatory narrative unsupported by logic or evidence. The defense was hampered in rebutting this narrative by the court's improper exclusion of evidence that would have challenged the prosecutor's inferences and offered an alternative explanation for Ghobrial's behavior.

The prosecutor also incited the passions of the jurors against Ghobrial, an Egyptian whose jury selection began on September 10, 2001, by his repeated references to September 11, Al Qaeda, Osama bin Laden and suicide bombers, which, by design or otherwise, had to have had a prejudicial effect on Ghobrial and defied the jurors to spare this potential terrorist from the death penalty.

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[1]Shakespeare, *Macbeth*, Act V, Scene V.

Individually and collectively, the errors in this case require that appellant's conviction and sentence of death be reversed.

STATEMENT OF FACTS

A. Ghobrial's Early Life.[2]

Appellant John Ghobrial was born in the small village of Tahta in southern Egypt. According to Ghobrial's father, Samwiael Ghobrial, the family noticed signs that Ghobrial was disturbed from a young age. He was different from his brother and four sisters. He had no friends; he was isolated; and he had problems in school. (10 RT 2445-2447, 2449, 2450.) Samwiael also explained that Ghobrial would spit and was always shivering. (10 RT 2450.)

> When I look at him, if I cry in front of him, he would start to cry. If I smile, he would smile. And this hand would shake nervousness, and spitting, was not normal.

(*Ibid.*)

Ghobrial also received head injuries as a youngster and was frequently beaten. When was quite young, Ghobrial fell and hit his head on a bed stand. (10 RT 2449.) When he was about seven, Samwiael hit him over the head with a table. His head bled and he needed to be treated by a doctor. (*Ibid.*) When Ghobrial was a bit older, Samwiael assaulted Ghobrial's mother. After Ghobrial interceded to help his mother, Samwiael beat him "very badly." (10 RT 2452-2453.)

Samwiael testified that they lived in an area rich with tombs of the Pharaohs, and in order to divert Ghobrial's attention, when he was in junior high school, his mother told him about buried gold from ancient times. (10

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[2]This testimony was introduced at the penalty phase of trial through a translator.

RT 2450-2451.) After that, Ghobrial started digging in the house for gold. He dug for years – into young adulthood. Even after his parents told him it was just a story, Ghobrial continued to dig. His father explained, "It was attached in his brain." (10 RT 2450-2452.)

Ghobrial was trained to do agricultural work, then was conscripted into the Egyptian army. Samwiael believed that the army would be very difficult for Ghobrial. (10 RT 2447, 2449.) And, indeed, Ghobrial returned from the army with an arm amputated. (10 RT 2453.) With the loss of his arm, Ghobrial's mental health went from bad to worse.[3] Samwiael suspected that Ghobrial took expensive items from their home and sold them. As punishment, he beat Ghobrial with "metal chains, metal chains similar to the one that you use to restrain dogs in this country." (10 RT 2452-2453.) Samwiael also tied up Ghobrial so that he would confess to taking the missing items. (10 RT 2454.)

After his return from the army, Ghobrial continued to dig for gold, but his digging behavior was different. When he did not find anything, he became frustrated and tired. He got angry when his mother told him there was no gold in the house. He then went out to "pick a fight with the Muslim people, and they would beat him up. Then so he would release his frustration mostly inside the house." (*Ibid.*)

Ghobrial also defecated in the house, on the roof and in the garage. He would sometimes just stare as if he were lost. He was already isolated,

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[3]Even the father of the victim of an assault that was introduced at the penalty phase of trial said that Ghobrial's "psychological status was adversely affected" by the arm amputation. (11 RT 2686, 2616-2618, 2645-2648.)

but his family tried to isolate him completely "so he will not cause more troubles." (10 RT 2455.)

Ghobrial's family took him to various doctors, including psychologists, brain surgeons and nerve specialists, in Sohag, Cairo and Asyout. (10 RT 2456-2457.)[4] Ghobrial was also subjected to electric shock therapy. Samwiael described that experience:

> The day he began to spit and to foam out of his mouth and his hand start to shaking really badly and he fell down, then I took him to the doctor and the doctor will lay him down on a table and he would get that metal rod on his head, and his body start to shiver and shake, the whole body would be shivering very violently on the table. The doctor will not let me hold him at that time because he – he knew that I have very weak nerves and then he would – and then he would get up out of the table and he would look almost fainted, almost like he's going to die, and he would sleep for long hours after that, and the treatment doesn't give any results, so we would go back to the doctor. That's it.

(10 RT 2456.)

Ghobrial was placed on different medications, but they had no effect. They just made him drool and foam at the mouth. (10 RT 2457.)[5]

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[4]Dr. Girgis, a psychiatrist who received his medical degree from the University of Cairo, testified that, in general, psychiatric care in Egypt was poor because of the stigma of mental illness in that country. Egyptians tended to think about mental illness from a religious standpoint and believed that those with mental illness should see exorcists to deal with demonic possession. As a result, the quality of care was poor. (11 RT 2595-2596, 2606.)

[5]Samwiael Ghobrial testified that he himself had been treated by psychiatrists in Asyout and Cairo. The doctors prescribed medication, but Samwiael explained that it made him worse, so he rejected it. (10 RT 2458.)

B. Ghobrial's Existence in La Habra and Relationship with Juan Delgado.

It was this man who, in March 1998, found himself living in La Habra, California, in a $100 a month shed behind Maria Asturias's home at 641 West Greenwood Avenue. Ms. Asturias testified that Ghobrial was withdrawn and very quiet. She never talked with Ghobrial, although she let him watch TV and shower at her house a few times. (6 RT 1417-1420.) Ms. Asturias testified that Ghobrial was out on the street all day. (6 RT 1421.) In fact, Ghobrial spent most of his days prior to the crime panhandling and offering to do odd jobs in a strip mall in La Habra.

Alfonso Solano testified about an incident he observed at the Northgate Market on La Habra Boulevard approximately two to four weeks before the victim Juan Delgado's death in March 1998. (6 RT 1320-1321, 1329.) Mr. Solano explained that one day in mid-February or early March, he was about to enter a liquor store near the Northgate Market when he observed a man and a boy, who he later identified as Ghobrial[6] and Juan, horsing around outside the store. It appeared that they knew each other. (6 RT 1321, 1323-1324.) Juan was running in circles around Ghobrial, and it initially appeared to Mr. Solano that he was teasing Ghobrial. Mr. Solano heard yelling and saw that Ghobrial was becoming upset and throwing his cap at the boy. (6 RT 1323-1324, 1332, 1334.) Ghobrial was laughing and throwing his cap in a playful manner, and then he became irritated and frustrated with Juan. (6 RT 1334-1335.) Ghobrial also just shouted out –

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[6]Mr. Solano had approximately three weeks earlier given money to Ghobrial when he was begging outside the grocery store. (6 RT 1325-1326.) After the incident with Juan, Mr. Solano again saw Ghobrial in his same clothing, begging with his cap. (6 RT 1331.)

often without even looking at Juan. (6 RT 1335.)

Mr. Solano eventually entered the liquor store and, upon leaving, the boy approached him and privately said in Spanish, "Señor, sir, . . . he is going to kill me." (6 RT 1325-1327, 1338.) Mr. Solano "honestly . . . thought they knew each other, they were horsing around," and so told the boy not to worry. "You will mess him up. . . . He only has one arm." (*Ibid.*) He added to the boy, however, that if Ghobrial kept bothering him, he should tell the man in the liquor store to call the police. (*Ibid.*)

Mr. Solano then heard Ghobrial say in English, "I am going to kill you. I will kill you and eat your pee-pee." (6 RT 1327.) He repeated this several times, sometimes appearing angry and other times smiling like he was kidding. (6 RT 1328.) When Ghobrial smiled, he had a very weird look – like "a maniac's look." "He looked like he wanted to do it in a way." (6 RT 1340.)

Armando Luna, who was 12 years old in March 1998, attended school with Juan Delgado. They were sixth graders at Washington School in La Habra. (6 RT 1300-1301.) Armando last saw Juan on Tuesday, March 17, 1998, when they both received detention and were supposed to report to the Homework Club from 3:30 to 4:30. Just before the class started, Juan decided not to go and left. (6 RT 1301, 1307.)[7] Before leaving he told Armando he did not want to go home because he was "scared of his mom." (8 RT 1733.)

Armando knew Ghobrial as the one-armed man he had seen around La Habra, and he identified Ghobrial in court. In December 1997,

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[7]The parties stipulated that Juan was not at Washington Middle School Monday, March 16, 1998. He was at school on Tuesday, March 17, 1998, but did not again return to school. (8 RT 1827.)

Armando, his sister and Juan were at a Taco Bell, where they saw Ghobrial with a sign saying he was hungry. Juan bought Ghobrial a Snickers candy bar. Armando also recalled that Juan and Ghobrial went together to the Pick 'n' Save. (6 RT 1302-1303, 1305.)

Another classmate of Juan's, Josefina Gomez, testified that after school on March 18, 1998, she was helping at her family's restaurant, El Pastor, on La Habra Boulevard. (6 RT 1310.) While there, she heard someone call her name. She looked and saw it was Juan, walking with a one-armed man toward the alley behind the restaurant. (6 RT 1311-1312.) Josefina had seen the man before and identified him as Ghobrial. (6 RT 1313, 1315.) He often stopped by the restaurant to beg for food or money. (6 RT 1315.) Ghobrial was carrying a basketball under his severed arm. (6 RT 1313, 1318.) Josefina recalled that Juan looked normal and happy. (6 RT 1317.) She believed that Juan wanted to come in, but Ghobrial gestured with his hand to stay with him. (6 RT 1317-1318.) Juan returned to Ghobrial, and they left. (6 RT 1319.)

C. Ghobrial's Actions on March 19, 1998.[8]

Yvette Trejo, a cashier at Super K-Mart in La Habra, testified that while she was working at 12:30 a.m. on March 19, 1998, Ghobrial was a customer at her register. (6 RT 1345-1346.) Ms. Trejo explained that Ghobrial's transaction was prolonged for several reasons: he told her to ring up each item separately as he was buying them for different people; he repeatedly left to go get additional items; and he paid in quarters. (6 RT 1346-1350, 1351-1352.)

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[8]The prosecutor acknowledged at trial that these events occurred after Juan's death. (See 8 RT 1910; see also 1 RT 172.)

Ms. Trejo testified that Ghobrial bought a large stock pot, knives, a wooden cutting board with knives and a white plastic cutting board. (6 RT 1346.) Ms. Trejo recalled that Ghobrial seemed nervous and that she did not want to touch his hand because it appeared to have rusty brown stains on it and black under his nails. (6 RT 1346.)

Thomas Favila testified that at approximately 1:30 p.m. on March 19, 1998, he was working at the Home Depot in La Mirada, when Ghobrial came to him with concrete and other items and asked if he had all he needed to mix the concrete. (6 RT 1354-1356.) Mr. Favila said that he did, then rang up the sale and gave Ghobrial a receipt for a sixty-pound bag of ready-mix concrete, rabbit garden fencing, a mixing tool, a pointing trowel, a capping tool and bolt cutters. (6 RT 1355-1357, 1365.)

Another employee of the Home Depot in La Mirada, Alan Hlavnicka, testified that during the afternoon of March 19, 1998, Ghobrial approached him about what he would need to put in a driveway or walkway. (6 RT 1360.) Mr. Hlavnicka directed Ghobrial to the items he needed, put them in the cart for him and explained how to mix the concrete and use the rebar so it would not crack. (6 RT 1362, 1365.) Ghobrial then asked if Hlavnicka could take him to his job site. Mr. Hlavnicka thought it would be good for PR, so asked the assistant manager if he could. The manager said that no one could take Ghobrial right then, but if Ghobrial could wait, they would find someone to help him. (6 RT 1365-1366.) Mr. Hlavnicka then pushed Ghobrial's chart to the register. He asked Ghobrial if he had enough money and Ghobrial pulled out a wad of bills. (6 RT 1366.) Ghobrial asked several people in the store for a ride, and when Hlavnicka left on his lunch break, Ghobrial was gone. (6 RT 1374-1375.)

Mr. Hlavnicka stated that he had difficulty understanding Ghobrial

because of his broken English. (6 RT 1368.) Ghobrial also asked the same question over and over again and seemed unsure of what he wanted. (6 RT 1372.)

Between 1:30 and 2:15 p.m. on March 19, 1998, Rene Hojnacki and her friend were driving on Imperial Highway when they saw Ghobrial pushing a basket from Home Depot. (6 RT 1377.) When driving back to the friend's house, the two women saw Ghobrial pushing his basket along Imperial Highway. Ms. Hojnacki again saw Ghobrial crossing the street while driving home on this same stretch of the road at approximately 2:45 p.m. For the first time, she noticed he was missing an arm. (6 RT 1378-1379, 1386.)

Ms. Hojnacki decided to give Ghobrial a ride so approached him and asked where he was going. (6 RT 1379.) Ms. Hojnacki noticed that Ghobrial spoke very broken English, but he told her he was going to La Habra to build a fence for a man with the cement and wire in his basket. Ghobrial told Hojnacki that he was doing this job to earn money to feed his children. (6 RT 1379-1380, 1384.) When Hojnacki saw the bags of cement and wire in Ghobrial's basket she realized that it would not fit into her car, so she instead gave him money to get himself something to drink. (6 RT 1379-1380.) She left to pick up her daughter from school, but told Ghobrial to wait and she would come back for him. (6 RT 1387.) When she returned to the area where she had left him, Ghobrial was gone. (6 RT 1387-1388.)

Steven Mead testified that at approximately 3:00 or 3:30 p.m. on March 19, 1998, he was leaving his construction job site when he ran into an older man in the parking lot. (6 RT 1390-1391, 1396.) The man was with Ghobrial and offered Mead $10 to give Ghobrial a ride. Mr. Mead initially said no, but then the man unloaded Ghobrial's items, said he had a

doctor's appointment and left. (6 RT 1392.) Mr. Mead felt badly and agreed to give Ghobrial a ride. He loaded the concrete, wiring and garden tools into his truck and drove where Ghobrial directed – essentially in a big circle. Mr. Mead described the route as "strange," and said that Ghobrial gave weird directions. (6 RT 1393-1394, 1399.) When they arrived at Ghobrial's residence, Ghobrial helped Mead unload the items from his truck and put them on the strip of grass in front of the house. Mead offered to move them to the back, but Ghobrial said no. (6 RT 1394, 1396.) When Mead left, Ghobrial thanked him and said "God bless you." (6 RT 1399-1400.)

Mr. Mead was with Ghobrial for a total of approximately 35 to 40 minutes, and during that time Mead asked Ghobrial what he was doing trying to move his items without a car. Ghobrial said that he had no means of transportation and had to feed his four children. (6 RT 1395.) Mr. Mead testified that Ghobrial's English was not great, but "it wasn't that bad either." (6 RT 1398.) Shortly after the event, however, Mead told police officers that Ghobrial did not speak English very well. (*Ibid.*) He also told the police that Ghobrial seemed "kind of strange" and smelled badly of cologne. (6 RT 1399-1401.) Ghobrial was also sweating profusely. (6 RT 1398, 1402.)

D. Discovery of Juan's Body.

At approximately 11:40 p.m. on Friday, March 20, 1998, Gina Thompson was driving with her husband to her parents' home on Florence Avenue in La Habra when she saw a man on the sidewalk pushing a shopping cart with one hand. (6 RT 1404-1406, 1408.) Thompson described the man as 27 to 35 years old, 5' 10" tall, and weighing less than 200 pounds. (6 RT 1411, 1415.) The man was having a difficult time

pushing the cart, which appeared to contain two box-shaped, rough-textured objects, one on top of the other, and a 2 x 4 piece of wood coming out from the cart seat toward the man. (6 RT 1406, 1416.) She stared at the man because he looked different, and it was unusual to see something like that so late in that neighborhood. (6 RT 1409-1410, 1413.) At first she thought he might be drunk. He was dirty, like he had been working on something, and his clothes were disheveled. His hair was dirty and not well-groomed. (6 RT 1414.)

Between approximately 11:30 p.m. and midnight of this same night, March 20, Jose Madrigal was watering outside his home on West Highlander Avenue in La Habra, when he heard a shopping cart coming from Walnut Street. As it got closer he recognized Ghobrial, whom he had seen panhandling outside the Northgate Market, pulling an empty shopping cart. (6 RT 1423-1425.) Ghobrial was walking like he was "as cool as a cat." (6 RT 1426.) He did not appear to be in a hurry. (6 RT 1427.) At one point they made eye contact. Ghobrial just looked right at Madrigal and kept walking. (*Ibid.*)

On the morning of Saturday, March 21, 1998, Lorenzo Estrada was gardening in the front yard of his home on the corner of North Willow Street and Greenwood Avenue in La Habra, when his neighbor alerted him to a cylinder shaped piece of concrete on the Greenwood side of his property that had not been there when he had returned home at 1:15 to 1:30 a.m. that same morning. (6 RT 1429-1430.) Upon taking a closer look at the cylinder, Estrada noticed that there was blood leaking from it. (6 RT 1431.)

La Habra Police Officer Ballard was one of the officers who responded to the scene on Greenwood Avenue, and he saw blood on the

street from the cylinder. (7 RT 1518-1519.) A second cylinder was found around the corner on Walnut Street, just off the sidewalk. (7 RT 1583-1584, 1589.)

Ghobrial checked into the La Habra Motel on March 21, 1998, and checked out the following morning at approximately 7:00 a.m. (6 RT 1433-1435.) La Habra Police Officer Jason Johnson arrested Ghobrial at 7:20 a.m. that same morning. (7 RT 1577-1578.)

Officer Ballard was present at the coroner's office March 22, 1998, when the recovered cement cylinders were broken and the contents removed. (7 RT 1513-1515.) The larger cylinder weighed 204 pounds and contained two legs, a torso and a right arm in a plastic trash bag. (7 RT 1516.) The smaller cylinder weighed approximately 88 pounds and contained the head and a left arm wrapped in a black trash bag. (7 RT 1517.)

Approximately one year later, on March 27, 1999, a third cement cylinder was found near an abandoned convalescent home at 605 Walnut Street. This cylinder contained the missing pelvis. (7 RT 1579-1581.)

E. Police Investigation.

Lisa Winter, a forensic scientist with the Orange County Sheriff's Department, was called to assist the La Habra Police Department's investigation of this case on March 21, 1998. (7 RT 1521-1522.) She too responded to the scene and saw the larger cement cylinder. She walked the neighborhood and south of Estrada's residence on Willow Street she found an Albertson's shopping cart with what appeared to be cement in it. (7 RT 1523-1524.) On the east side of Willow Street, she found a roll of metal wire and boards; in the backyard of 531 Willow Street she found a red Target basket; in front of the residence at 521 Willow Street, she found a

blue plastic jug with apparent cement on it; near 500 Willow Street she found a plastic mixing tray containing two pieces of pressed wood and cement; and on Willow Street, west of the house at the corner of Willow and Highlander Streets, she found a comforter blanket and a thong shoe. (7 RT 1524-1525, 1556, 1557, 1558.) In the driveway of 641 Greenwood Avenue – the house in front of Ghobrial's shed – she noticed a patch of wet cement with a track running through it. (7 RT 1526, 1558-1559.)

Ms. Winter went to the rear of the property where she saw a shed, padlocked shut. (7 RT 1527.) Ms. Winter was part of the first group to enter the shed after the padlock was removed on March 22, 1998. The first thing she saw was a pink blanket hanging in the doorway. (7 RT 1528.) She observed cement on the floor, a small amount of wet blood on the carpet near the dresser and blood on a quilt and a blanket. (7 RT 1529, 1538.) Apparent blood was also on the east side of the dresser and the north wall of the shed. (7 RT 1552.) In the shed she found pornography, a trowel, a saw, saw blades, scissors, a knife and a latex glove with cement on it. She also found a cleaver with blood on it, tin snips, bolt cutters, a capping tool, rabbit wire, a black stock pot with cement inside, empty concrete bags and black trash bags. (7 RT 1530-1538, 1566-1567.)

Ms. Winter also found the mate to the blue thong sandal she had found on Willow Street. (7 RT 1539.) She found various receipts from Super K-Mart and Home Depot, as well as a detention slip for Juan Delgado and paperwork with Juan's name on it. (7 RT 1541-1542.)

Outside the shed Ms. Winter found particle boards similar to those found with the black mixing tray at 500 Willow Street. (*Ibid.*) Outside the shed she also found a lot of concrete debris and wet concrete. (7 RT 1566.) The wire found on Greenwood looked like the same type of wire found in

the first cylinder. (7 RT 1564.)

During her examination of the shed for evidence, Ms. Winter looked for hairs and fibers and used an alternate light source device to look for stains of sexual assault that would fluoresce under the light. (7 RT 1569.) She used the alternate light source on the blanket, the quilt, a pair of underwear and a shirt, looking for semen stains, sperm cells, saliva, urine and other bodily fluids. (7 RT 1569-1570.) She obtained not one positive test reaction. (7 RT 1570-1572.)

F. Cause of Juan's Death.

There was no evidence presented as to how Juan was killed. The death certificate listed death by unspecified means, but asphyxia was the likely cause of death. (7 RT 1481, 1460.) The prosecutor postulated possible accounts of what could have happened – a head in the pillow or a hand over the mouth – but, in the end, he conceded, "we don't know the sequence of this. . . . We don't know, all right?" (8 RT 1927.)

G. Autopsies and Forensic Evidence.

Ms. Winter extracted DNA from the following items, which she then turned over to criminalist Ruth Ikeda for actual DNA testing: tissue on the cleaver; blood on the north wall of the shed; blood on the east side of the dresser; blood on the quilt; blood on the blanket; and blood on the carpet. (7 RT 1551-1553.) She was also able to get DNA samples from the six body parts found in 1998, and she had extracted DNA from blood samples from Ghobrial and the body of Juan Delgado. (7 RT 1553.)

Ruth Ikeda typed the DNA samples and determined that more than one contributed to the DNA on the blanket, quilt and carpet. (7 RT 1595-1596, 1600, 1604.) Ghobrial was eliminated as the source of the DNA found on the cleaver, dresser, shed, blanket, quilt and carpet. Juan was not

so eliminated and could have been the source. (7 RT 1601-1602.)

Ghobrial's fingerprints were found on the plastic tub, opened packaging from a butcher knife, capping tool and stock pot found in Ghobrial's shed. (7 RT 1533, 1549, 1581-1582, 1585-1587, 1593-1595.)

Aruna Singhania, M.D., a pathologist, testified that she performed an autopsy of the remains of Juan Delgado on March 22, 1998. (7 RT 1449-1451.) The remains were cut into six separate body parts and were covered with gray powdery material. (7 RT 1451.) She described the cuts as jagged. (7 RT 1453.) The head had been decapitated; the arms were dismembered; the upper torso to the umbilical area was dismembered; and the two legs were dismembered. (7 RT 1452, 1454, 1456.) The entire lower abdomen and pelvis were missing. (7 RT 1451, 1454-1455.)

Dr. Singhania listed the cause of death as death by unspecified means. (7 RT 1506.) She testified that a possible cause of death was asphyxia. (7 RT 1460, 1461, 1481-1482, 1506-1507.) Dr. Singhania testified that during the autopsy she may have stated to others that the body was obviously dismembered after death. (7 RT 1487.) She looked for signs of struggle and found none. (7 RT 1492.) There were no defensive wounds. (7 RT 1499.)

Approximately one year later, after the third cement cylinder was found, Dr. Singhania examined the pelvic section. (7 RT 1457, 1579-1581.) It, like the other body parts, had concrete on it and was decomposed. The penis had been severed and the scrotum sac and prostate portion of the bladder were also missing. The anus and rectal area were intact. (7 RT 1458-1459.) Dr. Singhania looked for tearing to the anus and rectal area, but she found none. She also found no bruising. (7 RT 1472-1473.) Dr. Singhania also looked for internal trauma of the rectal area, something she

would not do in every autopsy she performed. (7 RT 1475-1477.) She cut a portion of tissue from inside the body and observed it under the microscope. She found no trauma or evidence of healing process. (7 RT 1477-1478.)

Forensic scientist Elizabeth Thompson of the Orange County Sheriff's Crime Lab attended the March 30, 1999, autopsy and confirmed that Dr. Singhania stated that the pelvis was dismembered from the body after death, based on the appearance of the tissues. (8 RT 1728-1730.)

Criminalist Laurie Crutchfield of the Orange County Sheriff's Coroner's Division attended the March 28, 1999, examination of Juan's pelvic section at the Forensic Science Center. (7 RT 1609-1610.) Crutchfield collected forensic evidence, including swabs from what was thought to be a portion of the anus of the pelvic remains. She prepared a slide from those swabs, and then submitted them to Aimee Yap of the Forensic Evidence Area. (7 RT 1611-1612.)

Ms. Yap remembered receiving one slide from Ms. Crutchfield and six anal swabs, on which she was instructed to look for the presence of semen. (7 RT 1626-1627.) Ms. Yap performed a P30 test without positive results. She also examined the swabs under a microscope and found a partially degraded sperm, an intact sperm head and a third intact sperm. (7 RT 1628, 1630.) There are millions of sperm cells in a normal ejaculation. (8 RT 1705.) Ms. Yap attempted, but was unable, to extract DNA from the sperm she found. (7 RT 1632.)

The defense called as a witness Dr. David Posey, a hospital and forensic pathologist, who testified that on April 17, 2001, he reviewed the Juan Delgado autopsy reports of Aimee Yap and also viewed the microscopic photographs she took and slides she prepared. (8 RT 1787, 1791.) He looked at two slides under the microscope, trying to find sperm

cells or other material that might help him ascertain the absence or presence of sperm cells. (8 RT 1792-1793.) Dr. Posey was trained that to definitively identify sperm, all the anatomic parts must be present – the head, neck, middle piece and tail. (8 RT 1794, 1795, 1796, 1806.) Once the cell is broken apart microscopically, the different parts take on a different look and other material on a slide can mimic the tail, head and body. He testified that an individual part by itself is not necessarily conclusive that it comes from the entity one is trying to identify. (8 RT 1795.) Although some people "would like to believe" that they can identify sperm by the head alone, Dr. Posey was cautious in doing so based on his training. (8 RT 1796.)

Dr. Posey first looked at the slides with a 20 lens, which is a magnification of 200. He then moved up to 400 and finally to a magnification of 1000. (8 RT 1797-1799.) He saw a lot of amorphous debris on the slides and a few intact, but degenerating, squamous epithelial cells, which are cells found on the surface of the skin and the lining of the esophagus. (8 RT 1800.) He found nothing on the slides he would identify as a sperm cell. (8 RT 1801.)

Dr. Posey was aware that a P30 test conducted on anal swab samples was negative for the presence of seminal fluid. He was also aware that two unsuccessful attempts to extract DNA from the swabs had been made. Dr. Posey took both these factors into account in forming his opinion about the presence of a sperm cell. The inability to obtain a DNA sample indicates that no DNA was present. (8 RT 1802-1804.)

Dr. Posey studied the three items Ms. Ikeda identified as sperm cells, and he testified that he could not identify them as such. (8 RT 1811-1812.) His opinion was based on the morphology of the items. They did not match

up with normal sperm cells in any characteristics. (8 RT 1812.) "[I]t does not match the normal histologic appearance of a sperm cell." (8 RT 1819.) Dr. Posey described them as "amorphous debris," and reiterated, "I know for a fact that it is not sperm." (8 RT 1819.) Dr. Posey also testified that a 12 ½ year old boy can produce semen and sperm cells. (8 RT 1815.)

In rebuttal, the prosecution called Edwin L. Jones, a forensic scientist, who in June 2001, also reviewed the slides Ms. Yap prepared during the Juan Delgado autopsy. Ms. Yap had identified three sperm heads and asked Mr. Jones to confirm or refute her conclusions. (8 RT 1828-1830.) Mr. Jones testified that it is the majority view that sperm can be identified from the sperm head alone. (8 RT 1838.) The FBI Lab requires the full sperm be present before an object can be identified as sperm, but he is aware of high-placed scientists in the FBI who do not share that view. (8 RT 1838.)

In reviewing slide A2, on which Ms. Yap had identified and circled a sperm head, Mr. Jones found two other sperm cells that Yap had not identified. (8 RT 1841-1842.) He identified them because of the stain and because of their size, shape and visibility of the acrosomal cap. (8 RT 1842.) Mr. Jones had no doubt but that they were sperm. (8 RT 1843-1844.) He explained that there were plenty of things on the slide that were amorphous, but the sperm head has structure. (8 RT 1844.)

On cross examination, Jones conceded that identifying sperm cells morphologically is subjective. Two scientists could look at it and disagree. (8 RT 1851.) He also conceded that studies have cautioned examiners that things such as bacteria, fungus, pollen, nuclear debris and mucus threads can look like sperm cells, especially when they are found around the anus. (8 RT 1863-1865.)

H. Defense Evidence regarding Juan Delgado.

During the defense case, Ghobrial's counsel introduced evidence to show that Juan was unhappy at home; he often sought another place to spend the night; and he may have gone to Ghobrial's shed looking for a place to stay.

Juan Duarte, a school friend of Juan, testified that one evening in February 1998, Juan came to Duarte's house and asked to spend the night. (8 RT 1735, 1737-1738, 1739.) Duarte's father said no, but offered to take Juan home. Juan refused, saying he was going to his aunt's house. (8 RT 1738.) Duarte had seen Juan with Ghobrial at the Pic 'n' Save a couple of weeks before Juan's death. The two looked like friends. (8 RT 1740-1742.)

Another schoolmate of Juan's, Cipriano Flores, testified that while he and Juan were walking home from soccer practice on Tuesday, March 17, 1998, Juan asked if he could spend the night with him. (8 RT 1752-1754.) Juan had never before spent the night or even been to Cipriano's house. Juan explained that he did not want to go home because his mom would hit or spank him. (8 RT 1755-1756.) Juan spent the night, and the next morning, Wednesday, March 18, Cipriano's mother took them to school. After she dropped them off, Juan said he was not going to school and left. (8 RT 1759.) When Cipriano was walking home from soccer practice that day at approximately 4:30 p.m., he ran into Juan near the La Habra Market. (8 RT 1760-1761.) Juan again asked if he could go to Cipriano's house. Juan went home with Cipriano, but did not stay the night. (8 RT 1762.) When Cipriano's mother came home from work she asked why Juan was staying again. Juan told Cipriano to tell her his parents were in Los Angeles because he did not want to go home. Cipriano's mom

decided to take Juan home anyway. They arrived at Juan's house at approximately 9:30 p.m., and she went to the front door and talked to Juan's brother. She returned to the car and told Juan to go home because they were waiting for him. He left, and that was the last time Cipriano saw Juan. (8 RT 1763-1764.)

Cipriano's mother, Maria Flores, confirmed her son's testimony that Juan spent time at her apartment in March 1998. She had never seen Juan before that. (8 RT 1765-1766.) She was surprised to find Juan at the house, and she did not know that he would spend the night. (8 RT 1767-1768.) She drove her children to school the next morning, but Juan declined a ride, saying he would walk. Later that evening, Juan was again at her apartment. (8 RT 1769-1770.) She took Juan home because she "didn't think it was right." (8 RT 1771.) She did not know his mother or family. (*Ibid.*)

PENALTY PHASE

A. Prosecution Evidence.

1. Assault of Michael W. Fouzi-Fahim.

During the penalty phase of trial, Ghobrial's 16-year-old cousin Michael W. Fouzi-Fahim testified that Ghobrial assaulted him at a family wedding ten years earlier. Michael explained that his sister married when he was six. Both Michael and Ghobrial were guests at that wedding. (9 RT 2070-2071.)[9] At one point, Ghobrial asked Michael to "have some sweet near the house," and they walked away. When they got to a school,

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[9]Egyptian records of the assault, introduced by stipulation, reveal that Michael's sister had been engaged to Ghobrial. After Ghobrial lost his arm, however, her parents refused to let him marry their daughter. (11 RT 2616-2617; argument at 11 RT 2744; exhb. K [3 RT 654].)

Ghobrial told Michael to take off his clothes. When Michael refused, Ghobrial tied him up with a clothing line and pushed a handkerchief in his mouth. (9 RT 2072, 2078-2079.) Ghobrial held the rope in a clamp-like device that was on his amputated arm, and he held a knife in his hand. (9 RT 2079-2080.) Ghobrial took off Michael's clothes and his own and then tried, unsuccessfully, to sodomize Michael. (9 RT 2073.)

Ghobrial got dressed and then hit Michael on both sides of his jaw with his fist. (9 RT 2072, 9 RT 2083-2084.) Ghobrial opened his switchblade and stabbed Michael in his chest, shoulder and arm and under his testicles. (9 RT 2072, 2074-2075, 2084.) Ghobrial also hit Michael in the head with his shoe, which caused Michael to have difficulty speaking. (9 RT 2075-2076.) Michael lost consciousness, but Ghobrial pulled him and threw him "out of the fence." Michael fell to the floor and Ghobrial left. (9 RT 2072.)

Just as Michael was regaining consciousness, a security guard at the school found him. (9 RT 2086-2087.) At that time, Michael was wearing his shirt and pants, but Ghobrial had taken his jacket. (9 RT 2087.) Michael stated he had untied himself "a long time" before the guard arrived. (9 RT 2088.) Ghobrial had taken the handkerchief out of Michael's mouth. (9 RT 2089.)

Michael was taken to the hospital, where he gave his first statement about what had happened to him. (9 RT 2089.) Michael told the medical staff that Ghobrial had stabbed him and then left. (9 RT 2089.) He claimed he also told them of an attempted sexual assault. (9 RT 2090.) Police came and talked to Michael in the hospital a few days later. During the first meeting with the police, Michael told them that Ghobrial asked Michael to show him his penis, and then stabbed him. (9 RT 2090.) Michael again

insisted that he told the police that Ghobrial had tried to rape him. (9 RT 2091.)

Michael also told the police that Ghobrial untied him and took the rope, handkerchief, jacket and knife with him. (9 RT 2092.) He explained that Ghobrial penetrated him causing injury. (9 RT 2093.) Michael then clarified that he told the police that Ghobrial tried to penetrate him, but could not. (9 RT 2094.) The last time Michael spoke with the police was on June 26, 1993, nearly two months after the incident. (9 RT 2095.) At that time, Michael told them that he had fully recovered. (9 RT 2095.) Michael then insisted that he told the police that his jaw remained injured on June 26. (9 RT 2096.) Michael said that it was true that the police told him that the medical reports showed no anal trauma, and asked him again whether Ghobrial had put his penis in Michael's anus, and Michael again said that Ghobrial had. (9 RT 2096-2097.)

An investigator from the District Attorney's Office visited Michael in Sohag approximately one year earlier, and Michael told him that he was injured when Ghobrial kicked him in the jaw. (9 RT 2097.)

Egyptian medical and court records of the event were introduced into evidence by stipulation. (11 RT 2616-2617; 3 RT 654 [exhb. K].) The medical reports reflected no damage to Michael's jaw. The records contained nothing about Michael's permanent disability or problems speaking. Michael testified that a button was torn from his shirt when Ghobrial ripped it off him. (9 RT 2082.) The Egyptian reports revealed that Michael's clothing was collected and analyzed, but they contained nothing about a torn button. (11 RT 2745.) Michael testified that he was wearing no clothes when he was stabbed. (9 RT 2083.) The records show Michael was stabbed with his clothes on. (11 RT 2742, 2746.) In his first

two interviews Michael said nothing to the police about sodomy, a rope, a handkerchief, kicking, stomping or hitting in the jaw. (11 RT 2727-2731.) Approximately two months after the event, the police interviewed Michael and his mother. They both confirmed that Michael had fully recovered from his injuries. He assured them that he was not suffering from any disability from his injuries. (11 RT 2742-2743.)

The police records also reveal Ghobrial's mental state while he was in Egypt in and around 1993. Michael's father told the police,

> From the time John's arm was amputated while he was in the army and it was replaced with a plastic arm [...] his psychological status was adversely affected. Definitely the psychological complexes he is suffering from were the reason behind his attacking my son.

(11 RT 2758.) Michael's father also stated, "John has been ac[t]ing in a peculiar way lately as he hits his family members and destroys the furniture of the house." (*Ibid.*) Michael's mother told the police that Ghobrial "is psychologically sick." She added, "also, Michael's father always interferes in John's problems with his mother, so he's probably taking revenge by hurting Michael." (11 RT 2760.)

Ghobrial's father, Samwiael, told the police:

> [Ghobrial] is going through abnormal circumstances, as he is breaking everything in the house, continuously fighting with us at home and threatening us to set the house on fire, similar to what he has done to my uncle Nagy Fawzi's house.

(11 RT 2759.)

Samwiael also told the police about his son's treatment:

> Before [Ghobrial] joined the army, he used to go to Dr. Ibrahim Sobhy, the neurologist. Afterwards, I asked the doctors in Sohag to treat him at home but they refused and asked me to bring him to the clinic. However, John refused

> and claimed he is not psychologically sick. Then he burnt all the papers that prove that he is psychologically sick so that people would not know about his case.

(11 RT 2759.)

2. Testimony of Juan's Parents.

Juan Delgado's father, Jose, testified that Juan was a restless child who worked tending yards. (9 RT 2107-2108.) He played with Jose and his youngest son and always obeyed. (9 RT 2108-2109.) Jose said that he missed Juan and felt bitter he had not been there to defend him. (9 RT 2109.)

Juan's mother Margarita Delgado testified that Juan was one of her seven children. He was an obedient and hard-working boy who helped his elders and neighbors. (9 RT 2110-2111.) Juan's death left her feeling she was missing everything. It affected all of her children. Their grades went down; they became rebellious; and they got angry at her a lot. (9 RT 2112.)

B. Defense Evidence.

In mitigation, the defense presented lay witnesses who spoke of Ghobrial's strange behavior around La Habra and psychiatric testimony regarding his ongoing and severe mental illness, as well as testimony from Ghobrial's younger sister and former prison warden Daniel Vasquez.

1. Lay Witnesses Regarding Ghobrial's Behavior Prior to Juan's Death.

Hortencia Cisneros, an employee at the La Habra Taco Bell in March 1998, testified that she had seen Ghobrial in the Northgate Market a couple of times in 1997 to 1998. (9 RT 2115-2116.) Ghobrial was standing by himself outside the entrance to the store. (9 RT 2117.) Ghobrial was just staring. He "looked like he was dreaming." (9 RT 2118.) He made eye contact with no one. She got the impression that Ghobrial was begging for

money, and her mother gave him a few dollars. (9 RT 2119.)

Isabel Camacho, an employee of Juan Pollo Chicken in March 1998, remembered seeing Ghobrial in the restaurant two to three times a week during the approximately six months leading up to March 1998. (9 RT 2120-2122.) When Ghobrial came to Juan Pollo he either handed out fliers for a market in the shopping center or purchased chicken. (9 RT 2123.) She saw him passing out fliers several times. (9 RT 2123.) Ghobrial was quiet and never said anything. He would hand her a flier and then immediately walk out. (9 RT 2124.) When Ghobrial bought food, he generally bought three whole chickens and paid the sixteen or seventeen dollar bill in coins. (9 RT 2125.) Ghobrial was very serious. He never made conversation or showed any expression or emotion. (9 RT 2126-2127.) Ms. Camacho one time saw Ghobrial asking for money in front of the Northgate Supermarket. (9 RT 2122.) Another time Ghobrial came into the restaurant with forty to fifty dollars in coins and asked for paper money. (9 RT 2129.)

Rosalva Serrano, an employee of Taco Bell in La Habra in 1998, testified that she saw Ghobrial asking for money outside the La Michoacana Market in La Habra two times. (9 RT 2132-2135.) She did not remember him speaking; he would just stretch out his hand and sometimes people gave him money. (9 RT 2135.) Ghobrial sometimes looked at people from head to toe with a weird expression on his face. It made her feel uncomfortable. (9 RT 2136.)

Imran Bholat, owner of La Superior Market in the La Habra shopping center during 1997 and 1998, saw Ghobrial in the market approximately one or more times a week for a period of approximately one year. (9 RT 2138-2140.) Ghobrial purchased items in the store and also

asked once or twice if he could work there as a boxboy or doing general work. (9 RT 2141.) Mr. Bholat told him he did not have any work for him. The fact that Ghobrial only had one arm may have had something to do with his reluctance to hire Ghobrial. (9 RT 2141.) Once a week, Bholat paid his employees to pass out fliers for the store. He thinks that Ghobrial asked if he could help pass them out. (9 RT 2142.) Mr. Bholat never saw Ghobrial begging for money, but he did see him standing in front of stores such at the Taco Bell and donut shop for periods of time. Bholat figured he was asking for money. (9 RT 2143.)

Cesar Garcia was an employee of Juan Pollo Chicken Restaurant in La Habra between approximately March 1996 and March 1998, and during that time, he saw Ghobrial at the restaurant a couple of times a week. One time Ghobrial asked if he could work at the restaurant. Another time he asked if he could pass out fliers out for the restaurant. Other times, Ghobrial would just pass by. He often bought food to go, paying with coins. He spoke broken English and was hard to understand. (11 RT 2572-2576.)

Krisha Cauley, an employee at Pic 'n' Save in La Habra, saw Ghobrial in the store a couple of times a month. (11 RT 2581-2582.) She testified that Ghobrial "just kind of crept through the aisles," never speaking or buying anything. At times he would just stare at her, making her feel uncomfortable. (11 RT 2584.) She can remember Ghobrial purchasing one item, and he paid for that with change. (11 RT 2585-2586.) She also saw Ghobrial panhandling a few blocks away. (11 RT 2586.)

2. Mental Health Professionals Who Monitored and Treated Ghobrial after His Arrest on March 22, 1998.

The defense presented the testimony of the following 20 mental health professionals:

- **Rachelle Gardea**, a registered nurse at the Orange County Jail who worked with the mental health patients housed in acute mental health housing, which is the unit of the jail for those suicidal, actively psychotic or unable to function in regular housing. (9 RT 2145-2147.)
- **Jill Savage**, a case manager for mental health for the Orange County Sheriff's Department (9 RT 2158), who made observations of Ghobrial following ten visits with him from April 23, 1998, through December 19, 1998. (9 RT 2160-2170.).
- **Kristen Whitmore**, a nurse practitioner in mental health at the Orange County Jail, who saw Ghobrial for a time in 1998. (9 RT 2172 et seq.)
- **April Barrio**, a comprehensive care nurse practitioner with the Orange County Correction Mental Health Jail, who also made observations and filed entries in Ghobrial's case. (9 RT 2193.)
- **Nabeel Bechara**, a registered nurse at Metropolitan State Hospital, a mental hospital, who worked at the Orange County Jail from June 1998 to March 1999. (10 RT 2249-2250.)
- **Linda Kay Price**, a nurse employed by Orange County Health Care Agency as a mental health nurse at Orange County Jail. (10 RT 2256.)
- **Kay Cantrell**, a nurse in the mental health section of the Orange

County jail. (10 RT 2259.)

- **Margaret Wiggenhorn**, a mental health specialist with Orange County Mental Health in 1998. (10 RT 2371.)
- **Leonard Luna,** a clinical social worker at Orange County Jail, who was case manager for Ghobrial when he was in the psychiatric unit.
- **Virginia Sollars**, a registered nurse, who worked in the mental health section of the Orange County Jail. (10 RT 2402-2403.)
- **Saundra King**, a case manager for the correctional mental health team, who was Ghobrial's case manager for approximately one and one-half years. (10 RT 2408-2409.)
- **Dr. Steven Johnson**, the psychiatric director at Orange County Jail. (10 RT 2270-2271.)
- **Dr. Ebtesam Khaled**, a psychiatrist employed by the Orange County Correction Mental Health Division and a native speaker of Egyptian Arabic. (10 RT 2345-2346.)
- **Dr. Jasminka Depovic**, a psychiatrist employed by Orange County Mental Health, who participated in team meetings about Ghobrial. (10 RT 2428-2429, 2443-2444.)
- **Dr. Teresa Farjalla**, a psychiatrist employed by Orange County Mental Health and working at the Orange County Jail, who saw Ghobrial the entire three years he was in the jail. (10 RT 2462-2463.)
- **Dr. Jose Flores-Lopez**, employed by the California Department of Corrections as chief psychiatrist at Norco Prison, who worked for Correctional Mental Health in Orange County from 1992 to 1999, and was involved in Ghobrial's case. (10 RT 2474-2476.)
- **Dr. Juventino Lopez**, a psychiatrist who worked at Orange County

Jail. (10 RT 2515-2516.)

- **Dr. John Woo**, a psychiatrist employed by Orange County Mental Health, who worked for Correctional Mental Health at the Orange County Jail while Ghobrial was there. (11 RT 2588-2589.)
- **Dr. Faafat Girgis**, a forensic psychiatrist and native Egyptian, employed by the state of California and working at Patton State Hospital, who was called in by the Orange County Jail Mental Health Team to conduct an evaluation of Ghobrial on August 19, 1999. (11 RT 2595-2597.)
- **Dr. Ari Kalechstein**, a licensed psychologist with a specialty in neuropsychology, who was hired by the defense to conduct neuropsychological testing of Ghobrial. (10 RT 2524-2525, 2527, 2529-2530.)

Defense counsel had each of the mental health witnesses read portions from his or her entries in Ghobrial's medical chart, which were often sporadic and out-of-context since Ghobrial was moved in and out of the different psychiatric wards, and, with each move, his care staff changed. Appellant has tried to organize the testimony chronologically to meaningfully display Ghobrial's behavior and treatment and the witnesses' efforts, difficulties and conclusions during Ghobrial's pretrial custody from March 1998, through August 2001.[10]

Just three days after Ghobrial's arrest, Dr. Jasminka Depovic diagnosed him with a psychotic disorder. (10 RT 2428-2429.) This assessment was shared by virtually every other mental health expert with

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[10]Appellant has condensed the testimony as best he can, but the mental health evidence is key to, and the factual basis of, the first two appellate arguments and must be presented with some specificity.

whom Ghobrial came in contact at the Orange County Jail.

On March 24, 1998, during intake at the jail, Ghobrial exhibited inappropriate affect, heard command hallucinations telling him to hurt others and himself, and admitted to prior suicidal thoughts. (10 RT 2404-2406.) By March 25, 1998, a few days after his confinement, Ghobrial was placed on safety status and could not be pulled from his cell for an interview. (10 RT 2259-2260.)

On March 26, 1998, nurse Kay Cantrell was told that Ghobrial spoke of "wanting to get through with the courts, end with life." (10 RT 2260-2261.) She also learned that Ghobrial was treated by a doctor in Egypt for 7 years. (10 RT 2263.) On April 7, 1998, Ghobrial stopped taking his medications. (10 RT 2477.) On April 10, 1998, Ghobrial was cleared to the less acute psychiatric ward. (10 RT 2275.) By May 1998, however, he was referred back to the psychiatric unit. Linda Kay Price, a mental health nurse, noted in Ghobrial's chart that he was reported to that unit due to his "bizarre behavior." (10 RT 2256-2257.) A deputy reported that Ghobrial would not respond to verbal commands, food was all over the cell and floor, and Ghobrial was "talking to himself." When Price arrived, Ghobrial was in the recreation area, pacing along the side wall, eyes down, talking to himself. He did not look or respond to her verbal prompts. He sat down and began crying and talking to himself. Ms. Price reported that Ghobrial appeared to be responding to internal stimuli. (10 RT 2257.) She noted in his chart that Ghobrial was unpredictable and a potential danger to himself and others. She ordered a safety gown,[11] observation, psychiatrist

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[11]Dr. Steven Johnson, the psychiatric director of Orange County Jail, testified that those on suicide watch are placed in cell confinement and subject to observation. The most severe level is cell confinement in a safety

evaluation, a case manager discharge plan and a 5150.[12] (10 RT 2258.) On May 11, 1998, Dr. John Woo saw Ghobrial, and on May 12, he diagnosed Ghobrial with psychosis, NOS [not otherwise specified]. (11 RT 2590.) By May 20, Ghobrial was cleared for the sub-acute psychiatric housing. (10 RT 2276.) He, however, continued to complain to Dr. Woo of auditory hallucinations (11 RT 2592-2593), and on May 25, Ghobrial was placed on Mellaril, an antipsychotic medication to eliminate voices, hallucinations, paranoid ideations and other symptoms of psychosis. (10 RT 2278.)

On July 10, 1998, Ghobrial was disheveled, grinning inappropriately and having visual hallucinations of four black men in his cell. (9 RT 2165.) Nurse Kristen Whitmore could not see Ghobrial on July 13, because the deputies were concerned about Ghobrial's safety. (9 RT 2173-2176.) On July 24, 1998, Jill Savage, a case manager for mental health for the Orange County Sheriff's Department, saw Ghobrial and noted that he was becoming increasingly bizarre. (9 RT 2167-2168.)

On August 12, 1998, Ghobrial was moved to the non-psychiatric unit. (10 RT 2267.) He began trashing his cell on August 17. On August 18, deputies called Nurse Cantrell to report that Ghobrial was shaking and smearing food in his cell. She saw Ghobrial outside his cell with a deputy

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gown, which the inmate cannot rip into shreds to hang himself. (11 RT 2288.)

[12]5150 refers to California Welfare and Institutions Code section 5150, which provides that person may be taken into custody of a mental health facility for 72-hour treatment and evaluation when that person, "as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled." The patient would be not able to care for himself due to mental illness. (9 RT 2220.) A 5150 flag placed on a patient's file is a warning sign to alert others that he should not be released without assessment for mental health. (9 RT 2224.)

and noted that he was mute. His eyes were making slightly jerking movements, and he was moving his lips without speaking. Ms. Cantrell concluded that Ghobrial was decompensating and responding to internal stimuli. She ordered that he be returned to the psychiatric unit for observation. (10 RT 2267.)[13]

Dr. Jose Flores-Lopes, a psychiatrist, saw Ghobrial on August 19, 1998, and observed he was wearing a silly grin and acting bizarrely. He also was sticking his fingers in his ears as if to drown out the noise, which is very common in one experiencing auditory hallucinations. Ghobrial appeared anxious and was pacing in his cell. Dr. Flores-Lopez assessed that Ghobrial was likely suffering from schizophrenia. (10 RT 2479.) On August 20, 1998, Ghobrial was sent back to the acute psychiatric unit. (10 RT 2464.)

On September 19, 1998, case manager Jill Savage reported that Ghobrial had tied a string tightly around his penis, but did not recall doing so. He reported that this happened many times, but he could usually get the string off. Ms. Savage then had Ghobrial moved to a more acute housing in a safety gown. (9 RT 2168-2169.) Dr. Depovic saw Ghobrial in that unit on September 20, and Ghobrial admitted to him suicide ideations. (10 RT 2435.)

Dr. Flores-Lopez saw Ghobrial on September 21, 1998, and described his behavior as bizarre – a term usually associated with schizophrenia or schizoaffective disorder. (10 RT 2480.) Dr. Johnson saw Ghobrial the next day, September 22, and noted that he was disheveled,

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[13]Ms. Cantrell testified that the psychiatric unit is for the most acute patients. Patients with chronic mental illness controlled with medication will be moved into non-psychiatric ward. (10 RT 2268.)

complaining of auditory hallucinations and had suicidal ideations. Dr. Johnson assessed him as psychotic and increased the dosage of Mellaril. (10 RT 2280.)

Dr. Johnson explained that a psychotic person is one who is out of touch with reality. He is either hallucinating or having delusions, like paranoid ideation, and holding beliefs, seeing things or hearing things that are not consistent with reality. (10 RT 2281.)

On September 24, 1998, Dr. Johnson and Ghobrial's entire treatment team assessed Ghobrial with an Arabic-speaking interpreter. Ghobrial admitted auditory hallucinations, suicidal ideations and depression. The team increased Ghobrial's dosage of Mellaril and started him on Prozac for depression. (10 RT 2282-2283.)

On December 19, 1998, Ghobrial was placed on suicide watch and moved to the acute psychiatric unit in a safety gown. Ghobrial had complained that he was hurt and had an abrasion on his scrotum, along with a history of self-mutilative behavior to his penis. (9 RT 2170.) Ghobrial was on suicide watch observation for a full 18 days, which Dr. Johnson explained is a very long time to be on observation. (10 RT 2290-2291.) On January 7, 1999, observation was discontinued, and Ghobrial's team increased his dosage of a second anti-psychotic drug, Zyprexa. (10 RT 2291-2292.)

On January 18, 1999, Dr. Woo assessed Ghobrial as psychotic. He believed that Ghobrial was exhibiting blocking, where his thought process was interrupted. Ghobrial's thoughts were, perhaps, interrupted by hallucinations. This was yet another indication of a psychotic process. (11 RT 2594.)

Dr. Flores-Lopez testified that on April 7, 1999, Ghobrial reported

increased auditory hallucinations. Dr. Flores-Lopez also observed that Ghobrial appeared to be responding to internal stimuli. Dr. Flores-Lopez recommended that Ghobrial be fully assessed by an appropriate specialist at a mental hospital. He also testified, "I made the recommendation as well that I wasn't sure that he was competent. That he needed a competency assessment." (10 RT 2492.) Dr. Flores-Lopez was not sure whether Ghobrial was competent to stand trial or understand the nature of the proceedings against him because of his psychotic illness. (10 RT 2493.)[14]

By May 19, 1999, Ghobrial had been moved out and then back to the psychiatric acute housing because of odd behavior. May 19 was day one of observation. (10 RT 2296-2297.)

On June 16, 1999, Ghobrial was back in psychiatric acute housing for observation because he was not eating. He was also defecating and urinating in his cell and constantly talking to himself. (10 RT 2494-2495, 2435-2436.) On the second day of observation, June 17, Ghobrial was moved again for possible suicidal ideation. The mental health specialists treating Ghobrial had a team meeting that day and maintained him on suicide watch. (11 RT 2299-2300.) On June 18, the safety gown was removed. (10 RT 2300.)

On July 2, 1999, Ghobrial was chronic and stable on Zyprexa and Depakote for treatment for schizoaffective disorder. He was on the maximum dose of Zyprexa and any benefit had plateaued because he

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[14]Dr. Flores-Lopez testified that in psychiatry, three elements are used to make a diagnosis or define treatment: 1) mental status exam and observation of inmate; 2) what the inmate self-reports, including past medical history and records; and 3) actual testing. Without all three, Dr. Flores-Lopez could not definitively rule out anything. (10 RT 2494-2495.)

remained symptomatic. (10 RT 2495.) On July 21, 1999, Ghobrial was moved to the sub-acute psychiatric housing. (10 RT 2269.)

On August 4, 1999, Dr. Johnson saw Ghobrial in the acute ward with a translator. Ghobrial complained of auditory hallucinations. Dr. Johnson noted that Ghobrial was "still" psychotic after months on Zyprexa, and suggested that at the next treatment team meeting they consider the antipsychotic medication Seroquel to decrease his hallucinations. (10 RT 2306-2307, underlining in original.)

After a team meeting, on August 5, 1999, Ghobrial was given an updated diagnosis of schizoaffective disorder. (10 RT 2308-2309.) Dr. Johnson testified that schizoaffective applies to people who have symptoms of both bipolar disease and schizophrenia. (10 RT 2305.) Ghobrial was in the acute ward again on August 13, 1999. (10 RT 2496-2497.)

On August 19, the Orange County Jail mental health team contracted forensic psychiatrist Dr. Faafat Girgis to conduct a psychiatric evaluation of Ghobrial. (11 RT 2597.) Dr. Girgis, a native Egyptian, received his medical degree from Cairo University and practiced for a time in Egypt. (11 RT 2595-2597.) Dr. Girgis reviewed Ghobrial's county jail chart and met with him for approximately one and one-half hours. (11 RT 2597, 2600.) During that time, Ghobrial appeared to be responding to internal stimuli and said he was hearing voices commanding him to cut himself, especially his penis. (11 RT 2597-2598.) Ghobrial also heard voices making him angry against people. (11 RT 2598.) Dr. Girgis concluded that Ghobrial had poor insight into the nature of his illness. That is, Ghobrial knew he was mentally ill, but did not understand the specifics of his illness. Dr. Girgis concluded that Ghobrial suffers from schizophrenia, disorganized type. (11 RT 2599.) He explained that disorganized means

there is a prominent gross disorganization of Ghobrial's thought process. (11 RT 2601.)

Dr. Johnson testified that by August 20, 1999, the team working on Ghobrial's case – the psychiatrists, psychologists, nurse practitioners, case managers and service chief – all considered Ghobrial seriously ill. (10 RT 2313.)

Dr. Flores-Lopez saw Ghobrial on September 3, 1999, and noted that Ghobrial was "chronic," meaning he remained ill with chronic schizoaffective disorder and, "most likely," would have it for the rest of his life. (10 RT 2497-2498.)

On October 27, 1999, Ghobrial was moved to the acute psychiatric unit. (9 RT 2198.) On November 23, 1999, Ghobrial was back in the non-psychiatric unit, but was decompensating in regular housing. (10 RT 2498.) Throughout December, Ghobrial was talking to himself, dirty, unkempt and wearing a blank stare. (10 RT 2391, 2392; 9 RT 2194-2198.) On December 25, 1999, Ghobrial was transferred to the psychiatric unit for closer monitoring. (9 RT 2198.)

On January 31, 2000, Dr. Flores-Lopez noted that he continued to see symptoms of psychosis in Ghobrial but could not rule out anything without neuropsychiatric testing. (10 RT 2499.) Dr. Flores-Lopez left the Orange County Jail in February 2000, and later learned that Ghobrial had been diagnosed with schizoaffective disorder. He then and at trial agreed with that diagnosis. (10 RT 2501.)

In late February 2000, Ghobrial was transferred back to the non-psychiatric unit of jail, which he claimed to prefer. He informed nurse practitioner Barrio that he heard voices: "Calls my name. Tells me to kill myself." (9 RT 2193, 2203.)

On April 25, 2000, Dr. Depovic saw Ghobrial with an interpreter after he received reports that Ghobrial had defecated in the shower. (10 RT 2440.) Ghobrial claimed that a week prior, he had tied a knot on his penis in order to stop breathing. (10 RT 2441.)

On July 1, 2000, Ghobrial was in the psychiatric unit. (9 RT 2208.) On July 11, Ghobrial told case manager Saundra King that he had had an hallucination commanding him to wrap a sheet around his penis. (10 RT 2408-2411.) On July 12, he complained to Ms. Barrio of increased auditory hallucinations resulting in sexual preoccupation and self-destructive behavior impulses. (9 RT 2210.) On July 15, he admitted to Ms. Barrio that he had shaved his eyebrows based on the command of auditory hallucinations. He was not sleeping and had increased auditory hallucinations. (9 RT 2212.) Ms. Barrio decided to consult with a psychiatrist to ascertain whether a second atypical antipsychotic medication should be added. (9 RT 2213.)

On July 25, 2000, Ms. King saw Ghobrial after she received reports that he had been picking his face. She saw abrasions on his forehead between his eyebrows. Ghobrial said that voices told him to pick his face and then rub butter and coffee grounds on the abrasions. (10 RT 2411-2412.) He was transferred back to acute mental health housing. (10 RT 2470.) Ghobrial was still hearing command hallucinations on July 31, telling him to tie things on his penis and rub his forehead. (9 RT 2148-2149.) Ms. King placed a flag in Ghobrial's chart, alerting the sheriff's department and medical staff that Ghobrial was to be evaluated for a 72-hour involuntary psychiatric hold should he be released from the facility. (9 RT 2150.)

On August 12, 2000, Ghobrial was still hearing auditory

hallucinations telling him to put butter on his mouth and coffee between his eyebrows. He also admitted to tying his penis with a piece of cloth. Ghobrial trashed his cell, and his thoughts were coherent, but illogical. He was assessed as psychotic. (9 RT 2215-2216, 2217-2218.) On August 26, while still in the acute psychiatric unit, he reported hearing voices, "my mother calling my name, tell me not to kill myself." (9 RT 2219.) Ms. Barrio noted that Ghobrial was on Paxil, Depakote, and the maximum dose of Seroquel. She also noted that he "definitely fits" one of criteria under section 5150, which is that he is either a danger to himself, to others or gravely disabled. He was not able to care for himself due to a mental illness. (9 RT 2220.)

In September 2000, Ghobrial described not only auditory but also visual hallucinations of someone touching him. (10 RT 2413, 2221.) On September 25, 2000, Ms. Barrios found Ghobrial in his cell, lying supine on his back with his head hanging off the end of the bed and chanting or talking to someone. He was disoriented and confused and said, "voices, food, John, eat." (9 RT 2222-2223.) On September 26, Ghobrial complained of olfactory hallucinations. (10 RT 2415.)

On October 8, 2000, Ghobrial was again lying on his back with his head hanging off the bunk. He described auditory hallucinations of a woman telling him to eat and giving constant commentary on his behavior. He also described visual hallucinations of a woman running by and tactile hallucinations of someone touching his shoulder. (9 RT 2225.) On October 11, 2000, Ghobrial was hyper talkative but not making a lot of sense. (10 RT 2416-2417.)

On November 14, 2000, auditory hallucinations said, "Go, John; eat, John; John bad." Ghobrial also experienced increased tactile hallucinations

of a female touching him. (10 RT 2233-2234.) Ghobrial was observed actively hallucinating on November 22, 2000, and on December 2, 2000, Ghobrial complained of auditory hallucinations telling him to scratch himself and pull his hair. (10 RT 2236.) Ms. Barrio reported that despite the maximum levels of medication, Ghobrial was still psychotic. (10 RT 2237.) On December 15, 2000, Ghobrial complained of auditory hallucinations telling him to pull out his hair and pull off his toenails. Ms. Barrio observed thinning of Ghobrial's hair. She assessed that Ghobrial was only partially stable. (10 RT 2238-2239.) After consulting with Dr. Depovic, Risperdal was added to target Ghobrial's hallucinations. (10 RT 2240.) On December 29, 2000, Ms. Barrio noted in Ghobrial's chart: "Keep his 5150 flag, patient danger to others and gravely disabled. Return with psychiatrists in two weeks." (10 RT 2243.)

On January 26, 2001, a neuropsychologist hired by the defense, Ari Kalechstein, Ph.D., tested Ghobrial. Through an interpreter, Dr. Kalechstein administered tests sensitive to malingering, attention and executive systems functioning, i.e., frontal lobe functioning. (10 RT 2530, 2531.) Dr. Kalechstein testified that because of Ghobrial's cultural and language differences he selected tests that did not require knowledge of English. The tests were nonverbal and relatively culture free or fair so Ghobrial's performance would reflect brain impairment rather than cultural differences. (10 RT 2548.)

Of the five tests on attention administered, Ghobrial scored poorly on them all. He was in the 16th percentile on the first test, the 12th and 32nd percentiles on the second two-part test, the first percentile in the third test and the first percentile on the fourth test. (10 RT 2531-2536.)

Dr. Kalechstein gave four tests on executive system functioning.

Ghobrial performed in the impaired range on the first three tests, first percentile on test one, second percentile on test two and second percentile on test three. Ghobrial performed in the borderline impaired range, sixth percentile, on the fourth and final test. (10 RT 2538-2541.)

Finally, Dr. Kalechstein tested Ghobrial on malingering. (10 RT 2542.) The test presents a recognition task that appears to be difficult but is in fact quite easy. People with dementia or Alzheimer's can remember 45 out of 50. Someone performing poorly, remembering less than 90 percent, may not be putting forth his or her best effort. Ghobrial performed within normal limits. (10 RT 2545.) Dr. Kalechstein testified that the results of all of Ghobrial's testing showed that he had more specific types of impairment, particularly on tests of executive systems functioning. The tests showed that Ghobrial had frontal lobe impairment, consistent with a psychotic illness such as schizophrenia or schizoaffective disorder. (10 RT 2546-2547.)

On February 27, 2001, Ghobrial was observed actively hallucinating. (10 RT 2423.) On March 7, 2001, Ghobrial had begun pulling out his hair and requested medication to make him feel happier. (10 RT 2419.) On March 16, case manager King saw Ghobrial and noted that he continued to pull out chunks of his hair. She saw bald spots on him and hair on the floor. (10 RT 2419; 2420 [the same on March 20, 2001].) By April 3, 2001, the hair pulling had decreased. (10 RT 2517.)

On April 10, 2001, Dr. Lopez saw Ghobrial with an interpreter and assessed that Ghobrial had schizoaffective disorder. (10 RT 2518.) On May 8, 2001, Dr. Johnson saw Ghobrial with an interpreter and Ghobrial complained of headaches and auditory hallucinations at noon every day. (10 RT 2322.) On May 16, 2001, Dr. Khaled, on duty in the acute

psychiatric unit, interviewed Ghobrial in Arabic. He observed that Ghobrial was better, but still exhibited poor insight and judgment. (10 RT 2347-2348.) Dr. Khaled assessed Ghobrial as suffering from schizoaffective disorder. (10 RT 2349.)

On June 21, 2001, Dr. Khaled assessed Ghobrial who reported that voices were on and off. Dr. Khaled noted that Ghobrial was not fully oriented. He was dizzy and "falling off" a lot. He also had poor judgment and insight. (10 RT 2352.) By June 25, Ghobrial reported he could not sit up. He was dizzy and fell three times. He was lying down and could not sit up. He reported hearing voices. (10 RT 2353-2354.) He said he heard his mother's voice talking to him. (9 RT 2150-2154.) On June 26, Ghobrial told Dr. Khaled he could not remember how many times he had fallen the day before, but he said he could not stand straight even to go to the bathroom. He was still hearing voices and appeared paranoid and guarded. (10 RT 2354-2355.) When Ghobrial was still unable to sit up on June 27, Dr. Khaled decided to present his case for the treatment team, which recommended closer observation and monitoring of Ghobrial's vitals. (10 RT 2356-2357.)

On June 28, 2001, Ghobrial told Dr. Khaled he was pulling out his hair again. He still heard auditory hallucinations, but fewer. (10 RT 2356.)

On July 3, 2001, Ghobrial told Dr. Khaled he wanted to kill himself, but he could not find anything with which to do it. He was hearing voices, was depressed and wanted to hurt himself. (10 RT 2358-2359.) Dr. Khaled concluded that Ghobrial was psychotic and suicidal and continued him on suicide prevention. (10 RT 2359.) A deputy told Dr. Khaled that Ghobrial had fallen four times that morning, but Ghobrial had no memory of that happening. (*Ibid.*)

On July 5, 2001, Dr. Khaled saw Ghobrial who heard voices from the window and doors. He was paranoid. Dr. Khaled concluded Ghobrial was still psychotic, but no longer suicidal. He nonetheless continued Ghobrial on suicide precaution observation. (10 RT 2359-2360.) Suicidal observation was discontinued on July 12, 2001. (10 RT 2363.)

On July 20, 2001, Dr. Depovic reported that Ghobrial was "mostly rocking in his bed. Refusing to tell me if he's suicidal." (10 RT 2442.) He added that Ghobrial was responding to internal stimuli and "[q]uestionable if dangerous to self or questionable if dangerous to others. Insight and judgment poor." (10 RT 2443.)

On August 20, 2001, psychiatrist Dr. Juventino Lopez noted that Ghobrial had schizoaffective disorder and that it appeared that Ghobrial was "regressed with more repressive symptoms." (10 RT 2522.) On August 27, Ghobrial told Dr. Khaled that he heard his father's voice cursing him through the television. (10 RT 2368.)

3. Other Mitigation.

The defense also presented the testimony of Father Athanasius Ragheb, a Coptic Christian priest who housed Ghobrial for approximately six months in Santa Ana. (11 RT 2609-2611.) Ghobrial attended church and made regular confessions to Father Ragheb during his stay there. (11 RT 2611-2612.) During his confessions Ghobrial frequently asked, "Am I upsetting God somehow? Is God pleased with me?" (11 RT 2612.)

Father Ragheb described Ghobrial as a humble and simple man who was not very smart. (11 RT 2612.) He needed food and money, but when Father Ragheb gave him some, he would give it away to needy people on the street. Everybody in the church liked Ghobrial and had sympathy for him, not just because of his lost arm but also because of the way he dealt

with people. (11 RT 2613.) Father Ragheb saw good in Ghobrial. (11 RT 2614.) But it was his gut feeling that psychologically, Ghobrial was not sane. (11 RT 2614.)

Ghobrial's 15-year-old sister Janet Salama described how Ghobrial attended Sunday School classes with her in Egypt when she was too young to go by herself. Ghobrial would sit next to her and teach her verses from the Bible and how to draw. She talked to Ghobrial when she was sad and he would make her feel "happy, joyous." He was Janet's best friend and a father to her. "He was everything to me." (11 RT 2649-2652.) Even while in jail, Ghobrial advised Janet as a father. She reiterated that Ghobrial was everything to her. "As a little girl loves [] her father, that's the same way I feel for him." (11 RT 2652.)

Finally, Daniel Vasquez, a former warden in the California State prison system and director of corrections in Santa Clara County, and current consultant on correctional issues, testified about conditions of confinement for prisoners sentenced to life without the possibility of parole. (10 RT 2550-2551, 2557-2558.) He explained that in all his years with correctional facilities, he was involved in or responsible for the classification of inmates. (10 RT 2560.) In his opinion, Ghobrial, because of the type of conviction, language problem, physical disability and mental illness, "would be a protective custody case . . . on the first day of arrival."

Prison environment is tough, "and you're going to need all your limbs to try to survive as best you can." (RT 10 2566.) Vasquez testified that Ghobrial's handicap would make him more of a target, and that his Egyptian citizenship could be a problem, especially given 9/11. (10 RT 2567.) Also, his convictions for child molestation and homicide would place him "very, very low on the food chain, if you will, in the prison

environment." "They're the lowest of the low in that kind of environment, in that kind of reality." In the eyes of the other inmates, a molester is a "terrible offender and will be subject to punishment every day." "They'll beat them." (10 RT 2567.) "They'll beat them, slash him. They'll kill him." (10 RT 2568.)

Vasquez also testified that, in his opinion, a person such as Ghobrial would not be a risk to others in state prison. The circumstances of the offense will all weigh against him "and he'll need protective custody from the first day he walks into any prison." A program for a person under those conditions is an hour or two of exercise a day and the rest of the time, in the cell. (10 RT 2568-2569.) He would exercise alone, and he would have no access to other inmates, ever. His meals would be served in cells. Any movement he made would be escorted by minimum of two officers while he was cuffed. (10 RT 2569.)

Vasquez also described the parameters of protective custody. He explained that administrative segregation is a maximum security lock-up, and protective custody is a specialized and unique lock-up within administrative segregation. It is not for punishment as much as for control of the inmate who is a predator or to protect inmates susceptible to prison pressure. An inmate assigned to that status is one who cannot take care of himself in a prison environment. He explained that the quality of life in this environment was not good. (10 RT 2561-2562.)

I.

THE TRIAL COURT VIOLATED GHOBRIAL'S CONSTITUTIONAL RIGHTS WHEN IT FAILED TO INQUIRE SUA SPONTE ABOUT HIS COMPETENCY, DESPITE SUBSTANTIAL EVIDENCE THAT GHOBRIAL WAS NOT COMPETENT TO STAND TRIAL.

When a genuine doubt regarding the competence of a criminal defendant arises, the trial judge must suspend criminal proceedings and hold a competency hearing. (*Pate v. Robinson* (1966) 383 U.S. 375, 385; *People v. Hale* (1988) 44 Cal.3d 531, 539-540; *Blazak v. Ricketts* (9th Cir. 1993) 1 F.3d 891, 893 fn.1, cert. den. (1994) 511 U.S. 1097.) The trial court's failure to take that step in the instant case, after substantial evidence that appellant Ghobrial was not competent was introduced at the penalty phase of trial, deprived Ghobrial of his rights to due process of law, a fair trial, trial by jury, confrontation and cross-examination, effective assistance of counsel, equal protection and a reliable penalty verdict as guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It also violated Penal Code section 1367. The verdict and death judgment must be vacated. (*Drope v. Missouri* (1975) 420 U.S. 162, 127.)[15]

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[15]The evidence that Ghobrial might not be competent was introduced at the penalty phase of trial, but it certainly was not temporally limited to that phase. Testimony described Ghobrial's behavior from his incarceration to just months before the guilt phase began, and the symptoms of his mental illness would have affected Ghobrial's ability rationally to consult with his lawyer and assist in his defense at all phases of trial.

A. The Guilt and Penalty Phase Verdicts Must Be Vacated Because the Trial Court Failed to Suspend Proceedings and Order a Competency Hearing after the Defense Presented Testimony Demonstrating That Appellant Was Not Competent to Stand Trial.

It is a venerable principle of our criminal law that a criminal defendant may not be tried unless he is competent, and that the state must give the defendant access to procedures for determining his competency. (*Pate v. Robinson*, *supra*, 383 U.S. at p. 386; *Drope v. Missouri*, *supra*, 420 U.S. at p. 172; *People v. Lewis* (2008) 43 Cal.4th 415, 524, quoting *Dusky v. United States* (1960) 362 U.S. 402, 402 (*per curiam*); accord, *People v. Taylor* (2009) 47 Cal.4th 850, 861; *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1087.) Trial of an incompetent defendant violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. (*Medina v. California* (1992) 505 U.S. 437, 449; *Cacoperdo v. Demonsthenes* (9th Cir. 1994) 37 F.3d 504, 510, cert. den. (1995) 514 U.S. 1026.)

The rule that a criminal defendant who is incompetent should not be required to stand trial is "fundamental to an adversary system of justice" (*Drope v. Missouri*, *supra*, 420 U.S. at p. 172) and "has deep roots in our common-law heritage" (*Medina v. California*, *supra*, 505 U.S. at p. 446). As Justice Kennedy emphasized in his concurring opinion in *Riggins v. Nevada* (1992) 504 U.S. 127, 139-140:

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

(Accord, *Cooper v. Oklahoma* (1996) 517 U.S. 348, 354.)

The test for competence to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – whether he has a rational as well as factual understanding of the proceedings against him." (*Boag v. Raines* (9th Cir. 1985) 769 F.2d 1341, 1343, citing *Dusky v. United States*, *supra*, 362 U.S. at p. 402.) In *Drope v. Missouri*, the Supreme Court added a fourth prong to the test by requiring that the defendant be able "to assist in preparing his defense." (402 U.S. at p. 171.)

The constitutionally-mandated procedure governing competency questions in California is codified in Penal Code sections 1367 et seq. (See *People v. Pennington* (1967) 66 Cal.2d 508, 518 [noting that *Pate v. Robinson* transformed Penal Code section 1368 into a constitutional requirement].) Section 1367 provides that a trial may not occur if "the defendant is unable to understand the nature of the criminal proceedings *or* to assist counsel in the conduct of a defense in a rational manner." (Pen. Code, §1367 subd. (a), italics added).

An orientation as to time and place and some recollection of events is not enough. (*De Kaplany v. Enomoto* (9th Cir. 1976) 540 F.2d 975, 979 (en banc). Accord, *People v Tomas* (1977) 74 Cal.App.3d 75, 88.) As a panel of the Ninth Circuit Court of Appeals explained in *Odle v. Woodford*, *supra*, 238 F.3d at p. 1089:

> After all, competence to stand trial does not consist merely of passively observing the proceedings. Rather, it requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense. The judge may be lulled into believing that petitioner is competent by the fact that he does not disrupt the proceedings, yet this passivity itself may mask an incompetence to meaningfully participate in the process.

With assistance of counsel, a defendant is called upon to make myriad decisions concerning the course of his defense. The importance of the rights and decisions underscores that an erroneous determination of competence "threatens a 'fundamental component of our criminal justice system' – the basic fairness of the trial itself." (*Cooper v. Oklahoma*, *supra*, 517 U.S. at p. 364.)

In addition, the United States Supreme Court has clearly cautioned that, "[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." (*Drope v. Missouri*, *supra*, 420 U.S. at p. 181.)

1. A Trial Court Must Conduct A Competency Hearing Whenever There is a *Bona Fide* Doubt as to the Defendant's Competency to Proceed.

"Where the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a [competency] hearing." (*Pate v. Robinson*, *supra*, 383 U.S. at p. 385.) A bona fide doubt should exist where there is substantial evidence of incompetence. (*Moran v. Godinez* (9th Cir. 1995) 57 F.3d 690, 695; see also *Drope v. Missouri*, *supra*, 420 U.S. at p. 180; *People v. Halvorsen* (2007) 42 Cal.4th 379, 401; *People v. Hale*, *supra*, 44 Cal.3d at p. 539.)[16]

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[16]Courts have used different terms to describe the level of "doubt" required before a trial court must hold a competency hearing. (*Chavez v. United States* (9th Cir. 1981) 656 F.2d 512, 516, fn.1 [collecting cases using "sufficient doubt," "good faith doubt," "genuine doubt," "reasonable doubt," and "substantial question].) Regardless of the term used, the standard has remained the same for at least decades. (*Blazak v. Ricketts*, *supra*, 1 F.3d at p. 893.)

"Substantial evidence" of incompetence is judged by an objective standard. It does not mean unconflicting evidence (see, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1219; *People v. Welch* (1999) 20 Cal.4th 701, 738); and it does not mean evidence sufficient to raise a *subjective* doubt regarding the defendant's competence in the mind of the trial judge (see, e.g., *People v. Jones*, *supra,* 53 Cal.3d at p.1153 ["substantial evidence" is measured by an objective standard and, hence, cannot be defeated by the trial court's own observations of the defendant or judge's subjective belief that he appears competent]; accord, e.g., *People v. Pennington*, *supra*, 66 Cal.2d at p. 518; *People v. Castro* (2000) 78 Cal.App.4th 1402, 1415). As the Ninth Circuit Court of Appeals has explained, "evidence is 'substantial' if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence." (*Moore v. United States* (9th Cir. 1972) 464 F.2d 663, 666, cert. den. (1976) 429 U.S. 919; see also *People v. Welch*, *supra*, 20 Cal.4th at p. 738, and authorities cited therein; *People v. Danielson* (1992) 3 Cal.4th 691, 726, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *Tillery v. Eyman* (9th Cir. 1974) 492 F.2d 1056, 1058-1059.)

When a defendant shows that the evidence before the trial court raised such a doubt as to competency, the conviction must be set aside; if the prosecution then wishes to retry to defendant, a hearing must be held to determine present competency. (*Pate v. Robinson, supra*, 383 U.S. at p. 387; *Drope v. Missouri*, *supra*, 420 U.S. at p. 183.)

It bears emphasis that the initial question is *not* whether the defendant is definitely incompetent, but merely whether there is sufficient

doubt in that regard:

> The function of the trial court in the applying *Pate's* substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? It[s] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue. It is only after the evidentiary hearing, applying the usual rules appropriate to trial, the court decides the issue of competency of the defendant to stand trial.

(*Moore v. United States*, *supra*, 464 F.2d at p. 666.)

In California, section 1368[17] requires the trial court to inquire about the defendant's mental competency when *any doubt* concerning competency arises. In addition, section 1368 imposes a duty on a trial court to order a competency hearing if there is substantial evidence that the defendant is incompetent. (*People v. Guzman* (1988) 45 Cal.3d 915, 963, overruled on another ground in *Price v. Superior Court*, *supra*, 25 Cal.4th at p. 1069, fn. 13 ["a competency hearing is mandatory when 'substantial' evidence of the accused's incompetence has been introduced"].) The trial court has no

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[17]Section 1368 provides in relevant part that "(a) If ... a doubt arises in the mind of the trial judge as to the mental competence of the defendant, he or she shall state the doubt on the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent.... At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings ... to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time. [¶] (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing," and even if "counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing."

discretion in this regard. (See, e.g., *People v. Welch*, *supra*, 20 Cal.4th at p. 738; *People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 69; *People v. Pennington*, *supra*, 66 Cal.2d at pp. 518-519.) Indeed, the trial court is obligated to conduct a hearing even if defense counsel objects or asserts a belief that the defendant is competent. (*People v. Guzman*, *supra*, 45 Cal.3d at p. 963; Pen. Code, §1368, subd. (b).) Where a doubt exists, the court must "take the initiative in obtaining evidence on that issue." (*In re Davis* (1973) 8 Cal.3d 798, 807.) The issue may be raised on appeal, whether raised in the trial court or not. (*People v. Tomas, supra*, 74 Cal.App.3d at p. 88; *People v. Superior Court (Marks)*, *supra*, 1 Cal.4th at p. 69.)

2. There Was Substantial Evidence Before the Trial Court That Appellant Ghobrial Was Incompetent to Stand Trial.

In determining whether there is substantial evidence to require a competency hearing, the trial court must consider all of the relevant circumstances. (*Drope v. Missouri*, *supra,* 420 U.S. at p. 180.) There are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." (*Ibid.*) In some cases, many factors may be significant, while in others, just one factor may be enough to require that a competency hearing be held. (*Ibid.*; accord, *People v. Laudermilk* (1967) 67 Cal.2d 272, 283 [what constitutes substantial evidence "cannot be answered by a simple formula applicable to all cases"].)

Among the factors that courts have consistently considered in finding substantial evidence to raise a reasonable or bona fide doubt

regarding the defendant's competency are the following:

- a mental health professional's prior determination of incompetency or observations and conclusions regarding the defendant's present ability to understand the proceedings or rationally assist in his defense (see, e.g., *People v. Ary* (2004) 118 Cal.App.4th 1016, 1022, 1024; *Miles v. Stainer*, *supra*, 108 F.3d at p. 1112; *Moore v. United States*, *supra*, 464 F.2d at p. 666; *Burt v. Uchtman* (7th Cir. 2005) 422 F.3d 557, 566);
- evidence of suicide attempts or suicidal ideation (see, e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 848; *Drope v. Missouri, supra*, 420 U.S. at pp. 166-167, 179-180; *United States v. Loyola-Dominguez* (9th Cir. 1997) 125 F.3d 1315, 1318-1319;
- a history of treatment with anti-psychotic and anti-depressant medications (*McMurtrey v. Ryan* (9th Cir.2008) 539 F.3d 1112, 1118, 1125 [evidence that defendant had been prescribed several antipsychotic and anti-anxiety medications over the course of his incarceration in addition to defendant's behavior and memory problems, was sufficient to raise a reasonable doubt as to defendant's competence]; *Miles v. Stainer* (9th Cir.1997) 108 F.3d 1109, 1112 [trial court's failure to ask defendant whether he had been taking his psychotropic medication before accepting his guilty plea raised reasonable doubt about defendant's competence to plead guilty, and therefore competency hearing should have been held]);

- the relevant observations of others in close contact with the defendant (see, e.g., *Drope v. Missouri*, *supra*, 420 U.S. at pp. 179-180; *Pate v. Robinson*, *supra*, 383 U.S. at pp. 385-386; *Odle v. Woodford*, *supra*, 238 F.3d at p. 1087);
- evidence of a head injury or brain trauma followed by a change in behavior (see, e.g., *Pate v. Robinson*, *supra*, 383 U.S. at p. 378; *Odle v. Woodford*, *supra*, 238 F.3d at p. 1087; *Torres v. Prunty*, *supra*, 223 F.3d at p. 1106 & fn. 2; *McGregor v. Gibson* (10th Cir. 2001) 248 F.3d 946, 955-956);
- the defendant's previous irrational or bizarre behavior (see *Drope v. Missouri*, *supra*, 420 U.S. at pp. 179-180; *Pate v. Robinson*, *supra*, 383 U.S. at pp. 385-386); and
- a trial counsel's opinion regarding his client's mental state and competency (see, e.g., *Medina v. California*, *supra*, 505 U.S. at p. 450; *Drope v. Missouri*, *supra*, 420 U.S. at p. 177 and fn. 13 ["an expressed doubt in that regard by one with 'the closest contact with the defendant,' is unquestionably a factor which should be considered]).

While the presence of any one of these criteria may be sufficient to raise a doubt of competency,[18] here, Ghobrial exhibited virtually all of them, except a recommendation of counsel.

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[18]As the Supreme Court observed in *Drope v. Missouri, supra*, 420 U.S. at p. 180, "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone, may, in some circumstances, be sufficient."

a. Mental Health Expert Opinions & Schizoaffective Disorder Diagnosis.

Given Ghobrial's life-long struggle with mental illness, it comes as no surprise that virtually every mental health specialist with whom he came in contact following his arrest through the beginning of trial found him to be psychotic. Twenty mental health employees, nineteen of them staff at the Orange County Jail,[19] testified at Ghobrial's trial, and each one documented Ghobrial's nearly constant auditory, and at times visual[20] and tactile,[21] hallucinations. And although the severity of Ghobrial's symptoms waxed and waned, as is normal for his illness,[22] it is clear that Ghobrial was no less psychotic in September 2001, than he was on the day of his arrest on March 22, 1998, immediately after the killing.

No fewer than nine psychiatrists separately diagnosed Ghobrial at least 17 times as psychotic, having either schizoaffective disorder or schizophrenia, paranoid or disorganized type. (See, e.g., 9 RT 2215-2216, 2217-2218;10 RT 2237, 2280-2281, 2305, 2306-2307, 2308-2309, 2349, 2359-2360, 2428-2429, 2473, 2479, 2493, 2497-2498, 2499, 2501, 2518, 2546-2547, 2590; 11 RT 2590, 2594, 2599.) Appellant is well-aware that mental illness alone does not render a defendant incompetent to stand trial. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 849 [evidence of mental illness

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[19]See Statement of Facts, *supra*, at pp. 3-32.

[20]For example, in July 1998 Ghobrial described visual hallucinations of four black men in his cell. (9 RT 2165; see also 9 RT 2165, 2225 & 10 RT 2412-2413.)

[21]See, e.g. 9 RT 2225 (someone touching Ghobrial's shoulder) & 10 RT 2231, 2233-2234 (female touching him), 2238-2239 (same).

[22]See 10 RT 2305 (normal for disease to fluctuate over time).

alone insufficient to raise doubt regarding defendant's competency]; *People v. Ramos* (2004) 34 Cal.4th 494, 509 [same].) In this case, however, the symptoms of Ghobrial's mental illness, as documented in his lengthy jail psychiatric records, substantially interfered with his ability to understand the nature of the proceedings and rationally assist his counsel.

The psychoses with which Ghobrial has been diagnosed are defined, in part, by the sufferer's loss of touch with reality. (See testimony of Dr. Johnson [10 RT 2280-2281]; DSM-IV, Diagnostic criteria for Schizophrenia, pp. 285-286; Diagnostic criteria for 295.30 Paranoid Type, p. 287; Diagnostic criteria for 295.10 Disorganized Type.) Dr. Johnson explained that schizophrenia is an inherited chemical imbalance that renders one unable to distinguish reality from fantasy. Schizophrenics have hallucinations and delusions, which are fixed false beliefs that are unswayable by evidence of reality. (10 RT 2304.) Bipolar disorder is also an inherited chemical imbalance. It causes mood swings unrelated to what is going on in an individual's life. (10 RT 2303.) During depression, one suffering from bipolar disorder can become suicidal. The DSM describes bipolar disorder as an illness causing fluctuations in mood and characterized by depressive and/or manic episodes. A manic episode may include grandiose ideas, decreased sleep, rapid speech, tangential thinking and excessive, impulsive behavior and is often accompanied by psychotic symptoms. (DSM IV-TR, pp. 349-352 and 357-359.)

As the evidence presented at the penalty phase demonstrated, the manifestations of Ghobrial's mental illness directly affected, and tended to undermine, the functional abilities required by section 1367 and the standards set out in *Dusky v. United States*, *supra*, 362 U.S. at p. 402 and *Drope v. Missouri*, *supra*, 420 U.S. at p. 180. Dr. Girgis testified that

Ghobrial had a prominent gross disorganization of his thought process and concluded that Ghobrial's auditory hallucinations interfered with his ability to communicate. (11 RT 2601.) Dr. Girgis also stated that Ghobrial had a "paranoid tinge," was distracted, had mental blocks, and sometimes was unable even to comprehend Dr. Girgis' questions. (11 RT 2599.)[23]

Dr. Flores-Lopez noted that Ghobrial was ill with chronic schizoaffective disorder and, "most likely," would have it for the rest of his life. (10 RT 2497-2498.) And just months before trial, Dr. Juventino Lopez noted Ghobrial's schizoaffective disorder and stated that Ghobrial had "regressed with more repressive symptoms." (10 RT 2522 [August 20, 2001 entry].)

Ghobrial exhibited symptoms associated with a severe mental illness before, during and after the commission of the crimes, and these symptoms substantially impaired his ability to process information logically, to communicate logically or engage in logical reasoning. As the jail mental health staff meticulously documented, during pretrial proceedings, Ghobrial

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[23]A number of the jail mental health experts attributed their inability to communicate with Ghobrial and Ghobrial's apparent lack of memory to language barriers. (See, e.g. 9 RT 2169, 2235, 2258, 2278, 2280, 2282, 2285, 2286, 2289, 2297, 2300, 2301, 2314, 2332.) It is clear, however, that Ghobrial had difficulty communicating even in his native language of Arabic. Dr. Khaled testified that during his visit with Ghobrial on July 2, 2001, Ghobrial could not remember whether or not he had fallen the day before. (10 RT 2357.) Dr. Khaled stated that Ghobrial could not remember a lot of questions and appeared to have a poor memory. (10 RT 2358; see also 10 RT 2362 [on July 11, 2001, Ghobrial claimed he could not remember a lot of things about orientation and symptoms]; 10 RT 2254 [on August 3, 1998, Nabeel Bechara saw Ghobrial and tried to interview him to assess his mental status in his native language Arabic, but Ghobrial kept responding "I don't know" and "I don't remember"].)

was suffering from delusions and disoriented thought processes. He was reacting to command hallucinations. He was heavily medicated and, at times, disoriented and suicidal. All of these factors compromised Ghobrial's ability to understand the nature of the proceedings and provided substantial evidence creating a bona fide doubt about whether Ghobrial was capable of communicating with his counsel and assisting her in a rational manner with preparing a defense.

It is also noteworthy that references to a section 5150 hold were made in Ghobrial's charts at least three times, in May 1998 (10 RT 2258), August 2000 (9 RT 2220) and December 2000 (10 RT 2243.) In *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561, 572-573, the panel held that the initial section 5150 hold, "standing alone, put the court on notice that a qualified professional had certified that there was 'probable cause to believe' that Maxwell was 'as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled.'"[24] There, as in *Drope*, and as here, in light of the evidence of petitioner's behavior including his suicide attempt "the correct course was to suspend the trial until . . . an evaluation could be made." (*Maxwell, supra*, 606 F.3d at p. 574, quoting *Drope, supra*, 420 U.S. at p. 181.) In *Maxwell*, the panel concluded that "[n]o reasonable judge, situated as the state trial judge was here, could have proceeded with the trial without doubting Maxwell's competency to stand trial." (*Ibid.*)

If, in this case, the evidence the defense presented at the penalty

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[24]The panel also took note of the defendant's inability to control himself in court, his suicide attempt, his history of mental illness and his impaired communication with defense counsel. (*Maxwell v. Roe*, *supra*, 606 F.3d at pp. 575-576.)

phase left any doubt but that the trial court should have ordered a competency hearing, it was put to rest by the testimony of Dr. Jose Flores-Lopez. Dr. Flores-Lopez was a thoroughly independent witness.[25] He was not hired by the defense to see or test Ghobrial. At the time of Ghobrial's trial, Dr. Flores-Lopez was employed by the California Department of Corrections as the chief psychiatrist at Norco Prison. (10 RT 2474-2475.) He worked for correctional mental health in Orange County from 1992 to 1999, and was involved in Ghobrial's treatment at the jail. (10 RT 2476.) During trial, Dr. Flores-Lopez testified that on April 7, 1999, he saw Ghobrial who reported increased auditory hallucinations. Dr. Flores-Lopez also observed that Ghobrial appeared to be responding to internal stimuli. Dr. Flores-Lopez recommended that Ghobrial be fully assessed by an appropriate specialist at a mental hospital. He also testified, **"I made the recommendation as well that I wasn't sure that he was competent. That he needed a competency assessment**." (10 RT 2492, emphasis added.) Dr. Flores-Lopez was not sure whether Ghobrial was competent to stand trial or understand the nature of the proceedings against him because

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[25]Indeed, Dr. Flores-Lopez was alert to the possibility that Ghobrial was malingering. (10 RT 2483, 2484, 2502.) He explained, however, that while malingerers usually have an agenda, the staff was unable to find one with Ghobrial. He never claimed his illness caused him to commit the crimes. As a result, the staff had difficulty with the malingering concept. (10 RT 2505-2506.) It was Dr. Flores-Lopez's opinion that without actual testing of Ghobrial, nothing could be definitively ruled in or out. (10 RT 2494-2495.) In fact, neuropsychological testing by Dr. Kalechstein (10 RT 2546-2547) and an examination by forensic psychiatric Dr. Faafat Girgis (11 RT 2595-2601) confirmed the diagnosis of Ghobrial, and testing done by the former to determine whether Ghobrial was malingering specifically ruled it out.

of his psychotic illness. (10 RT 2493.)

Dr. Flores-Lopez's articulation of what should have been obvious triggered an obligation on the part of the court to hold a hearing to establish Ghobrial's competency to proceed. Dr. Flores-Lopez stated his professional opinion that a doubt as to Ghobrial's competence existed. That was enough to require a hearing. Even though Dr. Flores-Lopez made his initial recommendation two years before trial, he made known those concerns during his testimony at trial, and, as set out more fully in the statement of facts, *ante* at pp. 30-45, Ghobrial's condition at no time improved during those two years.[26] In the months preceding trial Ghobrial was suffering from hallucinations, had poor insight and judgment, was not oriented, was paranoid and guarded and regressing. (10 RT 2322, 2347-2348, 2352, 2353-2354, 2150-2154, 2356-2360, 2522, 2368.)

This Court has consistently recognized that,

> [i]f a psychiatrist or qualified psychologist [citation], who has had sufficient opportunity to examine the accused states under oath and with particularity that in his [or her] professional opinion the accused is, because of mental illness [or disorder], incapable of understanding the purpose or nature of the proceedings being taken against him *or* is incapable of assisting in his defense or cooperating with counsel, the substantial evidence test is satisfied.

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[26] Ghobrial's diagnosis remained the same (see 9 RT 2215, 2217-2218; 2219, 2359; 10 RT 2237, 2495, 2306-2307, 2349, 2497-2498, 2518, 2522; 11 RT 2599); he was repeatedly moved to psychiatric acute housing (9 RT 2198, 2208; 10 RT 2347-2348, 2470, 2494-2495, 2496-2497); he continued to possess suicidal ideations (10 RT 2358-2359; 11 RT 2299-2300); and he continued to have hallucinations (9 RT 2148-2149, 2150-2154, 2193, 2203, 2210, 2212, 2353-2354, 2358-2359; 10 RT 2306-2307, 2413, 2415 2221; 2222-2223, 2225, 2233-2234, 2236, 2238-2239, 2322, 2354-2355, 2368, 2423, 2442-2443; 11 RT 2598).

(*People v. Pennington*, *supra*, 66 Cal.2d at p. 519; accord, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1217; *People v. Welch*, *supra*, 20 Cal.4th at p. 748; *People v. Stankewitz* (1982) 32 Cal.3d 80, 92.)

While Dr. Flores-Lopez did not affirmatively state that Ghobrial was not competent to proceed, he affirmatively stated that a doubt existed. This was sufficient to compel a hearing. (See *People v. Kaplan* (2007) 149 Cal.App.4th 372, 386-387 [although psychologist "did not expressly state the opinion defendant was 'incompetent,'" she submitted a report in which she "addressed at length how and why defendant was unable to assist counsel," which was sufficient to raise reasonable doubt regarding competency and demand hearing]; *People v. Ary*, *supra*, 118 Cal.App.4th at pp. 1023-1024 [court erred in failing to initiate competency proceedings in face of substantial evidence raising reasonable doubt as to defendant's competency; despite fact psychologist did not offer an explicit opinion as to whether the defendant was competent to stand trial, he did testify in effect that defendant was unable to understand the proceedings or assist counsel in his defense]; see also *Drope v. Missouri*, *supra*, 420 U.S. at pp. 175-180 [although psychiatrist's report did not specifically address issue of competency to stand trial because that question was not presented to him, information contained therein, including descriptions of "episodic irrational acts" and difficulties in participating, along with other evidence, was sufficient to raise a reasonable doubt regarding defendant's competency, which triggered the trial court's sua sponte duty to initiate competency proceedings].)

b. Evidence of Suicide Attempts or Suicidal Ideation.

In *Maxwell v. Roe*, *supra*, 606 F.3d at p. 574, the panel stated that "successive involuntary holds by themselves, and in the context of the other evidence of incompetence, would have raised a doubt [of competency] in a reasonable judge." Ghobrial was placed on numerous and unusually long suicide watches,[27] repeatedly moved to acute psychiatric housing, and subjected to the most severe level of confinement – cell confinement in a safety gown – to prevent him from harming himself.[28] (11 RT 2288; 10 RT 2323- 2330.) Ghobrial initially admitted suicide ideations in September 1998. (10 RT 2435, 2280.) A telling indication of Ghobrial's deteriorating mental state is one method of suicide he attempted: in April 2000, Ghobrial told Dr. Depovic through an interpreter that he had tied a knot on his penis

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[27]Ghobrial was on suicide watch at least two times, and he repeatedly expressed suicidal ideations. On March 26, 1998, Kay Cantrell made an entry in Ghobrial's chart, saying that Ghobrial had a history of auditory hallucination of command nature telling him to harm others and himself. And she was told that Ghobrial spoke of, "wanting to get through with courts, end with life," and that he had a history of suicide attempts. (10 RT 2259-2261, 10 RT 2405-2406.) He admitted suicide ideations in September 1998 (10 RT 2435); December 1998 [following genital mutilation, placed on suicide precautions] (10 RT 2286); June 1999 (10 RT 2299-2300); March 2000 [voices calling his name and telling him to kill himself] (9 RT 2206); April 2000 [(10 RT 2441); and July 2001 (10 RT 2359). On January 6, 1999, Ghobrial was on his 18th day of suicide observation, which, Dr. Johnson testified, is a long time for such cell confinement. (10 RT 2290-2291.)

[28]Dr. Steven Johnson, the psychiatric director of Orange County Jail, testified that those on suicide watch are placed in cell confinement and subjected to observation. The most severe level is cell confinement in a safety gown, which the inmate cannot rip into shreds to hang himself. (11 RT 2288.)

in order to stop breathing. (10 RT 2440-2441.) In July 2001, two months before trial was scheduled to begin, and four months before it actually did begin, Ghobrial told Dr. Khaled that he wanted to kill himself, but could not find anything with which to do it. (10 RT 2358.) He was depressed and wanted to hurt himself. (10 RT 2359.) Ghobrial was continued on suicidal precaution through July 12, 2001. (*Ibid.*, 10 RT 2363.)

c. History of Treatment with Antipsychotic and Antidepressant Medications.

Evidence that a defendant is taking powerful psychotropic medication raises a doubt about his competence. (*United States v. Howard* (9th Cir. 2004) 381 F.3d 873, 880 [defense attorney may have been incompetent for failing to present evidence of effect of prescribed narcotic drug on defendant's competence]; *Moran v. Godinez*, *supra*, 972 F.2d at pp. 265, 268.) Just recently, a panel of the Ninth Circuit reaffirmed that the panoply of drugs the defendant was administered during trial "alone should have raised concerns" about the defendant's competency to stand trial. (*Maxwell v. Roe*, *supra*, 606 F.3d at p. 570, quoting *McMurtrey v. Ryan*, *supra*, 539 F.3d at p. 1125.)

Here, as early as April 1998, following his March 1998, arrest, Ghobrial was prescribed Haldol, an antipsychotic drug. (10 RT 2272-2274.) Numerous other medications were prescribed throughout Ghobrial's pretrial custody, and the latest entry in Ghobrial's jail chart introduced at trial reveals that on August 24, 2001, Ghobrial was taking Seroquel, an anti-psychotic medication, 200 mg at noon and 600 mg at bedtime; Risperdal, another anti-psychotic medication, 4 mg at noon and at bedtime; Paxil, an antidepressant, 30 mg; and Depakote, a mood stabilizer, 500 mg four times a day. (10 RT 2322, 2323, 2326, 2520.) Nabeel Bechara wrote in

Ghobrial's chart that Ghobrial was taking medications that interfered with his memory. (10 RT 2255.) This alone should have raised a doubt in the court's mind as to Ghobrial's ability to communicate with counsel.

d. Relevant Observations of Those in Close Contact with the Defendant and Evidence of Head Trauma.

The trial court heard evidence of Ghobrial's panoply of psychiatric problems: his undisputed and lengthy history of psychosis, previous psychiatric treatment in Egypt, and extremely erratic and irrational behavior from childhood. Ghobrial's father testified regarding his own psychiatric illness and described his son's early head injuries and the family's awareness that Ghobrial was disturbed from a young age. (10 RT 2449-2450, 2456, 2458.) He admitted that he beat Ghobrial "very badly" and, on one occasion, beat him with "metal chains, metal chains similar to the one that you use to restrain dogs in this country." (10 RT 2452-2453.) He explained that the loss of Ghobrial's arm while in the army aggravated Ghobrial's condition. (10 RT 2453.) Ghobrial defecated in the family home, on the roof and in the garage. He would sometimes just stare as if he were lost. (10 RT 2455.) Ghobrial's family took him to psychologists, brain surgeons and nerve specialists. (10 RT 2456-2457.) Ghobrial also received crude electro-shock therapy, and he was placed on different medications, none of which had any positive effect perceptible to his father. (10 RT 2457.)

In addition, Father Athanasius, who housed Ghobrial for approximately six months after he came to California, testified that he felt that Ghobrial was "not sane." (11 RT 2614.)

e. Ghobrial's Previous Irrational and Bizarre Behavior Reflects His High Degree of Mental Instability.

The facts of this case, alone, presented a red flag that appellant Ghobrial was not a man of rational thought or logical reasoning. Ghobrial's offense was brutal and bizarre, yet this highly recognizable one-armed Arabic-speaking Egyptian, made no legitimate attempt to disguise himself or his actions. He told Juan, in front of a complete stranger, Alfonso Serano, that he was going to kill him and "eat [his] pee-pee." (6 RT 1327.) After killing Juan, Ghobrial purchased items to dispose of the body at the Super K-Mart and the Home Depot (6 RT 1345-1347, 1354-1357), and, although he gave false reasons for his purchases, he, if anything, went out of his way to be recognized and remembered. He spent an inordinate amount of time discussing, making, and paying for his purchases, and then he had a motorist drive him to his shed and help unload the items. (See, e.g., 6 RT 1350-1353, 1368.) Moreover, after he severed the body and encased its parts in three different cement blocks, Ghobrial pushed a grocery cart filled with the huge cement blocks down a residential street in full view of everyone. Then, after disposing of the blocks, Ghobrial pushed the cart back to his shed, leaving a literal cement track to his front door. (7 RT 1526.) The prosecutor described following the tracks as akin to following the bread crumbs of Hansel and Gretel. (8 RT 1915.) It is hard to believe that someone who "reasoned" that the best way to dispose of a body was to place pieces of it in cement blocks, then deposit those blocks, oozing blood, on a neighbor's lawn, can be expected to assist in his defense.

f. Opinion of Counsel.

Counsel in this case did not request a competency hearing, but she clearly was aware of Ghobrial's psychiatric problems. She at no point

affirmatively stated her belief in Ghobrial's competency. In fact, virtually the entire penalty phase defense consisted of evidence of Ghobrial's psychosis, and counsel argued that it was unconstitutional to order execution of a mentally ill defendant. (2 CT 582.) (See *Maxwell v. Roe*, *supra*, 606 F.3d at p. 574 [court inappropriately attributed great weight to the fact that Maxwell's counsel did not request a competency hearing where, "although Maxwell's counsel did not formally request a competency hearing, defense counsel clearly expressed concern about Maxwell's competence"].)

Moreover, while counsel's opinion as to competency is unquestionably a factor that should be considered (*Drope v. Missouri*, *supra*, 420 U.S. at p. 177 and fn. 130), counsel's opinion is not determinative. Indeed, the trial court may order a hearing *even if* "counsel informs the court that he or she believes the defendant is mentally competent." (Pen. Code § 1368, subd. (b).) "'Regardless of defense counsel's opinion, a hearing on the issue of defendant's mental competence must be held if the trial judge has declared a section 1368(a) doubt which has not been formally resolved.'" (*People v. Marks* (1988) 45 Cal.3d 1335, 1340 (*Marks* I), quoting George, L.A.Super. Ct.Crim. Trial Judges' Benchbook (Jan.1985 ed.) p. 130, italics omitted.) As the panel observed in *Odle v. Woodford*, *supra*, 238 F.3d at p. 1089, "counsel is not a trained mental health professional and his failure to raise petitioner's competence does not establish that petitioner was competent." In *Odle*, the court held that other evidence in the record, including evidence of head trauma and brain injury followed by psychotic behavior, some of which occurred while Odle was awaiting trial, was sufficient to raise doubt in a reasonable jurist regarding competency to stand trial.

The absence of any statement from defense counsel certainly did not relieve the trial court of its independent duty to initiate competency proceedings in the face of substantial evidence raising an objective, reasonable doubt regarding Ghobrial's competency. (See, e.g., *United States v. John* (7th Cir. 1984) 728 F.2d 953, 957 [substantial evidence raising doubt regarding defendant's competency demanded hearing despite defense counsel's statement that he believed his client was competent]; *People v. Ary*, *supra*, 118 Cal.App.4th at p. 1025 [same]; *Maxwell v. Roe*, *supra*, 606 F.3d at p. 574 [a trial judge has an independent duty to conduct a competency hearing on his own motion].)[29]

3. The Combination of Factors Known to the Trial Court in this Case Raised a Bona Fide Doubt That Ghobrial Was Not Able to Consult His Lawyer with a Reasonable Degree of Rational Understanding.

Here, as in *Saddler v. United States*, there was a "flurry of warning flags" sufficient to alert the trial court of the need to inquire into Ghobrial's competence. (See *Saddler v. United States* (2d Cir. 1976) 531 F.2d 83, 87 [evidence sufficient to raise doubt as to competency where the trial court was aware of appellant's history of mental illness, including repeated

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[29]It is true that the trial court also had an opportunity to observe Ghobrial during trial. The court, however, had little direct interaction with Ghobrial. Ghobrial speaks very little English and used interpreters during trial. He did not testify at any point during the case or speak more than to agree to waive time or his presence at various colloquies between the court and counsel. Ghobrial may not have been disruptive, but a court must beware of being "lulled into believing that [defendant] is competent by the fact that he does not disrupt the proceedings." "[T]his passivity itself may mask an incompetence to meaningfully participate in the process." (*Odle v. Woodford*, *supra*, 238 F.3d at p. 1089.)

hospitalizations, attempted suicide, present incoherence such that counsel was unable to have a rational conversation with him].) Indeed, the facts of this case are no less compelling that those in the seminal cases of *Pate* and *Drope*.

In *Pate*, the "uncontradicted testimony" of four witnesses established that the defendant, Robinson, had a long history of "disturbed behavior" and severe mental illness, that his irrational episodes became more serious with time, that the shooting of his common law wife at her place of work in front of numerous witnesses was part of a continuous course of irrational episodes, and that Robinson was still insane at the time of trial. (383 U.S. at pp. 378-384.) Robinson's mother, testified that a brick dropped on his head when he was seven or eight years old. (*Id.* at p. 378.) The injury made him cross-eyed, gave him headaches, and resulted in noticeably erratic behavior. (*Id.* at pp. 378-379.) A witness testified that on one occasion, Robinson, foaming at the mouth, "lost his mind," thinking someone was about to shoot him or come after him, and was hospitalized. (*Id.* at p. 379.) The medical records from his hospitalization indicated that he heard voices and saw things, and suggested the possibility that he was schizophrenic. (*Id.* at p. 380.) Other witnesses testified to the "daze" Robinson would be in from time to time. (*Id.* at pp. 380-381.) All four defense witnesses expressed the opinion that Robinson was insane. (*Id.* at p. 383.) The Supreme Court concluded that this evidence entitled Robinson to a hearing on the issue of his competence to stand trial. (*Id.* at p. 385.) In so doing, the Court rejected the state court's conclusion that evidence of "colloquies" between Robinson and the trial judge established that Robinson was mentally alert and understood the proceedings and that a competency hearing was unnecessary. According to the Court, such

"reasoning offers no justification for ignoring the uncontradicted testimony of Robinson's history of pronounced irrational behavior." (*Id.* at pp. 385-386.)

In *Drope*, the defendant Drope's wife testified at trial that he had participated with four other men in forcibly raping her. (420 U.S. at pp.165-166.) She testified that she had initially told Drope's attorney that she believed Drope needed psychiatric care and related Drope's behavior of rolling down the stairs when he did not get his way. (*Ibid.*) After talking with Drope's psychiatrist, however, she was not convinced that Drope was actually sick. (*Ibid.*) Later in the trial, Drope did not appear in court because he had shot himself in the abdomen earlier that morning. (*Id.* at pp. 166-167.) The Supreme Court determined that this evidence created a sufficient doubt of Drope's competence and required further inquiry as to the question. (*Id.* at p. 180.)[30]

It is noteworthy that the petitioner in *Drope*, unlike Ghobrial here, "did not have 'any delusions, illusions, hallucinations . . .,' was 'well oriented in all spheres,' and 'was able, without trouble, to answer questions testing judgment.'" (*Drope*, *supra*, 420 U.S. at p. 175.) The case was

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[30]See also *Odle v. Woodford*, *supra*, 238 F.3d at p. 1087 (granting writ where reasonable jurist would have had good faith doubt of defendant's competency in light of defendant's history of massive lobectomy, followed by severe personality change and series of psychiatric hospitalizations; suicide attempt while in jail awaiting trial; and expert testimony describing defendant's extensive brain damage); *Torres v. Prunty* (9th Cir.2000) 223 F.3d 1103, 1105 (concluding that district court erred by not holding competency hearing where court-appointed psychiatrist had diagnosed the petitioner as having a severe delusional (paranoid) disorder, testing indicated that the petitioner had brain damage resulting from head trauma, and petitioner had disruptive outbursts in court).

remanded for a competency hearing, in part, because there had been contrary data that the "petitioner, although cooperative in the examination, 'had difficulty in participating well,' 'had a difficult time relating,' and that he 'was markedly circumstantial and irrelevant in his speech.' . . ." (*Id.* at pp. 175-176.)

In light of Ghobrial's lengthy history of acute psychosis and psychiatric treatment and substantial evidence that Ghobrial could not rationally understand the proceedings or assist in the preparation of his defense, the trial court was obligated to take the next step, by holding a competency hearing.

B. The Court's Failure to Hold a Competency Hearing Requires Reversal.

Where, as here, a defendant shows that the trial court failed to hold a competency hearing in the face of substantial evidence raising a doubt as to his competency to stand trial, the ensuing due process violation demands reversal per se of the judgment. (See, e.g., *People v. Marks*, *supra*, 45 Cal.3d at p.1344 [reversing the judgment, noting, "[t]hat the hearing was not held is dispositive"]; *People v. Young*, *supra*, 34 Cal.4th at pp. 1216-1217 [failure to hold hearing "rendered the subsequent trial proceedings void because the court had been divested of jurisdiction to proceed"]; *People v. Pennington*, *supra*, 66 Cal.2d at p. 521 [rejecting the suggestion that "the error be cured by a retrospective determination of defendant's mental competence during his trial"]; see also *People v. Ary* (2011) 51 Cal.4th 510, 521-522 (conc. opn. of Werdegar, J.).)

As the United States Supreme Court has explained, a limited remand for a retrospective determination of the defendant's competency to stand trial years earlier would generally be futile and inappropriate because the

"jury would not be able to observe the subject of their inquiry [i.e., the defendant at the time of trial], and expert witnesses would have to testify solely from information contained in the printed record. That [the defendant's] hearing would be held . . . years after the fact aggravates these difficulties." (*Pate v. Robinson, supra,* 383 U.S. at p. 387 [reversing outright, rather than remanding, six years after the fact]; accord *Dusky v. United States,* 362 U.S. at p. 403 [observing the "difficulties of retrospectively determining the petitioner's competency as of more than a year ago," Court reversed outright for failure to hold competency hearing]; *Drope v. Missouri, supra*, 420 U.S. at p. 183 [given "inherent difficulties of . . . a *nunc pro tunc* determination [of competency] under the most favorable circumstance," retrospective determination would be inadequate when seven years had elapsed since trial].)

For all the foregoing reasons, the trial court's failure to suspend proceedings and hold a competency hearing requires reversal of the conviction and death judgment.

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II.

SUBJECTING A SEVERELY MENTALLY ILL DEFENDANT TO A SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS INTERNATIONAL LAW.

A. Introduction and Proceedings Below.

As explained more fully in the preceding section, the uncontradicted evidence presented at trial established that appellant Ghobrial suffers from a severe mental illness.[31] The trial court concurred (11 RT 2839 ["[w]e all

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[31]Although the terms serious mental illness and severe mental illness are often used interchangeably, some authorities have identified a distinction:

> Serious mental illness [SMI] is a term defined by Federal regulations that generally applies to mental disorders that interfere with some area of social functioning. About half of those with SMI . . . [are] identified as being even more seriously affected, that is, by having "severe and persistent" mental illness [SPMI]. [citations omitted]. This category includes schizophrenia, bipolar disorder, other severe forms of depression, panic disorder, and obsessive-compulsive disorder.

(Mental Health: A Report of the Surgeon General [<http://www.surgeongeneral.gov/library/mentalhealth/chapter2/sec2_1.html> (as of May 3, 2011)].)

The National Alliance on Mental Illness defines serious mental illnesses, in terms similar to severe and persistent mental illness described above, as follows:

> major depression, schizophrenia, bipolar disorder, obsessive compulsive disorder (OCD), panic disorder, post traumatic stress disorder (PTSD) and borderline personality disorder.

agree that Mr. Ghobrial has a mental problem, mental illness, if it is schizophrenia or schizoaffective; that was established"]), as did the prosecutor (11 RT 2835 ["on my behalf we never contested that he had suffered from schizophrenia"].) And, accordingly, Ghobrial has argued that the symptoms of this severe mental disorder rendered him incompetent to stand trial. (See Argument I, *ante*.) However, even if this Court concludes that Ghobrial was competent to stand trial, it must nonetheless conclude that his severe mental disorder renders him ineligible for the death penalty.

Trial counsel made this argument below. On April 4, 2002, the defense filed a motion to modify the death verdict pursuant to Penal Code section 190.4, subdivision (4)(e), on the ground, inter alia, that it is unconstitutional to order the execution of a mentally ill defendant. (2 CT 582.) The motion was heard and denied prior to sentencing on April 10, 2002. (3 CT 640; 11 RT 2826.)

The trial court erred in denying this motion. Since Ghobrial's sentencing, the United States Supreme Court has ruled that evolving standards of decency could no longer tolerate the imposition of capital

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(<http://www.deathpenaltyinfo.org/mental-illness-and-death-penalty> (as of April 5, 2011).)

Ghobrial's condition clearly falls within any definition. He was diagnosed with schizoaffective disorder, a recognized Axis I mental disorder under the Diagnostic and Statistical Manual of Mental Disorders (Text Revision 2000) (hereinafter "DSM-IV-TV"), specifically, DSM 295.70. Its symptoms include delusions and hallucinations, and it significantly impairs a person's ability to interpret reality and accurately perceive what is going on around him or her. (*Ibid.*) In addition, the Mental Health Parity Act, codified at section 1374.72 of the Health and Safety Code, specifically defines "severe mental illnesses" to include schizoaffective disorder. (H & S Code, § 1374.72, subd. (d)(2).)

punishment on those with mental retardation. (*Atkins v. Virginia* (2002) 536 U.S. 304.) The Court held that the execution of mentally retarded persons violates the Eighth Amendment because those with mental retardation are significantly less culpable and deterable than others who commit capital murder. (*Id.* at p. 306.) Reasoning that their execution does not "measurably contribute [to one or both of the] goals" (*id.* at p. 319, quoting *Enmund v. Florida*, *supra*, 458 U.S. at p. 798) of "retribution an deterrence of capital crimes by prospective offenders" (*ibid.*, quoting *Gregg v. Georgia*, *supra*, 428 U.S. at p. 183), the Court found that "the imposition of the death penalty on a mentally retarded person . . . 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Ibid.*, quoting *Enmund*, *supra*, 458 U.S. at p. 798).

In *Roper v. Simmons* (2005) 543 U.S. 551, the Court extended this approach to juveniles under the age of 18 at the time of the offense. The Court found that juveniles similarly lack sufficient culpability and deterability to permit execution consistent with the Eighth Amendment. (*Id.* at p. 578.) The reduced culpability of juveniles, in the Court's view, renders them less deserving of retribution, and their immaturity, lack of future perspective, and reduced impulse control, make them less subject to deterrence. (*Id.* at p. 571.) These deficiencies, comparable to those experienced by offenders with mental retardation, support the conclusion that the juvenile death penalty lacks a sufficient relationship to the purposes of capital punishment to allow its imposition consistent with the Eighth Amendment. (*Ibid.*)

Following these decision, scholars have argued that "there may not be any plausible reasons for differentiating between the execution of people

with mental illness and execution of people with mental retardation or juveniles." (See, e.g., Slobogin, *What Atkins Could Mean For People With Mental Illness* (2003) 33 N.M.L. Review 293, 293.) "[I]f anything, the delusions, command hallucinations, and disoriented thought process[es] of those who are mentally ill represent greater dysfunction than that experienced by most 'mildly' retarded individuals (the only retarded people likely to commit crime)." (Slobogin, *Mental Illness and the Death Penalty* (2000) 1 Cal. Crim. L. Rev. 3, 12.)[32]

In both *Atkins* and *Roper*, the Court held that the cognitive and neurobehavioral limitations that characterize those suffering from mental retardation and those under 18 reduce the level of their culpability to a sufficient degree to make the imposition of a death sentence a violation of the Eighth Amendment. The reasoning of *Atkins* and *Roper* applies equally to Ghobrial in light of his identical impairments and limitations.

Capital punishment for individuals, such as Ghobrial, who suffered from a severe mental disorder at the time of the offense, is cruel and unusual under the Eighth Amendment of the United States Constitution for the same reasons that capital punishment for juveniles and individuals

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[32]See also Rapaport, *Straight is the Gate: Capital Clemency in the United States from Gregg to Atkins* (Spring 2003) 33 N.M.L. Rev. 349, 367-368 ["The *Atkins* decision itself provides ample jurisprudential justification, mutatis mutandis, for the exclusion of juveniles and the mentally ill as well as the mentally retarded from capital prosecution"]; Mossman, *Atkins v. Virginia, A Psychiatric Can of Worms* (Spring 2003) 33 N.M.L. Rev. 255, 289 ["Increased knowledge about the biological underpinnings of mental illness may well help convince courts that sufferers of severe mental disorders deserve the same constitutional protections that *Atkins* confers upon defendant's with mental retardation"]; Blume and Johnson, *Killing the Non-Willing: Atkins, the Volitionally Incapacitated, and the Death Penalty* (Fall, 2003) 55 S.C.L. Rev. 93.

suffering from mental retardation is cruel and unusual. Ghobrial's death judgment must be reversed.

B. The Two-Part Analysis for Disproportionality Challenges to the Death Penalty.

"Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (*Roper*, *supra*, 543 U.S. at p. 568, citing *Atkins, supra*, 536 U.S. at p. 319.) A capital sentence is violative of the Eighth Amendment when it is "grossly out of proportion to the severity of the crime" (*Coker v. Georgia* (1977) 433 U.S. 584, 592; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 833, (plurality opinion); *Tison v. Arizona* (1987) 481 U.S. 137; *Enmund v. Florida* (1982) 458 U.S. 782, 798-801) or "so totally without penological justification that it results in the gratuitous infliction of suffering" (*Gregg v. Georgia* (1976) 428 U.S. 153, 183).

The Eighth Amendment guarantee against cruel and unusual punishment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." (*Weems v. United States* (1910) 217 U.S. 349, 378.) The guarantee "must its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101 (plur. opn.); see also *Roper*, *supra*, 543 U.S. at p. 587 (conc. opn. of Stevens, J.).) As the High Court recently stated, "[] the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." (*Kennedy v. Louisiana* (2008) 554 U.S. 407, 419, quoting *Furman v. Georgia* (1972) 408 U.S. 238 (dis. opn. of Burger, C. J.).)

In *Gregg v. Georgia*, the Supreme Court adopted a two-part analysis to determine whether the death penalty is disproportionate to a particular crime or a particular category of defendants and thus violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. (*Gregg*, *supra*, 428 U.S. at pp 179-187.) First, the Court the ascertains "contemporary standards of decency" with respect to criminal sanctions; it then exercises its own independent judgment about whether the challenged penalty "comports with the basic concept of human dignity at the core of the Amendment." (*Id.* at pp. 173-174, 181-182.) The Court has identified retribution and deterrence as the two principal social functions that the death penalty purports to serve (*id.* at p. 183), and in *Enmund v. Florida* the Court held that "unless the death penalty when applied to those in [the defendant's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Enmund*, *supra*, 458 U.S. at p. 798, quoting *Coker v. Georgia, supra*, 433 U.S. at p. 592.)

In *Gregg*, the Court ruled than an assessment of contemporary values concerning the infliction of a challenged sanction requires the Court to look to "objective indicia that reflect the public attitude toward a given sanction." (*Gregg*, *supra*, 428 U.S. at p. 173.)[33] The Court identified the most reliable objective evidence of contemporary values as legislative judgment and jury behavior. (*Id.* at pp. 175-176 & 181-182.) In some

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[33]At the same time, the Court stated "our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" (*Gregg*, *supra*, 428 U.S. at p. 173, quoting *Trop v. Dulles*, *supra*, 356 U.S., at 100 (plurality opinion).)

cases, these have been the only two considerations taken into account by the Court. (See, e.g., *Penry v. Lynaugh* (1989) 492 U.S. 304, 334-335 [Court looks to legislation and not public opinion polls and opinion of AAMR presented by petitioner to determine if there was a national consensus against executing people with mental retardation]; *Stanford v. Kentucky* (2989) 492 U.S. 361, 369, fn. 1 [refusing to consider the "practices of other nations" to satisfy the first Eighth Amendment prerequisite] and *id* at p. 377 [expressly refusing to consider "other indicia [of consensus], including public opinion polls, the views of interest groups, and the positions adopted by various professional associations" as "uncertain foundations" for constitutional law].)

In other and more recent cases, however, the Supreme Court has taken a more flexible approach to the first prong of its two-part analysis. (See, e.g., *Atkins, supra*, 536 U.S. at p. 315, and *Roper*, *supra*, 543 U.S. at p. 566 [emphasizing that it is the consistency of the direction of legislative change rather than the number of states that is significant in assessing contemporary values].) The Court has also been willing to consider evidence other than legislation and jury verdicts as reflecting on contemporary standards of decency. (See, e.g. *Coker v. Georgia*, *supra*, 433 U.S. at p. 596, fn. 10 [noting that only three of the 60 "major nations of the world" retained the death penalty for rape where death did not result]; *Enmund v. Florida*, *supra*, 458 U.S. at p. 796, fn. 22 [noting that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at pp. 830–831, and n. 31 (plurality opinion) [noting the abolition of the juvenile death penalty "by other nations that share our Anglo-American

heritage, and by the leading members of the Western European community"]; *Graham*, *supra*, 130 S.Ct. at p. 2033 [acknowledging the relevance of judgments of other nations and the international community[34]]; *Atkins*, *supra*, 536 U.S. at p. 316, fn. 21 [noting that "this legislative judgment reflects a much broader social and professional consensus" and citing positions of organizations like the APA and AAMR and diverse religious communities as well as polling data]; *Roper*, *supra*, 543 U.S. at p. 575 [noting as instructive for interpreting the Eighth Amendment's prohibition of "cruel and unusual punishments" that the United States was "the only country in the world that continues to give official sanction to the juvenile death penalty"].)

There currently is no legislative action or jury behavior reflecting a consensus against applying the death penalty for those with severe mental illness. Nonetheless, the United States Supreme Court's evolving and expanding interpretation of prong one of its two-part analysis permits this Court to find a national consensus against it based on other objective indicia of evolving societal norms on this issue. Moreover, even if this Court finds no national consensus against applying the death penalty for those with severe mental illness, this Court should proceed to step two of *Gregg*'s two-part analysis and employ its independent judgment to determine that capital punishment for Mr. Ghobrial, who suffers from a severe mental illness, is a

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[34]The Court stated: "The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But '"[t]he climate of international opinion concerning the acceptability of a particular punishment"' is also '"not irrelevant."' [Citation.] The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual." (130 S.Ct. at p. 2033.)

disproportionate penalty and hence cruel and unusual in violation of the Eighth Amendment.

1. Objective Indicia of Evolving Standards Against Execution of the Mentally Ill.

There is substantial agreement amongst professional, religious and world communities that defendants with severe mental disorders should be excluded from capital punishment, which indicates "a much broader social and professional consensus" on the issue. (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21.)

Justices presiding over capital cases have cast doubt over the appropriateness of subjecting people with severe mental disorders to the death penalty. In *State v. Scott* (Ohio 2001) 748 N.E.2d 11, Justice Pfeifer of the Ohio Supreme Court dissented from the majority's opinion, which had affirmed a death sentence for a man with schizophrenia. Arguing that evolving standards of decency prohibited the man's execution, Justice Pfeifer wrote:

> I cannot get past one simple irrefutable fact: he has chronic, undifferentiated schizophrenia, a severe mental illness. Mental illness is a medical disease. Every year we learn more about it and the way it manifests itself in the mind of the sufferer. At this time, we do not and cannot know what is going on in the mind of a person with mental illness. As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so.

(748 N.E.2d at p. 20 (dis. opn. of Pfeifer, J.).)

Another justice, dissenting in *Corcoran v. State* (Ind. 2002) 774 N.E.2d 495, cited *Atkins* to propose that the death penalty should not be imposed on an individual with severe mental illness. Acknowledging that the defendant who received a death sentence did not have mental

retardation, Justice Rucker of the Indiana Supreme Court opined that "the underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency." (*Id.* at p. 502 (dis. opn. of Rucker, J.).) Still another judge, Justice Zazzali of the New Jersey Supreme Court in his concurring opinion in *State v. Nelson*, (N.J. 2002) 803 A.2d 1, relied heavily on *Atkins* when he contended that the defendant's "irrationalities" lessened her culpability. Justice Zazzali reasoned,

> if the culpability of the average murderer is insufficient to invoke the death penalty as our most extreme sanction, then the lesser culpability of [defendant] Nelson, given her history of mental illness and its connection to her crimes, "surely does not merit that form of retribution."

(803 A.2d at p. 47 (dis. opn. of Zazzali, J.), quoting *Godfrey v. Georgia* (1980) 446 U.S. 420, 433.)

In her concurring opinion in *State v. Ketterer* (Ohio 2006) 855 N.E.2d 48, Justice Evelyn Lundberg Stratton of the Ohio Supreme Court called upon the state legislature to exempt defendants with serious mental illness from the death penalty. She noted in her opinion that she was not questioning Ketterer's guilt, nor whether he was competent to stand trial, nor even his possible mental retardation, all of which are covered by other aspects of the law. She believed the defendant's mental illness should merit an exemption from the death penalty:

> Ketterer is a person with a serious mental illness. His family also has had a long history of mental illness and suicide attempts. Ketterer himself was hospitalized repeatedly and attempted suicide several times. His mental illness was fueled by drug and alcohol abuse. Two psychologists testified that Ketterer had a serious mental illness, known as bipolar disorder, which makes it difficult for him to control impulses

> normally. Not even the state disputed that he was seriously mentally ill. But the state argued that Ketterer could have controlled his behavior.

(*State v. Ketterer*, *supra*, 111 Ohio St.3d at p. 82 (conc. opn. of Stratton, J.) (internal citations omitted).)

Justice Stratton went on to observe that,

> Deterrence is of little value as a rationale for executing offenders with severe mental illness when they have diminished impulse control and planning abilities. As for retribution, capital punishment still enjoys wide public support among Americans, but a Gallup Poll conducted in October 2003 found that while almost two thirds of Americans surveyed support the death penalty, 75 percent of those surveyed in 2002 opposed executing the mentally ill. Society's discomfort with executing the severely mentally ill among us is further evidenced by the American Bar Association's formation of a task force in 2003 to consider mental disability and the death penalty. After studying the issue, the task force made recommendations that were adopted by the ABA House of Delegates in August 2006.
> . . .

(*State v. Ketterer supra*, 111 Ohio St.3d at p. 85 (conc. opn. of Stratton, J.) (internal citations omitted).)

In addition, mental health organizations and world communities agree that, in criminal sentencing proceedings, offenders with severe mental disorders should be evaluated similarly to offenders with mental retardation. Organizations such as the National Alliance for the Mentally Ill (NAMI) and Mental Health America (MHA) have taken an official stance against capital punishment imposed on persons with severe mental illness. (See MHA Position Statement 54, approved June 11, 2006;[35] National Alliance

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[35] <http://www.mentalhealthamerica.net/go/position-statements/54> (as of April 5, 2011).

for the Mentally Ill, Public Policy No.10.9 ["NAMI opposes the death penalty for persons with serious mental illnesses"].[36])

On August 8, 2006, the American Bar Association passed Resolution 122A, endorsing an exemption of those with severe mental illness from the death penalty.[37] An almost identical resolution has been endorsed by the American Psychiatric Association, the American Psychological Association, and the National Alliance for the Mentally Ill.[38]

World communities have also expressed strong opposition to the execution of people with severe mental disorders. The European Union (EU), whose brief the Court cited in *Atkins* when noting that the world community "overwhelmingly disapproves" of capital punishment for individuals with mental retardation (*Atkins, supra*, 536 U.S. at p. 316. fn. 21), has specifically spoken out against inflicting the death penalty on any

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[36]< http://www.nami.org/Template.cfm?Section=NAMI_Policy_Platform&Template=/ContentManagement/ContentDisplay.cfm&ContentID=41302> (as of April 5, 2011).

[37]The resolution provides:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

[38]See <www.deathpenaltyinfo.org/mental-illness-and-death-penalty> (as of April 5, 2011).

person with a serious mental illness. An EU Statement on Death Penalty in the USA provides:

> The EU strongly believes that the execution of persons suffering from a mental disorder is contrary to accepted human rights norms including, most recently, Resolution 2004/94 adopted at the recent session of the UN Commission on Human Rights. This resolution specifically urges all States still maintaining the death penalty "not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person."

(<www.eurunion.org/legislat/DeathPenalty/OSCEPatterson.htm> (as of April 5, 2011).)

Additionally, as Justice Stratton noted in her concurring opinion in *State v. Ketterer*, *supra*, 111 Ohio St.3d at p. 82, a 2002 Gallup Poll analysis found that 75% of Americans oppose applying the death penalty to the mentally ill, with only 19% in support. (Gallup News Service, May 20, 2002.)[39] The polling data suggests that a significant segment of the United States disapproves of executing the mentally ill, a population that would encompass at the very least those persons with severe mental disorders. These national polls, combined court opinions, and the views of world communities, reveal an overwhelming consensus opposing imposition of capital punishment on defendants with severe mental disorders.

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[39]<http://www.gallup.com/poll/6031/slim-majority-americans-say-death-penalty-applied-fairly.aspx> (as of March 28, 2011).)

2. Regardless of Objective Consensus That the Death Penalty Is Inappropriate for the Severely Mentally Ill, this Court should Independently Determine Whether the Death Penalty for Such Individuals Satisfies the Eighth Amendment.

In *Graham v. Florida*, the United States Supreme Court applied the capital case analysis for categorical claims in death penalty cases to Graham's hybrid claim – a categorical (juvenile) challenge to a term-of-years sentence, life without the possibility of parole, for certain types of crimes (non-homicide). There, the majority acknowledged that "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (*Graham*, *supra*, 130 S.Ct. at p. 2023, internal citations omitted.) But when the State argued that the numbers did not add up to a national consensus against the challenged practice, the Court stated, "This argument is incomplete and unavailing. 'There are measures of consensus other than legislation.'" (*Ibid.*, internal citation omitted.) The Court moved to the second prong of the *Gregg* two-part analysis, minimizing the first prong while emphasizing the second:

> Community consensus, while "entitled to great weight," is not itself determinative of whether a punishment is cruel and unusual. [Citation.] In accordance with the constitutional design, "the task of interpreting the Eighth Amendment remains our responsibility." [Citation.] The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. [Citations.] In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals. [Citations.]

(*Graham*, *supra*, 130 S.Ct. at p. 2026.)

As Justice Thomas observed in his dissent, the majority "openly claims the power not only to approve or disapprove of democratic choices

in penal policy based on evidence of how society's standards have evolved, but also on the basis of the Court's 'independent' perception of how those standards should evolve, which depends on what the Court concedes is necessarily ... a moral judgment regarding the propriety of a given punishment in today's society." (*Graham*, *supra*, 130 S.Ct. at p. 2046 (dis. opn. of Thomas, J.), internal quotes and citations omitted.)

Atkins, *Roper* and *Graham* have expanded the second prong of the *Gregg* proportionality analysis in capital cases such that, whatever the evidence of a national consensus against the challenged punishment, it remains the Court's responsibility to determine whether that punishment offends the notion of proportionate punishment rooted in the Eighth Amendment. When the penalty harshly punishes a category of people whose moral culpability is diminished by virtue of what defines their category without a further legitimate penological purpose, that penalty violated the Cruel and Unusual Punishments Clause.[40] For all these

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[40]Several of the justices have recognized the High Court's trend toward reliance on its own independent judgment on the acceptability of the death penalty under the Eighth Amendment. For example, in his dissenting opinion in *Atkins*, Justice Scalia labeled the majority's independent proportionality analysis as "the genuinely operative portion of the opinion." (*Id.* at p. 349 (dis. opn. of Scalia, C.J.); see also Justice O'Connor's dissent in *Roper v. Simmons, supra*, 543 U.S. 551 [*Atkins* did not rest upon the Court's "tentative conclusion" concerning an emerging national consensus; "the Court's independent moral judgment was dispositive" and "played a decisive role in persuading the Court that the practice was inconsistent with the Eighth Amendment"] (*Id.* at p. 592, 598 (dis. opn. of O'Connor, J.).)

In *Kennedy v. Louisiana*, the four dissenters observed that, in the view of the majority, the Court's independent judgment is dispositive, even in the absence of objective indicia of evolving standards of decency. Justice Alito, dissenting on behalf of himself, Chief Justice Roberts, and

reasons, this Court should consider whether severe mental illness at the time of the offense significantly diminishes Ghobrial's blameworthiness and amenability to deterrence in ways not unlike mental retardation and juvenile status, and therefore death is a disproportionate penalty for him.

3. This Court Should Conclude that the Death Penalty Is a Disproportionate Punishment, and Hence Cruel and Unusual, for Those Suffering from a Severe Mental Illness.

In Argument I, *ante*, Ghobrial contends that he was incompetent to stand trial. There, the question is whether his mental illness prevented him from understanding the nature of the proceedings or assisting in his defense. (See *Dusky v. United States*, *supra*, 362 U.S. 402.) The instant Eighth Amendment inquiry focuses on the extent to which Ghobrial's mental illness diminishes his culpability and deterability. The severe mental illness from which Ghobrial suffers eliminates the requisite relationship between

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Justices Scalia and Thomas, lamented that the majority "is willing to block the potential emergence of a national consensus in favor of permitting the death penalty for child rape because, *in the end, what matters is the Court's own judgment regarding the acceptability of the death penalty*." (554 U.S. at p. 461 (dis. opn. of Alito, J.), italics added, internal quotations omitted.)

Justice Scalia also recognized that the dispositive element in the Court's decision was its own independent judgment. In voting against reconsideration, he stated:

> the views of the American people on the death penalty for child rape were, to tell the truth, irrelevant to the majority's decision in this case. . . . [T]here is no reason to believe that absence of a national consensus would provoke second thoughts.

(*Kennedy v. Louisiana* (2008) 129 S.Ct. 1, 3, statement of Scalia, J., joined by Roberts, C.J.)

the punishment of death and the goals of retribution and deterrence.

In *Panetti v. Quarterman* (2007) 551 U.S. 930, the Court addressed the standard for competency to be executed and shed some light on when severe mental illness may deprive an offender of sufficient culpability and deterability to make capital punishment a disproportionate penalty under the Eighth Amendment. In *Panetti*, the Court ruled that it is "error to derive from *Ford* [*v. Wainwright* (1986) 477 U.S. 399] a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted." (*Id.* at p. 960.) "Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." (*Ibid.*)

In *Panetti*, the Court ruled that execution of a severely mentally ill prisoner violates the Eighth Amendment for several reasons, including that it "serves no retributive purpose." (551 U.S. at p. 958, citing *Ford v. Wainwright*, *supra*, 477 U.S. at p. 408.) In other words, "the objective of community vindication" by execution of a condemned prisoner whose "mental state is so distorted by a mental illness" that he is prevented from recognizing the severity of his offense is "called in question" since "his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole." (*Id.* at pp. 958-959.) Thus, the *Panetti* Court concluded that a prisoner's "awareness of the State's rationale for an execution is not the same as a rational understanding of it," and that it was error for the lower court to have foreclosed inquiry into whether the prisoner suffered from a severe mental illness "that is the source of gross delusions preventing him from

comprehending the meaning and purpose of the punishment to which he has been sentenced." (*Id.* at pp. 959-960.) "Gross delusions stemming from severe mental disorder," the court observed, "may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." (*Id.* at p. 960.)

The *Panetti* Court's language suggests that when severe mental illness produces gross delusions or other cognitive effects, significantly distorting the offender's understanding and appreciation of his conduct and of its wrongfulness, capital punishment will serve no retributivist purpose, and therefore would be cruel and unusual. The Court's statements concerning the impairing effect of mental illness that might render a prisoner incompetent for execution emphasize serious cognitive impairment substantially interfering with the individual's understanding and rationality. By stressing gross delusions that significantly impair comprehension, the *Panetti* Court seemed to limit its standard to major mental illnesses such as "psychoses."[41] Appellant Ghobrial has been diagnosed as suffering from schizoaffective disorder, a mental illness that clearly falls within this label.

Ghobrial's disorder is associated with delusions, hallucinations,

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[41]Psychosis has been defined as "a major mental disorder of organic or emotional origin in which a person' s ability to think, respond emotionally, remember, communicate, interpret reality, and behave appropriately is sufficiently impaired so as to interfere grossly with the capacity to meet the ordinary demands of life. Often characterized by regressive behavior, inappropriate mood, diminished impulse control, and such abnormal mental content as delusions and hallucinations." (Am. Psychiatric Ass'n, American Psychiatric Glossary 161 (8th ed. 2003); see also DSM-IV-TR at p. 297 (most definitions of psychosis involve "delusions or prominent hallucinations"). This term is no longer used as a formal diagnostic category, but remains in use.

extremely disorganized thinking or very significant disruption of consciousness, memory and perception of the environment. (American Bar Association Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, (2006) 30 Mental & Physical Disability L. Rep. 668, 670; see also *Indiana v. Edwards* (2008) 554 U.S. 164, 176 [Common symptoms of severe mental illness include "[d]isorganized thinking" and "deficits in sustaining attention and concentration"], quoting the Brief for APA et al. as Amici Curiae 26 [2008 WL 405546].)

Offenders like Ghobrial who suffer from these conditions and experience these effects at the time of the offense, even if not satisfying the standard for legal insanity, have significantly diminished responsibility for their conduct. They experience such distortions of reality that their ability to appreciate the wrongfulness of their conduct or to understand its consequences is significantly reduced. Similarly, their symptomatology may create such gross irrationality that it significantly impairs their judgment at the time of the crime. In addition, people suffering from these conditions may experience such cognitive impairment or impairment of mood that, even if they understand the nature and consequences of their acts and appreciate their wrongfulness, they nonetheless are substantially unable to control their conduct.

In *Atkins*, the Court concluded that impairments common to those with mental retardation left them with "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reason, to control impulses, and to understand the reactions of others." (*Atkins*, *supra*, 536 U.S. at p. 318.) These are the very impairments from which Ghobrial suffers because of his

severe mental illness. In both *Atkins* and *Roper*, it was the existence of impairments, not their causes, that the Court concluded diminished criminal culpability. The presence of those same deficits in Ghobrial diminishes his culpability in precisely the same way.

The Court in *Atkins* recognized that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. . . ." (536 U.S. at p. 319. Accord *Roper*, *supra*, 543 U.S. at p. 571 ["Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished"].) The functional impairments caused by severe mental illnesses similarly diminish culpability and exempt offenders suffering from such illnesses from "the most extreme sanction available to the State."

C. Conclusion.

Those with severe mental illness that significantly limited their ability to understand the wrongfulness of their conduct, or to control it, like those with mental retardation or who were juveniles at the time of the offense, have diminished responsibility for their actions. All merit punishment, but not the extreme penalty. Accordingly, for all the foregoing reasons, the death penalty is a disproportionate punishment for those suffering from a severe mental illness. Mr. Ghobrial's death judgment must be reversed.

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III.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FIRST DEGREE MURDER CONVICTION AND THE SPECIAL CIRCUMSTANCE FINDING OF LEWD ACT ON A CHILD.

A. Introduction and Factual Background.

Appellant was charged with murder and the special circumstance allegation of murder committed while engaged in a lewd and lascivious act upon a child under 14. (1 CT 87.) The prosecutor argued to the jurors that they could choose between two theories of first degree murder: premeditated and deliberate murder and felony murder based on the theory that the killing was committed during the course of the felony of lewd and lascivious conduct. (8 RT 1900-1907.) The jury was instructed on the murder theories with CALJIC Nos. 8.20, 8.21 and 8.24. (6 CT 1353-1355; 71 RT 4697-4699.) As shown below, there was insufficient evidence to sustain the first degree murder conviction based on theories of premeditated and deliberate murder and felony murder, and that there was insufficient evidence of the special circumstance of lewd conduct with a child.

The Due Process Clause of the Fourteenth Amendment and article 1, section 15, of the California Constitution require that a conviction be supported by substantial evidence. (*People v. Holt* (1997) 15 Cal.4th 618, 667.) The Eighth Amendment demands for heightened reliability in a capital case also require that this Court carefully review the evidence to ensure that the death sentence is not imposed on the basis of speculative evidence. (See *Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 [8th Amendment "mandates heightened scrutiny in the review of any colorable claim of error"]; *Flowers v. State* (Miss. 2000) 773 So.2d 309, 317 [heightened scrutiny requires all bonafide doubts to be resolved in

favor of the accused].)

The United States Supreme Court in *Jackson v. Virginia* (1979) 443 U.S. 307, announced the constitutionally-mandated rule for the review of the sufficiency of the evidence supporting a state criminal conviction. Rejecting the previous "no evidence" rule of *Thompson v. Louisville* (1960) 362 U.S. 199, the Court held "instead, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found essential elements of the crime beyond a reasonable doubt." (*Jackson*, *supra*, 443 U.S. at p. 319, original italics.) Any such doubt must be reasonable only. It need not be "grave" or "substantial." (*Cage v. Louisiana* (1990) 498 U.S. 39 (per curiam), overruled on another ground, *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.)

This Court has applied a virtually identical state standard to a sufficiency of the evidence challenge. On appeal, this Court must "review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Stanley* (1995) 10 Cal.4th 764, 792; see also *People v. Holt*, *supra*, 15 Cal.4th at p. 667.) The standard of review is the same, even where, as here, the evidence presented at trial is primarily circumstantial. (See, e.g., *People v. Towler* (1982) 31 Cal.3d 105, 118-119.)

As this Court has repeatedly held, it is the exclusive province of the fact finder to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. If the verdict is supported by substantial evidence, the court must accord due deference to the trier of

fact and not substitute its evaluation of a witness's credibility for that of the fact finder. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson* (1980) 26 Cal. 3d 557, 578.) If, however, the evidence in support of the convictions is not "of ponderable legal significance . . . reasonable in nature, credible and of solid value," (*Johnson, supra*, 26 Cal.3d at p. 576), it is the responsibility of the reviewing court to set aside the verdicts, for, as the United States Supreme Court has recognized, "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." (*Jackson v. Virginia, supra*, 443 U.S. at p. 317.)

"Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact.'" (*People v. Kunkin* (1973) 9 Cal.3d 245, 250, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.) In *People v. Morris* (1968) 46 Cal.3d 1, overruled on other grounds *in In re Sassounian* (1995) 9 Cal.4th 535, 545, fn.6, this Court added:

> We may *speculate* about any number of scenarios that may have occurred on the morning in question [when the victim was murdered with no eyewitnesses present]. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guesswork. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." [Citations.]

(*Id.* at p. 21, italics and ellipses in original; see also *People v. Holt* (1944) 25 Cal.2d 59, 83-90 [it is the jury's duty to avoid fanciful theories and unreasonable inferences and not to resort to imagination or suspicion]; (*People v. Bender* (1945) 27 Cal.2d 164, 186, overruled on other grounds in

People v. Lasko (2000) 23 Cal.4th 101, 110 ["Mere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute proof"].)

The standard of review for sufficiency of the evidence with regard to a finding of special circumstances is the same. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413; *People v. Alvarez* (1996) 14 Cal.4th 155, 224-225; *People v. Clair* (1992) 2 Cal.4th 629, 670.)

The first degree murder and special circumstance charged in this case were based on nothing more than speculation and suspicion, and appellant's guilt verdict, special circumstance finding and death sentence must be vacated.

B. Lack of Substantial Evidence of Deliberate Premeditated Murder.

An unjustified killing of a human being is presumed to be second, rather than first, degree murder. (*People v. Anderson* (1968) 70 Cal.2d 15, 25.) In order to support a finding that the murder is first degree, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant premeditated and deliberated the killing. (*Ibid.*; see also *In re Winship* (1970) 397 U.S. 358, 362-363; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488-490 [state must prove every element that distinguishes a lesser from a greater crime].)

Deliberate and premeditated murder requires more than an intent to kill. (*People v. Cole* (2004) 33 Cal.4th 1158, 1224.) The prosecution also must show that the killing was deliberate (i.e., the result of a careful weighing of considerations) and premeditated (i.e., thought of in advance). Deliberate and premeditated murder arises out of a cold, calculated judgment, rather than a rash impulse. (*Ibid.*)

The *Anderson* case identified three categories of evidence to be considered in assessing the presence or absence of premeditation and deliberation: (1) planning activity prior to the killing; (2) motive, usually established by a prior relationship or conduct with the victim; and (3) manner of killing. (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.)[42] Typically, this Court will sustain a verdict of first degree murder on a theory of premeditation and deliberation when there is evidence of *all three factors*; otherwise, absent other significant factors outside the rubric of *Anderson*, there must be "at least extremely strong" evidence of planning activity, or some evidence of planning activity in conjunction with either motive evidence or an exacting manner of killing. (*Id.* at p. 27.) The record in the present case is devoid of sufficient evidence of planning or motive, and it contains scant evidence of the manner of killing.

During the guilt phase closing argument in this case the prosecutor offered no theory of premeditated deliberate murder and outlined no facts that support a finding of premeditation and deliberation. While it is true that the prosecutor's argument is not evidence and that the jury may consider theories other than those put forth in the argument, it is also true that if evidence existed that supported a theory of premeditation, it might

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[42]Appellant recognizes "[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate." (*People v. Thomas* (1992) 2 Cal.4th 489, 517.) The *Anderson* analysis is only a framework to aid in appellate review and does not define the elements of first degree murder or alter the substantive law of murder. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1125.) In this case, however, where the prosecutor failed to articulate a theory of premeditation and deliberation, the *Anderson* analysis is a particularly helpful framework in which to assess the evidence supportive of an inference that the killing was the result of unconsidered or rash impulses rather than preexisting reflection and weighing of consideration.

reasonably be expected to arise in the prosecutor's presentation of the case to the jury. (*People v. Perez* (1992) 2 Cal.4th 1117, 1144 (disn. opn. of Mosk, J.).) The prosecutor's complete inability to point to any facts showing premeditation and deliberation demonstrates the absence of both in this crime.

1. Insufficient Evidence of Planning.

Planning activity – "facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing" (*People v. Anderson*, *supra*, 70 Cal.2d at p. 27) – is the most important of the three *Anderson* guidelines. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1018.) The record here contains no evidence that appellant planned an attack on Juan, and, indeed, the prosecutor never once mentioned planning in his closing arguments – except to comment on appellant's alleged plan to dispose of the body *after* the killing. (8 RT 1910, 1913.) The prosecutor utterly rejected pre-killing planning:

> if he's planning it beforehand, getting the stuff together to kill him, that's a whole different story I guess. So you know, I don't even want to go where that takes us.

(8 RT 1910.)

A defendant's actions just prior to the murder are often utilized to demonstrate the steps taken toward the act of killing the victim. Examples of planning activity have included the fact that defendant did not park his car in the victim's driveway, surreptitiously entered her house, and obtained a knife from the kitchen before attacking her as she entered (*People v. Perez*, *supra*, 2 Cal.4th at p. 1126); defendant's act of retrieving the murder weapon from the garage (*People v. Wharton* (1991) 53 Cal.3d 522, 547);

defendant's actions before crashing through living room window of victim's house demonstrate he planned his entry. (*People v. Young* (2005) 34 Cal.4th 1149, 1183.)

Here, there are no comparable actions by appellant. The prosecutor conceded there was no evidence Juan was forcibly taken to Ghobrial's shed.[43] Indeed, Juan may have gone there unsolicited.[44] If Ghobrial did not expect Juan, he certainly could not have planned to kill him.[45] Also, Ghobrial had no weapon or bindings or anything to suggest he was prepared to harm anyone. (See e.g., *People v. Rowland* (1982) 134 Cal.App.3d 1, 8 [use of cord already at crime scene to strangle victim does not support finding of premeditation and deliberation].) Similarly, Ghobrial had made no preparations for disposing of the body. He purchased the concrete, wire, knives and other material early Friday morning, after the killing. (See 6 RT 1345-1346, 1354-1357.)

Evidence was presented that approximately two to four weeks before the killing, a witness, Alfonso Solano, saw Juan teasing Ghobrial, who was

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[43]The prosecutor told the jurors:

> It's not like he came up to a boy that he had never seen before and snatched him up and took him back to the shed. No evidence of that.

(8 RT 1908.)

[44]As the prosecutor observed during his closing argument, no one knows how Juan got to Ghobrial's shed. "Don't know if he walked up there and knocked on the door. Don't know." (8 RT 1923.)

[45]It is possible that Ghobrial could have premeditated the killing after Juan entered the shed, but such a supposition would be precisely the type of sheer speculation that is insufficient to sustain a conviction under *Jackson*. (See, e.g., *People v. Morris*, *supra*, 46 Cal.3d at p. 21)

getting upset and frustrated. (6 RT 1320-1321, 1323, 1329, 1332-1335.) Solano heard the man say to the boy in English, "I am going to kill you. I will kill you and eat your pee-pee." (6 RT 1327.) He repeated this several times, sometimes appearing angry and other times smiling like he was kidding. (6 RT 1328.) Ghobrial's mental status, the circumstances under which the statement was made, Juan's apparent dismissal of any danger,[46] as evidenced by his continued relationship with Ghobrial, and Solano's decision not to take any action, all suggest that Ghobrial's words were nothing more than a disturbed man's rash and heated response to Juan's taunts at some times, and a bizarre, deranged jest at others. Even assuming Ghobrial meant them literally, these words could be construed to suggest no more than intent,[47] which does not amount to premeditated and deliberate murder. (See *People v. Cole, supra*, 33 Cal.4th at p. 1224.) Neither Ghobrial's words nor his actions suggest that he "killed as the result of careful thought and weighing of considerations, as a deliberate judgment or plan, carried on coolly and steadily, especially according to a preconceived design." (*People v. Rowland, supra*, 134 Cal.App.3d at p. 7, citing *Anderson, supra*, 70 Cal.2d at p. 26.)

2. Insufficient Evidence of Motive.

Evidence of motive is similarly lacking. Motive evidence consists of "facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill."

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[46]The prosecutor acknowledged, "For Juan, this fear did not last because he's seen after this with defendant Ghobrial, okay." (8 RT 1925.)

[47]The prosecutor described Ghobrial's statement as the forming of an intent: his words show "an intent that is forming in the defendant's mind." (8 RT 1909.)

(*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27.)

The motive offered by the prosecutor was that appellant killed Juan to cover up a molestation. (8 RT 1925.) It is true that all reasonable inferences must be drawn in support of the judgment;

> [t]his rule, however, does not permit us to go beyond inference and into the realm of speculation in order to find support for a judgment. A finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed.

(*Rowland*, *supra*, 134 Cal.App.3d at p. 8; see also *People v. Felix* (2001) 92 Cal.App.4th 905, 912 ["the prosecution may not fill an evidentiary gap with speculation"].)

This Court recently observed, "[t]hat an event *could* have happened . . . does not by itself support a deduction or inference it did happen." (*People v. Moore* (2011) 51 Cal.4th 386, 406, italics in original.) "Jurors should not be invited to build narrative theories of a capital crime on speculation." (*Ibid.*)

As demonstrated in Argument III. C., *post*, there is no credible evidence that appellant attempted to sexually molest Juan. The prosecutor, instead of offering evidence of a molestation attempt, bootstrapped one charge upon the other: Ghobrial killed Juan because he molested him; since he killed Juan he must have molested him. (See 8 RT 1925 ["It's a cover-up. The concrete is a cover-up of the murder. The murder is the cover-up of the molestation"].)[48] This is nothing more than circular logic that does

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[48]Evidence of a "cover up" of the crime is

> irrelevant to ascertaining defendant's state of mind immediately prior to, or during, the killing. Evasive conduct shows fear: it cannot support the double

not provide evidence of motive or of first degree murder.

Even if the record suggested that appellant Ghobrial had a motive to kill Juan, under the *Anderson* analysis, motive evidence alone is insufficient to support a finding of premeditation and deliberation. It must be supported by facts of planning or the nature of the killing which would "support an inference that the killing was the result of a 'pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]." (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27.) Such evidence is not present in this record.

3. Insufficient Evidence of Manner of Killing.

In this case, the cause of death was listed as "by unspecified means." (7 RT 1460, 8 RT 1926.) Dr. Aruna Singhania, who performed the autopsy, could not definitely state the cause of death, but observed that "the only [cause of death] which comes very close to my mind is asphyxia because of petechial hemorrhage" in the eye and on the lung surface. (7 RT 1460; see also 7 RT 1479-1483.)[49]

> inference that defendant planned to hide his crime at the time he committed it and that therefore defendant committed the crime with premeditation and deliberation.

(*People v. Anderson, supra*, 70 Cal.2d at pp. 31-32.)

[49]Although she could not rule out dismemberment as a cause of death, Dr. Singhania testified that during the autopsy she may have stated to others that the body was obviously dismembered after death. (7 RT 1487.) And forensic scientist Elizabeth Thompson who attended the autopsy testified that Dr. Singhania stated that the pelvis was dismembered from the body after death, based on the appearance of the tissues. (8 RT 1728-1730.) The prosecutor noted that Dr. Singhania "obviously" did not rule out

The prosecutor postulated that the asphyxiation may have been accidental. During his closing argument the prosecutor stated that asphyxiation could occur due to blocked air passages, "like a head in a pillow or a hand over the mouth." (8 RT 1927; see also 7 RT 1503 [asphyxia can be caused by placing a hand over the mouth and nose or pushing the head into pillow or sheets].)

> We don't know the sequence of this. We don't know if he is being sodomized, frankly, and he's dying as he's being sodomized because his little head is down in a pillow on that bed. We don't know, all right? Don't give – you know, don't be thinking that's not what happened.

(8 RT 1927.)

An accidental killing is antithetical to premeditation and deliberation. However, even assuming, arguendo, that Ghobrial intentionally asphyxiated Juan, nothing about this manner of killing reveals forethought and reflection. This Court in *Anderson* described the manner-of-killing factor as facts about the nature of the killing from which the trier of fact could infer that the manner of killing was so particular and exacting as to be accomplished according to a preconceived design "to take [the] victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of [planning or motive]." (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.)

In *Rowland*, the court found that strangulation of the victim with an electrical cord did not suggest that the defendant took "'thoughtful measures' to procure a weapon for use against the victim." (134 Cal.App.3d at p. 8.) The court reasoned that an electrical cord "is a normal

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asphyxiation, and "[o]bviously there's been evidence that that's probably what happened, and I'm not going to argue with that." (8 RT 1926.)

object to be found in a bedroom and there was no evidence presented that defendant acquired the cord at any time prior to the actual killing." (*Ibid.*) In this case, the prosecutor suggested that appellant, at most, may have used a pillow or blanket from his bed to smother Juan. Such a manner of killing is more suggestive of a lack of premeditation and deliberation than their presence.

Though suffocation does not exclude an inference of a deliberate intent to kill,

> A deliberate intent to kill . . . is a means of establishing malice aforethought and is thus an element of second degree murder in the circumstances of this case. In order to support a finding of premeditation and deliberation the manner of killing must be, in the words of the *Anderson* court, "so particular and exacting" as to show that the defendant must have intentionally killed according to a 'preconceived design."

(*Rowland, supra*, 134 Cal.App.3d at p. 9.)

In sum, there is simply no evidence that is reasonable, credible and of solid value to support a finding that the Juan's killing was deliberate and premeditated first degree murder. The actions depicted in the record in no way suggest the killing "was the result of careful thought and weighing of considerations, as a deliberate judgment or plan, carried on coolly and steadily, especially according to a preconceived design." (*People v. Rowland, supra,* 134 Cal.App.3d at p. 7, citing *Anderson*, *supra*, 70 Cal.2d at p. 26.)

4. The Error Is Prejudicial at the Guilt Phase Even If the Jurors Did Not Rely on Premeditation and Deliberation in Finding Ghobrial Guilty of First Degree Murder.

In *People v. Guiton* (1993) 4 Cal.4th 1116, this Court set forth the standard for reversal when the evidence is insufficient on one of two

theories of criminal liability presented to the jury. If the inadequacy of proof is factual, as it is here, the conviction should be affirmed "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*Id.* at p. 1130.) The *Guiton* prejudice analysis need not be applied here because there also is insufficient evidence of felony murder. (See Section C of this argument.) Thus there was *no* factually adequate theory of first degree murder presented to the jury. Under such circumstances the first degree murder conviction must be reversed. (*People v. Craig* (1957) 49 Cal.2d 313, 319, 321.)

Even if this Court concludes that although the evidence was insufficient to prove premeditated murder, there was legally sufficient evidence to support a felony murder and the jurors relied on that theory to find first degree murder, the insufficiency argument pertaining to the premeditated murder theory is not moot as it prejudiced appellant at the penalty phase of his trial. If, as a matter of law, no juror could have found premeditation and deliberation beyond a reasonable doubt, deliberate premeditated murder was not a crime of which appellant constitutionally could have been "convicted" for purposes of factor (a), and the jurors should have been instructed that they could not consider appellant culpable as one who had committed deliberate premeditated murder. (See, generally, *Enmund v. Florida, supra*, 458 U.S. at pp. 798-799 [indicating greater culpability for a murder that "is the result of premeditation and deliberation" than for one that is not]; *People v. Cowan* (2010) 50 Cal.4th 401 [where jury hangs on a charged offense in the guilt phase, only a juror who found that offense proved beyond a reasonable doubt could consider it under factor (b) in the penalty phase].)

C. Lack of Substantial Evidence of Felony Murder.

Murder committed in the perpetration of certain felonies constitutes murder of the first degree. (Pen. Code, § 189.) Under the felony-murder doctrine, the jury must find that the perpetrator had the specific intent to commit one of the felonies enumerated in section 189. The killing need not occur in the midst of the commission of the felony, so long as the felony is not merely incidental to, or an afterthought, to the killing. (*People v. Proctor* (1992) 4 Cal.4th 499, 532.) The only criminal intent required is the specific intent to commit the particular felony. The killing is first degree murder "regardless of whether it was intentional or accidental." (*People v. Coefield* (1951) 37 Cal.2d 865, 868.)

Ghobrial was not charged with a violation of Penal Code section 288, but the prosecutor's theory was that the killing was felony murder because it occurred during the attempted commission of a lewd act in violation of Penal Code section 288, within the meaning of Penal Code section 190.2, subdivision (a) (17) (5). (1 CT 87.) Felony murder clearly was the primary theory advanced by the prosecutor. In order to sustain a conviction under this theory, the elements of the underlying felony must be proved. (See *People v. Whitehorn* (1963) 60 Cal.2d 256, 264.) The elements of Penal Code section 288, subdivision (a) are that (1) a person touched the body of a child, (2) the child was under 14 years of age, and (3) the touching was done with the specific intent "to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person or child." (Pen. Code § 288, subd. (a). See CALJIC No. 10.41; 2 CT 420; 9 RT 2018-2019.) The prosecutor failed to prove even one of these three elements.

1. Insufficient Evidence That Ghobrial Touched or Attempted to Touch Juan in a Lewd Manner.

The prosecution in this case introduced no solid evidence that Ghobrial attempted any lewd behavior with Juan before he was killed. It is clear than no sodomy occurred. During the autopsy of the pelvic section Juan's body, Dr. Singhania specifically looked for tearing to the anus and rectal area; she found none. (7 RT 1459, 1469.) There was no evidence of bruising. (7 RT 1471-1474.) Dr. Singhania also looked for internal trauma; she found no trauma or evidence of healing process. (7 RT 1475-1478.)

Aware of the lack of evidence of a molestation, the prosecutor argued an *attempted* act of molestation, but this charge is not a patch that substitutes for evidence. The prosecutor still had to prove beyond a reasonable doubt that Ghobrial had the specific intent to molest Juan *and* that he committed a "direct but ineffectual act" toward commission of a molestation. (Pen. Code, § 21a.) This he failed to do. Even if, as the prosecutor argued, Ghobrial intended to molest Juan, there simply was no evidence of a direct but ineffectual act. "To amount to an attempt, the act or acts must go further than mere preparation; they must be such as would ordinarily result in the crime except for the interruption." (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements § 54.)

> Preparation alone will not establish an attempt. There must be " 'some appreciable fragment of the crime committed [and] it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter. . . .' " (*People v. Camodeca* (1959) 52 Cal.2d 142 . . . .; 1 Witkin & Epstein, Cal. Criminal Law, *supra*, Elements, § 54, p. 263.)

(*People v. Sales* (2004) 116 Cal.App.4th 741, 749.)

Although the law does not impose punishment for guilty intent alone,

"it does impose punishment when guilty intent is coupled with action that would result in a crime but for the intervention of some fact or circumstance unknown to the defendant." (*People v. Camodeca*, *supra*, 52 Cal.2d at p. 147.) In *People v. Anderson* (1934) 1 Cal.2d 687, this Court explained the difference between preparation, looking toward the commission of an offense, and an actual attempt to commit that offense: "The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after preparations are made, and must be manifested by acts which would end in the consummation of the particular offense unless frustrated by extraneous circumstances." (*Id.* at p. 690.) In *People v. Buffum* (1953) 40 Cal.2d 709, 718, overruled on other grounds in *People v. Morante* (1999) 20 Cal.4th 403, this Court further clarified the difference between acts of preparation and those of an attempt: "This court has held that two elements are necessary to establish an attempt, namely, a specific intent to commit a crime and a 'direct' ineffectual act done towards its commission." The crime of an attempt requires that there be "some appreciable fragment of the crime committed." (*Ibid.*)

The absence of any evidence of a direct but ineffectual act in this case stands in stark contrast to cases in which this Court has found sufficient evidence of attempt. (See *People v. DePriest* (2007) 42 Cal.4th 1, 48, 49 [evidence was sufficient to show attempted rape where defendant forced victim into secluded area, tore off her pants without stealing money from pocket, unzipped his own pants, and left pubic hair near victim's body, which was found partially nude with dirt on back, with legs in partially open position, with vaginal trauma, and with facial and neck injuries indicating possible struggle]; *People v. Rundle*, *supra*, 43 Cal.4th at p. 140

[evidence was sufficient to show attempted rape where deceased victim's nude and bound body was found in remote area, defendant admitted having had sex with her, evidence of nature of sexual assault was inconclusive due to decayed condition of body, and defendant confessed to raping and killing another young woman in similar circumstances not long before crime charged here took place]; *People v. Ervine* (2009) 47 Cal.4th 745, 785, 786 [defendant, who had prepared ambush for peace officers who came to arrest him at his home, was guilty of attempted murder of three officers notwithstanding that he shot at only two of them; plan to avoid arrest would have required killing all three officers, defendant was wounded before he could complete his plan, and killing two officers who posed most immediate threat would have facilitated killing third]; see also *People v. Lanzit* (1924) 70 Cal.App. 498, 506 [defendant, intending to kill his wife by dynamiting her place of business, procured someone to make the bomb, went with him to the spot, and there, while getting ready, was arrested]; *People v. Parrish* (1948) 87 Cal.App.2d 853, 856 [defendant, after having expressed his intention to kill his wife with a rifle, drove a feigned accomplice to her home, directed the accomplice to enter the house and choke the wife, and stated that he would then enter and "do the rest;" defendant arrested as he sat in his car with his loaded rifle]; *People v. Downer* (1962) 57 Cal.2d 800, 806 [attempted incest; defendant, who had previously engaged in sexual relations with daughter over two-year period, entered daughter's bedroom dressed in his underwear, asked for "relief," and in ensuing struggle, twisted daughter's arm, bloodied her nose, and tore her clothing off].)

In this case, there is no evidence that Ghobrial intended to molest Juan but some fact or circumstance prevented him from carrying out that

intention. There is no evidence that he was interrupted. In this case, the prosecutor charged attempt for the simple reason that he could not prove that any molestation occurred.

Rather than present evidence, the prosecutor appealed to the jurors to not let the absence of evidence stop them from finding an attempted molestation. As to the lack of semen in the shed, he stated, "I don't want to talk about that." (9 RT 2000.) As to what happened, he acknowledged, "we don't know the sequence of this." (8 RT 1927.) He acknowledged that no evidence of sperm was found, but led one witness to testify "that doesn't mean it isn't somewhere else in the shed or had been somewhere else in the shed at some time." (7 RT 1574-1575.) He argued to the jurors,

> we don't know if . . . [Ghobrial] rapes [Juan] and then kills him. We don't know if he achieved penetration of his anus. This is not pleasant to talk about, okay? We don't know if he actually got his penis in there. There's no evidence of tearing and so it probably didn't, right? We don't know that. But does it matter? Was he charged with sodomy? No. He's charged with an attempted or fully committed child molestation. A touching. A sexual touching.

(8 RT 1927.)

The prosecutor suggested that Juan was sodomized and died with his head in a pillow. "We don't know. All right? Don't give – you know, don't be thinking that's not what happened." (8 RT 1927.)

To the contrary, the jurors *should* be thinking "that's not what happened." The prosecutor bore the burden of proving Ghobrial's guilt, and he could not rely on the absence of evidence and the crime of attempt to bootstrap a conviction. The evidence presented simply was not sufficient – "that is, . . . reasonable, credible, and of solid value" – to support a finding of attempted molestation. (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

2. Insufficient Evidence that Ghobrial Had the Specific Intent to Arouse, Appeal to or Gratify His Lust, Passions or Sexual Desires.

With no hard evidence, the prosecutor asked the jurors to infer an attempted or actual lewd act from other evidence, which, he argued, proved Ghobrial's specific intent to arouse his lust, passions or sexual desire. (See argument at 8 RT 1920 et seq.) Even assuming that each piece of evidence the prosecutor relied upon is true, the pieces do not add up to legally sufficient evidence of the offense.

The prosecutor initially argued that because of the "unnatural age difference" between Ghobrial and Juan (8 RT 1921), the jurors could infer that "there's something going on there that's unnatural." (8 RT 1922.)[50] The prosecutor wondered, "what emotional attachment does this man have toward a stranger?" (8 RT 1921.)[51] It appears, however, that both Ghobrial and Juan were in need of emotional attachment. No one disputes that Ghobrial has serious mental and physical limitations and was living a marginal life with few or no friends. Similarly, no one disputes Juan's fear and avoidance of his family. (See, e.g., testimony of Juan's classmate Cipriano Flores at 8 RT 1755 [Juan said he did not want to go home

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[50]The prosecutor added the step that Ghobrial's outburst of anger when Juan teased him, as witnessed by Mr. Solano, was unnatural, "like a scorned lover type thing." (8 RT 1922.) This is imagination and conjecture, pure and simple.

[51]This is a disingenuous argument as the prosecutor vigorously objected to introduction of evidence that Juan sought out other adult men in an attempt to avoid going home. (See argument at 8 RT 1671-1678; see also *United States v. Cruz-Garcia* (9th Cir. 2003) ["Without the excluded evidence, defendant had no effective way to rebut the government's most compelling argument against him"].)

because his mom would hit or spank him]; testimony of classmate Armando Luna at 8 RT 1733 [Juan did not want to go home because he was scared of his mom]; prosecution argument at 8 RT 1922-1923.) The reasonable inference to be drawn is that it was Juan who sought out the friendship of a similarly lonely and disadvantaged individual. It was Juan who bought a Snickers candy bar for Ghobrial after seeing him with a sign saying he was hungry. (6 RT 1302-1303.) And it was Juan who apparently chose to spend time playfully teasing Ghobrial while he panhandled rather than spend time with his schoolmates or family. And, as the prosecutor conceded, it may have been Juan who initiated the visit to Ghobrial's shed. (8 RT 1923.)[52]

The prosecutor next asked the jurors to draw an inference that Ghobrial intended to molest Juan because Juan was "vulnerable." "He is not protected and he is easy prey for a man like this defendant." (8 RT 1923.)[53] The prosecutor argued that the situation was "a man with unnatural desires colliding with a boy who's vulnerable to it." (*Ibid.*) This is only the first of the prosecutor's many instances of logically fallacious reasoning. The fact that Juan was vulnerable does not make it true that Ghobrial had "unusual desires." One simply cannot find a defendant's intent to molest from the victim's vulnerability.

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[52]The trial court stated "[t]here is no suggestion that there has been a kidnapping. There is no suggestion that there was a false imprisonment." (8 RT 1672.) It concluded that "there is no evidence to support" an inference that Juan was lured to the shed or forcibly abducted. (8 RT 1677.)

[53]Appellant does not dispute that any twelve year old is "vulnerable," but Juan appeared to been more streetwise than many boys his age. Moreover, the prosecutor successfully challenged introduction of the testimony of Cesar Garcia who, according to the offer of proof, would have testified that Juan "appeared to be streetwise and in control of his situation." (2 CT 382.)

The prosecutor also pointed to the discovery of pornography near the bed in Ghobrial's 12 x 12 foot shed as evidence that Ghobrial molested Juan. (8 RT 1924; 7 RT 1511-1512, 1530.) The prosecutor made a point of stating that "not a lick" of "kiddie pornography" was found. (*Ibid.*) A reasonable inference from the discovery of such "kiddie pornography" might be that the reader is sexually attracted to young children. On the other hand, a reasonable inference from the discovery of adult heterosexual pornography is that the reader is sexually attracted to adult women. Instead, the prosecutor asked the jurors to infer that adult heterosexual pornography was there to "entice and excite" Juan. (8 RT 1924; 7 RT 1511-1512.) It was "a magnet for a boy." "Moth to a flame." (8 RT 1924.) Since there is no evidence that Ghobrial invited or expected Juan's visit, the argument that pornography was an enticement moved far beyond inference, and indeed, beyond speculation, to pure imagination. (See *People v. Morris*, *supra*, 46 Cal.3d at p. 21.) In fact, the presence of this material in Ghobrial's shed suggests that he was not sexually attracted to young boys and had no intent to molest Juan. In an effort to explain away this exculpatory evidence, the prosecutor devised a possible inculpatory narrative, but nothing supports this interpretation, least of all reasonableness. The prosecutor virtually conceded this when he disingenuously told the jurors not to "speculate" about the pornography, but then urged them to "imagine" how it was used to "entice and to excite" Juan. (8 RT 1924.)

The prosecutor next argued that an inference of Ghobrial's intent to molest could be inferred from the fact that Juan "is naked. He is found nude." (8 RT 1924.) It is true that the circumstance of the victim's being found partially or wholly unclothed, while "not by itself sufficient to prove a rape or an attempted rape has occurred," is a relevant circumstance.

(*People v. Rundle* (2008) 43 Cal.4th 76, 139.) In this case, the body parts found in the cement were unclothed. (See, e.g., 6 RT 1298; 7 RT 1616.) The facts are bizarre and disturbing, but they do not provide sufficient evidence of a touching or attempted touching with intent to arouse, appeal to or gratify sexual desire. In most cases where the body is found nude, it has been found where and as it was when killed. (See, e.g., *People v. Rundle, supra*, 43 Cal.4th at p. 139 [victim was found nude and with her arms bound behind her back]; *People v. Kelly* (2007) 42 Cal.4th 763, 789.) In this case, Juan's body was not discovered where he was killed. The body was cut up after the killing, and it is far more likely that anyone, but especially the one-armed Ghobrial, would remove the victim's clothing before cutting the body. The prosecutor also suggested that molestation could be inferred because Juan's clothing was not "just thrown haphazard around the shed." (8 RT 1925.) His clothes were neatly placed on a shelf in the shed. (6 RT 1297-1299.) How and where the clothes were placed, however, does not tell us anything about *when* the clothes were removed, which is the issue.

The prosecutor next asked the jurors to infer a sexual molestation from Ghobrial's motivation for the killing, which, he argued, was an attempt to cover up a molestation. (8 RT 1925.) This was another circular argument: the jurors could find molestation because Ghobrial was motivated to kill Juan because he molested him. This is specious reasoning, not evidence that is reasonable in nature, credible and of solid value. Again, the prosecutor improperly used speculation to build a narrative. (*People v. Moore*, *supra*, 51 Cal.4th at p. 406.)

The prosecutor also referred to Ghobrial's threat to kill Juan and eat his pee-pee. (8 RT 1925; 6 RT 1327.) He argued that Ghobrial's words

were evidence that his motivation for the murder was to cover-up a molestation. Ghobrial, however, did not state he was going to molest Juan then kill him. He said the opposite. If the prosecutor chose to use Ghobrial's words, he could not arbitrarily edit them to conform to the prosecution theory. Ghobrial clearly was not mincing words or being cautious. He stated in public, alternately teasing and in anger, that he would kill Juan and graphically described what he would do to the dead body. Ghobrial never mentioned a desire to do anything to Juan before killing him. Ghobrial's announcement that he would kill Juan is not evidence that the killing was a coverup for any molestation.

The prosecutor also argued that molestation can be inferred from the fact that the penis and genitals were removed and never recovered. (8 RT 1925-1926.) The more reasonable inference to be drawn from this evidence is that Ghobrial did exactly what he asserted he would do, eat Juan's penis. While such a violation of the ultimate human taboo suggests compelling evidence of Ghobrial's mental illness, it does not represent evidence of premortem sexual molestation.

The final bit of evidence that the prosecutor relied upon to establish an attempted molestation was the discovery of three to five sperm cells in anal swabs taken from the pelvic section found in a cement cylinder approximately one year after the killing. (7 RT 1611, 1626, 1628, 1630; 8 RT 1870.) The identification of the cells as sperm was contested. (8 RT 1787, 1795-1796, 1801.) But assuming, without conceding, the presence of these few sperm cells, their presence is not solid evidence of a

molestation.[54] Nor is it evidence that Ghobrial deposited those cells, or, even he did, that he did so while Juan was still alive. Assuming without conceding that Ghobrial engaged in some sexual activity with Juan, the evidence is no less consistent with post-mortem contact as with a pre-mortem molestation. And prior to the enactment of California Health and Safety Code section 7052 (which became effective January 1, 2005, four years after Ghobrial's trial), no criminal liability attached to engaging in sexual activity with a corpse.

In considering a claim of insufficiency of the evidence, the reviewing court "does not . . . limit its review to the evidence favorable to the respondent." Instead, it "must resolve the issue in light of the *whole record* – i.e., the entire picture of the defendant put before the jury – and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 577, original italics; internal quotations omitted; *see Jackson v. Virginia, supra,* 443 U.S. at p. 319 ["*all of the evidence* is to be considered in the light most favorable to the prosecution"], original italics.) In this case, the record includes the fact that absolutely no physical evidence of a sexual assault was found. During the autopsy of the pelvic area, Dr. Singhania found no tearing to the

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[54]The prosecutor apparently harbored reasonable doubt on this point. He argued that if the case for molestation were simply the discovery of the cylinder containing the pelvic section and contested testimony regarding the presence of semen, "if that's all you had, maybe you'd say, 'well, I don't know.' Somebody said yes, somebody said no. Don't know." (8 RT 1927-1928.) The prosecutor posited that it was the evidence of the shed, the two other cylinders and, presumably, the vulnerable victim who was friends with the older perpetrator, that somehow transformed the evidence that Ghobrial cut up the body into evidence that he sexually molested Juan while he was alive. (*Ibid.*) It does not.

anus or rectal area (7 RT 1469); she found no bruising (7 RT 1472-1473); and she found no internal trauma or evidence of healing process (7 RT 1477-1478).

In addition, prosecution witness Lisa Winter, a forensic scientist for the Orange County Sheriff's Department, testified that she examined Ghobrial's shed shortly after Juan's body was found. (8 RT 1521-1522, 1527). She looked for blood, hairs and fiber and she used an alternate light source to look for stains that would fluoresce, indicating the presence of semen stains, sperm cells, saliva and urine. (8 RT 1569-1571.) She used the alternate light source to look at the blanket hanging in the doorway to Ghobrial's shed, the quilt found on Ghobrial's bed and a pair of underwear and a shirt of Juan's found in the shed. (8 RT 1569-1570, 1528, 1538-1539, 8 RT 1917.) She obtained no positive acid phosphatase test reactions on any of these items. (8 RT 1572.)

Since it is clear that Ghobrial made no attempt to clean up or dispose of evidence – blood, cutting utensils and cement were found in the shed to which he left tracks[55] – this absence of evidence is significant.

More importantly, the cells, even if they are sperm cells, cannot be linked to Ghobrial. A far more reasonable inference is that they are Juan's own sperm, deposited in the anal area when his testicles or his vas deferens, which hold sperm cells until ejaculated, were severed.[56] (See 7 RT 1466-1467.) If they were not Juan's own sperm cells, they could easily have been deposited by someone other than Ghobrial – no evidence links them to him.

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[55]See 7 RT 1526, 1529-1538, 1558-1559, 1566-1567.

[56]The pathologist David Posey testified that a 12½-year-old boy can produce semen and sperm cells. (8 RT 1815.)

In sum, the molestation case was built on surmise, speculation and sophistry. The prosecution failed to present sufficient evidence to support the special circumstance finding.

3. Insufficient Evidence That Juan Was under 14 Years of Age.

The prosecutor failed even to present reliable evidence of Juan's age. He did not introduce a birth certificate; he did not call either of Juan's parents at the guilt phase of trial. Juan's older brother Jorge Delgado testified that he was 18 in 2001, and that Juan was younger than he. (6 RT 1295.) He was not asked, however, and he did not volunteer, Juan's age in 1998. Jorge would have been 15, and Juan could have been 14.

A classmate of Juan's at Washington Middle School, Arnaldo Luna, testified that he was 12 in 1998. The prosecutor asked, "was Juan 12, too?" "Yeah," he replied. "Same grade?" "Uh-huh." (6 RT 1300.) This is hardly solid, reliable evidence of Juan's age. Arnaldo had only moved to Orange County one year earlier, and he probably suspected he and Juan were the same age for the simple reason that they were in the same grade. (6 RT 1309.)[57] Being in a particular grade is not evidence of an individual's age. This is especially true here where it was undisputed that Juan was a frequent truant, and it is quite likely that he was held back one or more years.

It is true that at the penalty phase, Juan's mother Margarita Delgado testified that Juan would have been 16 in 1991, had he been alive, which would have made him 13 at the time he was killed. (9 RT 2111.) This does not cure the error, however, because failure to prove an element of an

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[57]They were school friends, but neither had ever spent the night at the other's home. (6 RT 1308.)

offense or special circumstance can never be harmless. Clearly, the prosecutor was more concerned with speculation and innuendo than garnering solid evidence of the elements of the offense.

4. Reversals of Sex Felonies for Insufficient Evidence.

This Court has several times reversed underlying sex felonies, felony-murder convictions, and sex-related special circumstance findings based on insufficient evidence. (*See People v. Craig*, *supra*, 49 Cal.2d 313; *People v. Anderson*, *supra*, 70 Cal.2d 15; *People v. Guerrero* (1976) 16 Cal.3d 719; *People v. Granados* (1957) 49 Cal.2d 490; *People v. Johnson* (1993) 6 Cal.4th 1, overruled on other grounds in *People v. Rogers* (2006) 39 Cal.4th 826; and *People v. Raley* (1992) 2 Cal.4th 870.) The evidence in each of these cases was far *more* substantial than that presented against Ghobrial, and a review of these cases clearly establishes that there is insufficient evidence of felony murder and the special circumstance finding.

In *Craig*, *supra*, 49 Cal.2d 313, this Court reversed a felony murder conviction for insufficient evidence of either an attempted rape or an actual rape despite substantial evidence suggesting a sexual assault of some kind had occurred. The evidence established that Craig had told someone earlier on the evening of the murder of his general desire to "have a little loving." (*Id.* at p. 315.) Later that same evening, he quarreled with a woman who would not dance with him at a bar. After leaving the bar, he attacked and killed a different woman by strangling and hitting her. (*Ibid.*) The victim's body was found the following morning beneath an automobile in a gas station. She was lying on her back with her legs spread apart and she was wearing a raincoat over nothing but a nightgown and panties. Her raincoat had been ripped open, and her nightgown and panties had also been torn so that the "front part of her body was exposed." (*Id.* at p. 316.) She had

suffered multiple contusions and lacerations of her face, breasts, neck and lower abdomen. (*Id.* at pp. 315-316.) The victim's body, however, showed no evidence of sexual molestation and no semen or spermatozoa was found on either the clothing of the victim or Craig. (*Id.* at p. 317.)

This Court rejected the prosecution's argument that the torn clothing, position of the victim's legs, Craig's abusive conduct toward the woman at the bar, and his statement about wanting "a little loving" proved that he had raped or attempted to rape the victim. (*Id.* at p. 318.) There was "[a] complete absence of any evidence in the record to show that he had had an intent to commit rape." (*Ibid.*) The Court further observed that there was,

> a complete lack of satisfactory evidence that this killing was committed during either an attempt to commit rape or in the commission of rape; that the evidence shows no more than the infliction of multiple acts of violence on the victim, and even though the killing was an extremely brutal one, the People have only proved that the defendant was guilty of second-degree murder.

(*Id.* at 319)

In *People v. Anderson*, *supra*, 70 Cal.2d 15, a ten-year-old victim, Victoria, was found naked under a pile of boxes and blankets next to her bed. There were over 60 wounds on her body, including repeated cuts and lacerations on her thighs and vaginal area. A knife had been thrust into her vagina so deeply that it cut through into the anal canal. (*Id.* at pp. 20-21.) Only defendant's socks and shoes had blood on them, suggesting he was partially nude during the attack. (*Id.* at pp. 24, 34.) In addition, the victim's torn and bloody dress had been ripped from her and was under her bed. (*Id.* at pp. 21, 24.) There was a large bloodstain found in the center of her mattress (*id.* at p. 37), the crotch of her blood soaked underpants had been ripped out, and her slip, with the straps torn off, was found under the bed in

the master bedroom of the house. (*Id.* at p. 24.) The window blinds were down and the doors were locked. (*Ibid.*)

Although no spermatozoa was found in the victim or her clothing or bed (70 Cal.2d at p. 22), the prosecution argued that the murder had taken place during the course of child molestation – a violation of Penal Code Section 288. In support of this claim, the prosecutor argued,

> the nature of the wounds and the clothing of the victim, the appearance of blood in several rooms in the house, and the lack of blood on any of the defendant's clothing except for his socks and shorts, suffices to support an inference that defendant was almost naked while attacking Victoria and pursued her through several rooms of the house and slashed at and ripped off her clothing with the intent to commit a lewd act upon her to satisfy his sexual desires.

(*Id.* at p. 34.)

This Court concluded that the evidence as a whole was insufficient to show that the defendant had the necessary intent to commit a sexual assault on the victim. The prosecution had failed to present any evidence relating to a possible section 288 offense other than the murder itself. (70 Cal.2d at pp. 35-36.)

In *People v. Guerrero*, *supra*, 16 Cal.3d 719, this Court found that there was no evidence of attempted rape when the victim was found fully clothed, with only her blouse in disarray. It noted that the condition of the blouse could have been caused by other factors, including a struggle to ward off a nonsexual attack. There was no trace of sperm or trauma related to a sexual approach. The charge was based upon speculation, stemming from the defendant driving the victim to a secluded spot. (*Id.* at p. 727.) This Court found that there was no evidence of sexual activity: "Contrary to the prosecutor's broad assumption, boy plus girl does not invariably

equal sex." (*Ibid.*)

In *People v. Granados*, *supra*, 49 Cal.2d 490, the defendant had been convicted of first-degree felony murder on the theory that the homicide was committed in perpetration of a child molestation. The defendant had lived in a common-law relationship with the mother of his victim, a 13-year-old girl. (*Id.* at p. 492.) After the defendant called the mother to tell her that the victim had poisoned herself, the mother returned home to find her daughter's body lying on the bedroom floor. Her skirt was pulled up exposing her private parts and an apron over the dress was pulled down below them. There were bloodstains on the wall, the floor and the decedent's head. A blood-covered machete was lying in a corner of the living room. (*Id.* at p. 493.) An autopsy failed to show any evidence of injury to the victim's vaginal area, and "a microscopic examination disclosed no spermatozoa." (*Id.* at p. 497.)

The defendant had previously been accused of sexually molesting the victim, and, at trial, the defendant testified that on the day of the killing he asked the victim if she was a virgin. (*Id.* at pp. 494-495; see also *People v. Anderson*, *supra*, 70 Cal.2d at p. 31.) Nevertheless, this Court concluded that there was "a total absence of evidence that defendant violated or attempted to violate section 288 of the Penal Code." (*Id.* at 497.)

This Court reaffirmed the principle underlying these cases in *People v. Johnson* (1993) 6 Cal.4th 1, where the defendant had been convicted of killing a mother and a daughter. There, the defendant admitted having sex with daughter, whom he encouraged to drink to the state of intoxication. (*Id.* at p. 39.) He told the police that "rape is hard to prove" even before that charge was mentioned to him. (*Ibid.*) The mother was dressed only in a sweatshirt and bra; she was naked from the waist down. She had been

severely beaten. However, no evidence was introduced to show any sexual trauma, seminal traces, or other evidence of penetration. The only possible evidence of attempted rape was the victim's unclothed body and the defendant's prior sexual activity with the daughter. (*Id.* at pp. 39-40.) This could have supported at least some inference that the defendant had an intent to commit rape. (*Id.* at p. 41.) However, without evidence of a sexual assault, it was insufficient to support a charge of felony-murder in the course of an attempted rape. (*Id.* at p. 41-42.)

Finally, in *People v. Raley*, *supra*, 2 Cal.4th 870, this Court found insufficient evidence to sustain the defendant's conviction for attempted oral copulation of a teenage girl, even while acknowledging that there was substantial evidence of *some kind* of forcible sexual assault. The evidence in *Raley* showed that the defendant locked two teenage girls in a basement and made them remove their clothing. He brandished a knife, handcuffed the girls and told them he would release them after they "fooled around" with him. He first led one of the girls, Jeanine, into a separate area. She returned about 15 minutes later with her clothes on, but looking very frightened. (*Id.* at p. 882.) Defendant then led the other girl, Laurie, to the kitchen and forced her to orally copulate him and manipulate his penis. After sexually assaulting Laurie, defendant stabbed and beat both girls, put them in the trunk of his car and eventually threw them down a ravine. Laurie managed to climb up to hill to get help. (*Id.* at p. 883.) Jeanine was still alive when help arrived, and she explained that she had not been raped, but that defendant had made her remove her clothes and "fool around" with him. (*Id.* at p. 884.) Jeanine later died in the emergency room.

The defendant was convicted of capital murder as well as other offenses, including attempted oral copulation by force against Jeanine.

(*Raley*, *supra*, 2 Cal.4th at pp. 889-890.) This Court reversed this conviction, stating that, while there was "substantial evidence of a forcible sexual attack of some kind on Jeanine and of a forcible oral copulation on Laurie," to infer that because Raley had committed a forcible oral copulation against Laurie, he attempted to commit the same offense against Jeanine would be applying "layers of inference far too speculative to support the conviction." (*Id.* at pp. 890-891.) As the Court reaffirmed, a reasonable inference "'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'" (*Id* at p. 891, quoting *People v. Morris*, 46 Cal.3d at 21).

Appellant recognizes that this Court has distinguished these decisions by noting "the lack of semen or absence of sexual trauma on the victim did not rebut an inference, *based on the other physical evidence surrounding the attack*, that the defendant entered the victim's house with an intent to rape." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1130, citing *People v. Holloway* (2004) 33 Cal.4th 96, 138-139, italics added.) Here, however, there was not sufficient evidence from which the jury could reasonably infer an intent to molest, and the absence of physical evidence the victim suffered a sexual assault confirms that. The evidence of attempted molestation in this case is nothing more than "speculation as to probabilities without evidence." (*Raley*, *supra*, 2 Cal.4th at p. 891.)

D. The Record Contains Insufficient Evidence to Support a True Finding of the Special Circumstance.

A felony special circumstances must be "charged and proved pursuant to the general law applying to the trial and conviction of the

crime." (Pen. Code, § 190.4, subd. (a).) The standard of review for sufficiency of the evidence with regard to a finding of the lewd act special circumstance is the same as the standard for the substantive crime of an attempted or completed lewd act upon a child. (See *People* v. *Ochoa supra,* 19 Cal.4th at p. 413; *People v. Alvarez, supra,* 14 Cal.4th at pp. 224-225; *People* v. *Clair, supra,* 2 Cal.4th at p. 670.) For the reasons set forth in section C, above, the record contains insufficient evidence to support an attempted lewd act and thus insufficient evidence of the lewd act special circumstance. If the evidence was insufficient to support a lewd-act felony murder conviction, the corresponding attempted lewd act felony murder special circumstance must also be reversed. (*See People* v. *Kelly* (1992) 1 Cal.4th 495, 530; *People v. Morris*, *supra*, 46 Cal.3d at pp. 21-23; *People v. Marshall* (1997) 15 Cal.4th 1, 41.)

This murder, like all murders, is horrible, and the facts of this case are particularly unsettling. But these facts did not make Ghobrial death eligible. The insubstantial theory of attempted molestation was the only special circumstance in this case. This Court should not allow insufficient evidence to be stretched this far.

E. Conclusion.

Even viewed in the light most favorable to the judgment, the evidence presented at trial does not support a finding that appellant premeditated and deliberated the killing, nor that the murder was committed during the commission of a felony, and thus, the first degree murder conviction was a violation of state law. (*People v. Anderson, supra*, 70 Cal.2d at pp. 34-35.) The improper conviction also violated appellant's federal rights to due process of law (*Jackson v. Virginia, supra*, 443 U.S. at pp. 313-314 [the "due process standard . . . protects an accused against

conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crimes has been established beyond a reasonable doubt"]), to present a defense (*id.* at p. 314 ("[a] meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused") and to a reliable guilt and penalty verdict. (U.S. Const., Amends. 6th, 8th, 14th; Cal. Const., art. I, §§ 7, 15, 16 & 17.) Thus, the first degree murder conviction must be vacated.

The jury's finding that the attempted molestation-murder special circumstance is true was not supported by substantial evidence. To hold otherwise would violate appellant's right to due process under the state and federal Constitutions. Moreover, to construe the attempted molestation-murder special circumstance in a manner that encompasses the facts of this case would result in a special circumstance that is vague and overbroad in violation of the Eighth and Fourteenth Amendments. Accordingly, the finding of the special circumstance must be set aside and the death sentence must be vacated.

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IV.

THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR WHEN IT REFUSED TO ALLOW DEFENSE WITNESSES TO TESTIFY THAT THE VICTIM SOUGHT OUT THE COMPANIONSHIP OF ADULT MEN.

A. Introduction and Proceedings Below.

Just prior to the defense case in the guilt phase of trial, defense counsel filed an offer of proof regarding 11 witnesses she wished to call to testify that Juan "was a child who sought out and was comfortable with strange adults, . . . who avoided being home," and whose efforts to avoid going home escalated in the weeks leading up to the homicide. (2 CT 381-386.) The witnesses were Imran Bholat, Isabel Camacho, Cesar Garcia, Hortencia Cisneros, Patti Norman, Rosario Serrano, Diane Hujhsman, Aubrey Chapman, Krisha Garcia, Oscar Leon and Juan Duarte. Only Juan Duarte and Cesar Garcia were allowed to testify.

The defense had described some of these witnesses during opening statement. Trial counsel told the jurors that Juan "hung-out" at businesses at a strip mall across the street from his residence for hours at a time and well into the night. (5 RT 1239.) Isabel Camacho and Cesar Garcia, employees of Juan Pollo Chicken, would testify that they saw Juan there everyday after school, from 3 p.m. to 6 p.m., for about six months. He would get into mischief, and when they told him to stop, he laughed and ignored them. They asked if he was going home, and he would say no. (5 RT 1240-1241.) Mr. Garcia thought Juan seemed very street wise and acted older than 12. He was not afraid of anyone. Mr. Garcia would testify that

Juan often stayed until 9 at night.[58] (5 RT 1241.)

Imran Bholat, the manager of Las Superior Market, a business in the same strip mall, would testify that Juan often came into the store, sometimes as late as 9 p.m. (5 RT 1241-1242.) Juan liked to hang out with Antonio from the meat department. Bholat also saw Juan panhandle at Taco Bell, and he saw him at a gas station with an adult male who worked there. (5 RT 1242.) Hortencia Cisneros and Rosalva[59] Serrano, employees of Taco Bell, would testify that they said saw Juan there almost daily. (5 RT 1243.)

Pat Norman would testify that on Friday, March 13, she was in that Taco Bell with her children. (5 RT 1243.) She saw Juan walk over from the market, where he had been talking to an adult male. While she was in line, Juan walked up and hovered by her, making her uncomfortable. When she sat down to eat, Juan came over to the table. She bought him a burrito, and he left to eat it. But when she got up to leave, Juan again came up to her. (5 RT 1244.) Juan then returned to the market and the man with whom he had previously been talking. (5 RT 1245.)

Counsel also stated that Diane Hujhsman, an employee at Farr Stationery in the same mall, would testify that on March 11, she saw Juan walking around the store alone at 7:30 to 8:00 at night. She again saw him on Saturday, March 14, wandering around and talking to customers. An objection as to relevance was sustained, and the evening recess was taken. (5 RT 1245-1246.) Outside the presence of the jurors, the parties argued

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[58]Despite counsel's assurance to the jurors that Mr. Garcia would give this testimony, neither he nor the other witnesses were permitted to give testimony on this subject.

[59]The offer of proof indicates that her first name is Rosario. (2 CT 383.)

the relevance of such witnesses. Defense counsel argued that without these witnesses, it was likely the jurors would assume that Ghobrial kept company with Juan for sexual purposes. (5 RT 1248.) The prosecutor countered that he did not charge or claim that Ghobrial abducted Juan. (*Ibid.*) Further, the fact that Juan sought out adults was irrelevant to Ghobrial's state of mind. (5 RT 1250.) The court reiterated that the last objection "remains sustained." (*Ibid.*)

The offer of proof contained information not presented during trial counsel's opening statement about Aubrey Chapman, Krisha Garcia and Oscar Leon. Ms. Chapman, another employee of Farr's Stationary, would have testified that she saw Juan on Sunday, March 15, on and off from 10 a.m. to 6 p.m. He was shadowing people in the parking lot, and she called the police to report he was neglected. The police responded and spoke with Juan. (2 CT 383.)

Ms. Garcia was an employee of Pic 'n' Sav who would have testified that she saw Juan in the store at least two nights a week. He often got very close to the customers. (2 CT 383.)

Finally, Oscar Leon would have testified that he met Juan after 11 p.m. one evening and Juan asked him to take him to look for his mother. After driving around for a while, the two eventually spent the night together in Mr. Leon's car :

> On February 20, 1998, between 11 p.m. and 12 a.m., he went to a donut shop on La Habra Boulevard and Harbor. Juan Delgado was there. When Mr. Leon played a video game, Mr. Delgado asked to play. When Mr. Leon prepared to leave, Mr. Delgado asked if Mr. Leon would take him to look for his mother who was shopping. Mr. Leon took Mr. Delgado to an Albertson's and a Ralph's, but Mr. Delgado's mother was not there. Mr. Delgado tried to direct Mr. Leon to

> his house, but he did not know the address. Mr. Delgado kept changing the description of the house. When Mr. Leon proposed taking him to the police station, Mr. Delgado started to cry. At Mr. Delgado's suggestion, Mr. Leon took him back to the donut shop at about 3:30 to 4:30 a.m. Mr. Delgado said that his mother sometimes went to the shop in the morning. They fell asleep in the car. When Mr. Leon woke at about 6:00 a.m., he took Mr. Delgado to the police station.

(2 CT 384.)

At a hearing on December 4, 2001, defense counsel argued that the proffered testimony was relevant because she assumed the prosecutor would argue that Juan had no reason to go to the shed with a strange adult male, and that Ghobrial used pornography to lure Juan into the shed. (8 RT 1672.) The prosecutor asked to respond and stated,

> I have no evidence that Mr. Ghobrial said, "come to my shack and I will give you lollipops," or "come to my shack and I will show you pornography." [¶] I don't know how he got him there. .... I have beliefs what happened once he got in the shed based upon the evidence that is there, but I am not arguing what [defense counsel] says that this evidence is relevant to show.

(8 RT 1673-1674.)

In the offer of proof, counsel added that the testimony tended to establish that Juan sought and had contact with multiple adult men, which suggested that Ghobrial was not the only person "with opportunity to be the source of the alleged sperm found in [Juan's] anus. Given the degraded nature of the alleged sperm, there is no way to know when it was deposited" in relation to the time of death. (2 CT 385.)

The trial court sustained the objections to the witnesses in question. (8 RT 1678.) The court's ruling was in error.

B. The Proffered Testimony was Relevant.

All relevant evidence is admissible. (Evid. Code. § 351 (quoted in *People v. Jones* (1998) 17 Cal.4th 279, 325); see also Cal. Const., art. I, § 28(d) [providing "relevant evidence shall not be excluded in any criminal proceeding" unless excepted by statutory provision inapplicable to this case].) Relevant evidence is that having "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "This definition of relevant evidence is manifestly broad. Evidence is relevant when no matter how weak it is it tends to prove a disputed issue." (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843; see also *People v. Williams* (1997) 16 Cal.4th 153, 249.) While a trial court has broad discretion in determining the relevance of evidence and lacks the discretion to admit irrelevant evidence (*People v. Scheid* (1997)16 Cal.4th 1, 14), "a trial court's authority to exclude relevant evidence must yield to a defendant's right to a fair trial" (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1777).

Under Evidence section 210, "relevant evidence" includes not only evidence of the ultimate facts actually in dispute but also evidence of other facts from which such ultimate facts may be presumed or inferred. (Cal. Law Revision Com. com., 29B, pt. 1 West's Ann. Evid. Code (1995 ed.) foll. § 210, p. 23.) In this case, the only truly disputed fact at trial was whether Ghobrial molested or attempted to molest Juan. The prosecution's evidence on this issue was entirely circumstantial and, as shown above, was insubstantial. (See Argument III *ante*.) The prosecutor argued that the age difference between Ghobrial and Juan was circumstantial evidence of molestation; he argued that the relationship was unnatural; he argued that Juan was a particularly vulnerable individual; he argued that adult

heterosexual pornography was in Ghobrial's shed to "entice and excite" Juan. (8 RT 1821-1824; 7 RT 1511-1512.) And he argued that disputed evidence regarding sperm found in the anal area of Juan's pelvic section was circumstantial evidence that Ghobrial molested Juan. (7 RT 1611, 1626, 1628, 1630; 8 RT 1870.) The excluded evidence is relevant to each of these contentions.

Juan's pursuit of relationships with adults, particularly adult men, altered the inference to be drawn from the circumstances the prosecutor described. The unnatural relationship was not of an older man pursuing a young boy, but a young boy's persistent seeking out older men. Disputed cells found in Juan's anus identified by some witnesses as sperm, if not attributable to Juan himself, might have been deposited by other men with whom he spent the night. These are reasonable inferences that would have refuted the prosecution's circumstantial evidence of molestation by Ghobrial. The trial court thus erred in excluding such evidence. (See *People v. Yokum* (1956) 145 Cal.App.2d 245, 260-261 [reversing conviction because trial court erroneously excluded relevant defense evidence].)

C. By Excluding the Evidence, the Trial Court Violated Appellant's Constitutional Right to Present Evidence in His Defense.

The trial court's ruling excluding testimony of the proffered witnesses violated Ghobrial's rights to present defense evidence, a fair trial, and a reliable guilt and penalty determination in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and his rights under article I, sections 7, 15, 16, and 17 of the California Constitution.

"Whether rooted directly in the Due Process Clause of the

Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . . , the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690, internal citations omitted; accord, *Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) The right of the defendant to present evidence "stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the states." (*Newman v. Hopkins* (8th Cir. 2001) 247 F.3d 848, 852, quoting *Taylor v. Illinois* (1988) 484 U.S. 400, 409.)

The Supreme Court has made clear that the erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense. (*Chambers*, *supra*, 410 U.S. at p. 294; *Washington v. Texas* (1967) 388 U.S. 14, 18-19.) In *Washington*, the Supreme Court held that exclusion of corroborative evidence was unconstitutional even though the defendant himself was allowed to testify. (*Id.* at pp. 15-17, 22.) The right to offer such evidence "is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." (*Id.* at p. 19.)

Similarly, in *Chambers v. Mississippi*, the Supreme Court held that exclusion of critical corroborative evidence was not only erroneous but unconstitutional because it interfered with the defendant's right to defend himself against the state's accusation. (*Chambers*, *supra*, 410 U.S. at p. 298-302; see also *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273 [exclusion of defense evidence bearing on key witness's credibility was error of constitutional magnitude]; *People v. Mizchele* (1983)142

Cal.App.3d 686, 691 ["We are further of the opinion that defendant had a constitutional right to present such material and relevant evidence in his favor, as was not otherwise disallowed by statute"].)

In *DePetris v. Kuykendall* (9th Cir.) 239 F.3d 1057, 1059, 1065, a panel of the Ninth Circuit held that the exclusion of a journal, and references to it, that would have corroborated the defendant's testimony unconstitutionally interfered with the petitioner's due process right to defend against the charges. There, the defendant, Ms. DePetris, attempted to introduce a journal containing her husband's account of his violent behavior toward his first wife and others in order to prove her claim that she killed her husband out of fear he would kill her and their baby. The trial court excluded as irrelevant the journal and DePetris' testimony about having read it. The California Court of Appeal held that the journal and related testimony were indeed admissible, but their exclusion was harmless because the jury had heard other evidence relating to the husband's propensity for domestic violence. The Ninth Circuit panel held that the trial court's exclusion of the journal and DePetris' testimony about having read it "was not mere evidentiary error. It was of constitutional dimension." (*Id.* at p. 1062.) The ruling went to the heart of the defense, which was that she killed her husband in an honest belief that she needed to do so to save her life. The success of the defense depended almost entirely on the jury's believing petitioner's testimony about her state of mind at the time of the shooting. (*Ibid.*)

> The trial court precluded petitioner from testifying fully about her state of mind and from presenting evidence that would have corroborated her testimony. Because this evidence was critical to her ability to defend against the charge, we hold that the exclusion of this evidence violated petitioner's clearly

established constitutional right to due process of law – the right to present a valid defense as established by the Supreme Court in *Chambers* and *Washington*.

(*Id.* at p. 1063.)

Evidence of the victim's behavior in this case was crucial to a fair trial because it supported Ghobrial's defense that he had no sexual interest in Juan and did not molest or attempt to molest him, which would have defeated the felony murder, special circumstance and death verdict. Here, as in the above cited cases, the trial court's exclusion of evidence was of constitutional dimension.

D. The Exclusion of the Evidence Prejudiced Appellant Ghobrial.

The exclusion of evidence of Juan's behavior was indisputably prejudicial to appellant's defense to the charges and the image he projected to the jurors at both phases of trial. It is well-recognized that the prosecutor's argument often heightens the prejudicial effect of error. (See *People v. Roder*, *supra*, 33 Cal.3d at p. 505; *People v. Brady* (1987) 190 Cal.App.3d 124, 138, disapproved on other grounds in *People v. Montoya* (1994) 7 Cal.4th 1027, 1040; *People v. Martinez* (1986) 188 Cal.App.3d 19, 26; see also *People v. Morales* (2001) 25 Cal.4th 34, 48 [observing that *People v. Green* (1980) 27 Cal.3d 1, 70, overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn.3, holds that "in cases suffering from insufficient evidence, deficient instructions or other errors made in presenting evidence or giving instructions, ill-advised remarks by the prosecutor may compound the trial's defects"].) The prosecutor's behavior in this case exploited and compounded the court's error.

After successfully challenging the testimony of witnesses who would have testified that Juan was a streetwise boy who sought out the company of

adult men, the prosecutor during his guilt phase closing argument argued that because of the "unnatural age difference" between Ghobrial and Juan (8 RT 1921), the jurors could infer that "there's something going on there that's unnatural." (8 RT 1922.) He asked, "what emotional attachment does this man have toward a stranger?" (8 RT 1921.) He asked the jurors to draw an inference that Ghobrial intended to molest Juan because Juan was "vulnerable." "He is not protected and he is easy prey for a man like this defendant." (8 RT 1923.)

In addition, after assuring the court and defense counsel that he would not argue that Ghobrial used pornography to lure Juan to the shed,[60] the prosecutor did just that. He argued that pornography found in the shed was circumstantial evidence that Ghobrial intended to molest Juan. He asked the jurors to infer that the pornography was there to "entice and excite" Juan. (8 RT 1924; 7 RT 1511-1512.) He claimed it was "a magnet for a boy." (8 RT 1924.)[61]

In *People v. Daggett* (1990) 225 Cal.App.3d 751, the court reversed

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[60]Defense counsel stated that if the prosecution "is not going to argue that the pornography in the shed was a lure," the witnesses were not needed. (8 RT 1673.) The prosecutor responded that he did not know how Juan got to the shed and he "was not going to conjecture how [Ghobrial] get [Juan] there." (8 RT 1674.)

[61]The prosecutor also took full advantage of the trial court's ruling, made after opening statements, by beginning his opening statement with a comment on defense counsel's inability to prove what they had promised. "When I gave my opening statement and told you the things that I was going to prove, I submit to you I proved everything I told you I was going to prove." (8 RT 1900.) He assured the jurors that he did not mean "to take a shot at the defense," but, in contrast with his performance, "[t]here are many things the defense said they were going to prove that they did not, all right?" (8 RT 1900-1901.)

a conviction based on the improper exclusion of evidence the defendant proffered. It found the "error was compounded" by the prosecutor's closing argument "ask[ing] the jurors to draw an inference they might not have drawn if they had heard" the excluded evidence. (*Id.* at pp. 757, 758, 275.) Although a prosecutor has broad discretion in argument, he or "may not mislead the jury." (*Id.* at p. 758; see also *State v. Bass* (N.C. 1996) 465 S.E.2d. 334 [conviction for statutory rape reversed where prosecutor argued that sexual matters were not in six year old victim's realm of knowledge after defendant had been rightfully prohibited from introducing evidence that victim had previously been sexually abused and therefore possessed knowledge of sexual matters]; cf., *People v. Varona* (1983) 143 Cal.App.3d 566, 570 [reversible error to urge exclusion of defense evidence and then argue that jury should penalize the defense because of its absence].)

Given the pertinence of the excluded evidence to Ghobrial's defense to the molestation and the prosecutor's exploitation of the erroneous ruling during his closing argument, the error cannot be deemed harmless. It is reasonably probable that if the trial court had admitted the excluded evidence, at least one of the jurors would have had reasonable doubt about whether Ghobrial molested or attempted to molest Juan. This Court cannot have confidence in the outcome of a case where corroboration of the accused, whom the jury might otherwise not believe, was excluded from the trial. (See *Hart v. Gomez* (9th Cir. 1999) 174 F.3d 1067, 1073 [failure to introduce readily available evidence that would have corroborated defense witness's exculpatory testimony undermined confidence in guilty verdict]; *cf. Eslaminia v. White* (9th Cir. 1998) 136 F.3d 1234, 1237-1239 [erroneous admission of evidence impeaching defendant's credibility was reversible error].)

Furthermore, notwithstanding of the effect of the exclusion of the evidence at the guilt phase, it is more than reasonably possible (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 448-449) that the error adversely affected the penalty determination. As this court has recognized, evidence that does not affect the guilt determination can have a prejudicial impact during penalty trial.

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137, overruled on other grounds *People v. Morse* (1964) 60 Cal.2d 631, 649; see also *People v. Brown*, *supra*, 46 Cal.3d at p. 446-447 [state law error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error].)

As set forth in Argument III, *ante*, there was insufficient evidence of a molest or attempted molest, so the felony murder theory and special circumstance must be reversed. But even assuming, arguendo, there were sufficient evidence, the exclusion of this evidence would have prejudiced the penalty determination. The excluded evidence and conclusions that can be drawn from it could have had a significant impact on at least one of the

jurors' penalty determination.[62] The evocation of Ghobrial targeting Juan, luring him to his shed and then tempting him with pornography is very different from that of a troubled man pursued by a boy desperate for adult male attention. It thus cannot be said that the error had "no effect" on the penalty phase verdict. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) Accordingly, at the very least, the death judgment must be reversed.

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[62]See *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 937 (conc. opn. of Gould, J.) ("in a state requiring a unanimous sentence, there need only be a reasonable probability that 'at least one juror could reasonably have determined that . . . death was not an appropriate sentence'"), quoting *Neal v. Puckett* (5th Cir. 2001) 239 F.3d 683, 691-692, footnote omitted.

V.

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.

At the conclusion of the guilt phase of the trial, the trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20; 2 CT 458; 9 RT 2015-2016) and on felony murder (CALJIC No. 8.21; 2 CT 459; 9 RT 2017). The jury found appellant guilty of murder in the first degree. (2 CT 473; 9 RT 2040.)

Appellant contends that the instructions on first degree murder were erroneous, and the resulting convictions of first degree murder must be reversed. The information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder; thus he could not be convicted of first degree murder.[63]

Count 1 of the information alleges that "JOHN SAMUEL GHOBRIAL in violation section 187(a) of the Penal Code (MURDER), a FELONY, did willfully, unlawfully and with malice aforethought murder Juan Delgado, a human being." (1 CT 87.) Both the statutory reference ("section 187(a) of the Penal Code") and the description of the crime ("murder") establish that appellant was charged exclusively with second

[63]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.

degree malice-murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.

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. Nieto Benitez* (1992) 4 Cal.4th 91, 102.)[64] 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.)[65]

Because the information charged only second degree malice-murder in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information"

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[64] 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."

[65] At the time of the alleged murder in appellant's case, section 189 read as follows: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree."

(*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) that charges that specific offense. (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after 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 Penal Code section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

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

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought.' (Pen. Code, sec. 187.) Murder, thus defined, includes murder in the first degree and murder in the second degree.[66] It has

[66]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,

> 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."

The rationale of *People v. Witt*, however, 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-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, italics 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

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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.

stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter, supra,* 15 Cal.4th at p. 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 defining that offense must be Penal Code section 189. No other statute purports to define premeditated murder 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 Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, this Court's conclusion that "[f]elony murder and premeditated murder are not distinct crimes" is not dispositive. (*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, supra,* 15 Cal.4th at p. 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[67]

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[67]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

The greatest difference among species of murder 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 high court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189, and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense." (*Id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, italics added, citation omitted.)[68]

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of second degree murder. . . .'" (*People v. Henderson*, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.), original emphasis.)

[68]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.]"

Premeditation and the facts necessary to bring a killing within the first degree felony murder rule are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. Therefore, those facts should have been charged in the information. (See *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; *Ex parte Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict appellant of murder without finding malice, which was an essential element of the crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *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 convictions for first degree murder must be reversed.

VI.

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

A. Introduction.

The trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20; 2 CT 458) and on felony murder (CALJIC No. 8.21; 2 CT 459.) The court did not, however, instruct the jurors that they had to agree unanimously on the same type of first degree murder before convicting appellant.

The failure to require the jury to agree unanimously on a theory of first degree murder deprived appellant of his rights under Sixth, Eighth and Fourteenth Amendments and their state constitutional analogs to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, to a verdict of a unanimous jury and to a fair and reliable determination that he committed a capital offense.

Appellant acknowledges that this Court has rejected the claim that a jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony murder. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1221; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 394-395.) Appellant submits the issue deserves reconsideration in light of the charges and facts of this case.

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

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

the defendant has been charged. (*In re Winship, supra,* 397 U.S. at p. 364.) Although each state has great latitude in defining what constitutes a crime, once it has set forth the elements of a crime, it may not remove from the prosecution the burden of proving every element of the offense charged. (See *Sandstrom v. Montana* (1979) 442 U.S. 510, 524; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704.)

In *Schad v. Arizona* (1991) 501 U.S. 624, the defendant challenged his Arizona murder conviction where the jurors were permitted to render their verdict based on either felony murder or premeditated and deliberate murder. The Supreme Court reaffirmed the general principle that there is no requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict. (*Id.* at p. 632, citing *McKoy v. North Carolina* (1990) 494 U.S. 433, 439.) *Schad* acknowledged, however, that due process does limit the states' capacity to define different courses of conduct or states of mind as merely alternative means of committing a single offense. In finding that defendant Schad was not deprived of due process, the Court relied on Arizona's determination that under their statutory scheme "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element." (*Schad, supra,* 501 U.S. at p. 637.) "If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, *rather than independent elements of the crime*, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." (*Id.* at p. 636, italics added.) Thus, where a state has determined that the statutory alternatives are independent elements of the crime, *Schad* suggests that due process is violated if there is not unanimity as to all the

elements.

California has followed a different course than Arizona. The various forms of first degree murder are set out in Penal Code section 189. These include not only felony murder but also deliberate and premeditated murder, as well as murder by other means.[69]

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

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

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[69]At the time of the alleged murder in appellant's case, section 189 read as follows: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death is murder of the first degree. All other kinds of murders are of the second degree."

. . [This is a] profound legal difference. . . .

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

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 felony murder and premeditated murder are not distinct crimes]), but it has continued to hold that the elements of those crimes are not the same. Thus, in *People v. Carpenter*, *supra*, 15 Cal.4th at page 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" (original emphasis). Similarly, this Court has declared that "the elements of the two

kinds of murder differ" (*People v. Silva* (2001) 25 Cal.4th 345, 367) and that "the two forms of murder [premeditated murder and felony murder] have different elements." (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1131).

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 819.) One consequence "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." (*Ibid.*) The analysis is different for facts which are not elements in themselves but rather theories of the crime – alternative means by which elements may be established. The Supreme Court in *Richardson v. United States*, *supra*, 526 U.S. at p. 817, explained this distinction and also showed why *Schad* is inapplicable in the present case. In *Richardson*, the Court cited *Schad* as an example of a case involving *means* rather than *elements*:

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

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

Comparison of the elements of the crimes at issue is the traditional method used by the United States Supreme Court to determine if the crimes are different or the same. The question first arose as an issue of statutory construction in *Blockburger v. United States* (1932) 284 U.S. 299, when the defendant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections described different crimes, 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 rights to proof beyond a reasonable doubt. (*Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.);[70] see *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 (lead opn. of Scalia, J.).)

By contrast, and as shown above, this case involves two forms of murder that California has determined are not merely separate theories of murder, but contain separate elements. Felony murder requires the commission or attempt to commit a felony listed in Penal Code section 189 and the specific intent to commit that felony; malice murder does not. (Pen. Code, §§ 187, 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.)

For first degree malice murder the prosecution must prove premeditation *and* deliberation, whereas felony murder does not require a premeditated intent to kill, but, here, the specific intent to engage in lewd and lascivious conduct with a child under 14.

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

[70] "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 'offence[s]' are 'the same,' see *Blockburger v. United States*, [*supra*] 284 U.S. 299 . . . , 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 italics.)

italics added.) If the elements of malice murder and felony murder are different, as *Carpenter* acknowledges is true for felony murder, then malice murder and felony murder are different crimes. (*United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

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

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.)

Though the United States Supreme Court has not specifically so held, the right to a unanimous verdict in a capital case is also guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. 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*, *supra*, 447 U.S. at p. 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, 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. In

People v. Steger (1976) 16 Cal.3d 539, the Court declared:

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

(*Id.* at p. 545, emphasis added, quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.)[71]

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

[71]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.)

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. (Pen. Code, §§ 189, 190, subd. (a).) Therefore, they must be found by procedures that comply with the constitutional right to trial by jury (see *Blakely v. Washington* (2004) 542 U.S. 296, 302-305]; *Ring v. Arizona* (2002) 536 U.S. 584, 603-605; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 494-495), 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 solely because the former requires premeditation while the latter does not. The crimes also differ because first degree premeditated murder requires malice while felony murder does not. "'The mental state required [for first degree premeditated murder] is, of course, a deliberate and premeditated intent to kill with malice aforethought. (See . . . §§ 187, subd. (a), 189.)'" (*People v. Hart*, *supra*, 20 Cal.4th at p. 608, quoting *People v. Berryman* (1993) 6 Cal.4th 1048, 1085; accord *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Thus, malice is a true "element" of murder.

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. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

Furthermore, this was not simply an abstract error. There was no compelling evidence supporting either form of murder, and reasonable jurors could have credited evidence supporting one form while rejecting evidence supporting the others. As argued in Argument III, above, there are legitimate arguments that there was insufficient evidence to find either theory of murder beyond a reasonable doubt. There is nothing to suggest that the jurors unanimously agreed the crimes were either premeditated murder or felony murder.

The trial court should have required the jurors unanimously to agree, if they could, on either felony murder or premeditated murder in order to convict appellant. Because the court failed to do so, the first degree murder conviction must be reversed and the death penalty vacated.

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VII.

THE TRIAL COURT'S ERRONEOUS, MISLEADING AND INCOMPLETE INSTRUCTIONS TO THE JURY AT THE GUILT PHASE WERE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND MANDATE REVERSAL.

Legally erroneous instructions that affect substantial rights are reviewable without requirement of objection below. (Pen. Code, § 1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1134-1135; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.) Section 1259 embodies the law that a trial court has ultimate responsibility for fulfilling the judicial duty of correctly instructing in a criminal case. (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127-1128; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1030-1031.)

Here, standard CALJIC instructions read to the jury impermissibly undermined and diluted the requirement of proof beyond a reasonable doubt. Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship*, *supra*, 397 U.S. at p. 364; accord, *Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra*, 397 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these

constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The series of standard CALJIC instructions given in this case each violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that never can be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

A. The Instructions On Circumstantial Evidence Undermined The Requirement Of Proof Beyond A Reasonable Doubt (CALJIC Nos. 2.01, 2.02, 8.83 & 8.83.1).

The court instructed the jurors with CALJIC No. 2.90 that appellant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving [him] guilty beyond a reasonable doubt." (2 CT 454; 9 RT 2013 [oral version].) CALJIC No. 2.90 defined reasonable doubt as follows:

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

(2 CT 454; 9 RT 2013-2014 [oral version].)

These principles were supplemented by four interrelated instructions that discussed the relationship between the reasonable doubt requirement and circumstantial evidence – CALJIC No. 2.01 [sufficiency of circumstantial evidence] (2 CT 442; 9 RT 2004-2005); CALJIC No.

2.02 [sufficiency of circumstantial evidence to prove specific intent or mental state] (2 CT 443; 9 RT 2005-2006); CALJIC No. 8.83 [special circumstances – sufficiency of circumstantial evidence] 2 CT 442; 9 RT 2004-2005); and CALJIC No. 8.83.1 [special circumstances – sufficiency of circumstantial evidence to prove required mental state] 2 CT 443; 9 RT 2005-2003.)[72] These instructions, addressing different evidentiary issues in nearly identical terms, advised appellant's jury that:

> if . . . one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, *you must accept the reasonable interpretation and reject the unreasonable.*

(2 CT 442, 443, italics added.)

These instructions informed the jurors that if appellant *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. This repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

First, the instructions not only allowed, but compelled, the jury to find appellant guilty and the special circumstance to be true using a

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[72]The trial court combined CALJIC Nos. 2.01 and 8.83 regarding sufficiency of circumstantial evidence to prove guilt and the special circumstance, and it combined CALJIC Nos. 2.02 and 8.83.1 regarding sufficiency of circumstantial evidence to prove specific intent or mental state as to guilt and the special circumstance. (See discussion at 8 RT 1775, 1779, 1783; 2 CT 442-443.)

standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instructions directed the jury to find appellant guilty and the special circumstances true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." (2 CT 442, 443; 9 RT 2004-2005, 2005-2006.) An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial-evidence instructions were constitutionally infirm because they required the jurors to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jurors to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314, italics added, fn. omitted.) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an

element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana*, *supra*, 442 U.S. at p. 524.)

Here, the combined circumstantial evidence instructions plainly told the jurors that if only one interpretation of the evidence appears reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. *A fortiori*, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The constitutional defects in the circumstantial evidence instructions were likely to have affected the jurors' deliberations. The only truly contested issue in this case was whether Ghobrial molested Juan, and the prosecution's theory was based solely on circumstantial evidence. During his closing argument the prosecutor told the jurors, that circumstantial evidence is,

> just as good as direct evidence. If you can interpret it two ways and both are reasonable and one favors the defendant, that's good, it goes to the defendant. But you can't interpret this circumstantial evidence two ways. It's one way when you look at it as a whole.

(8 RT 1912.)

In rebuttal, the prosecutor commented on the defense asking the jurors to "impute to [Ghobrial] innocent intents." (9 RT 1994.) He argued that the jurors should use their common sense. That is, the jurors had to accept the prosecution's view of the evidence if they found it to be

reasonable. (*Ibid.*) This standard is not one of reasonable doubt.

In fact, the prosecutor, aided by the instruction, turned the standard of proof on its head. He noted that the defense argued that the pornography found in Ghobrial's shed was relevant only if they knew where it was when Juan was in the shed – "asking you to impute an innocent use of the pornography to the defendant." (9 RT 1996.) The prosecutor asked, "[w]hy would you want to do that?" (*Ibid.*) He noted that the defense suggested that Juan's clothes were removed after his death. The prosecutor asked, "Why would you do that? Why would you give that an innocent motivation – " (9 RT 1996-1997.) He continued,

> Why give this benefit, knowing his intent, knowing the things we know about him, why input [sic] to him that his motivation for taking the clothes off was innocent or was done after death?

(9 RT 1997.)

Contrary to the prosecutor's argument, and the jury instructions given the jurors, the jurors had to find that the prosecution carried its burden of proving appellant's guilt beyond a reasonable doubt.

The prosecution's incriminatory interpretation of the evidence may have been reasonable, but more is required to prove beyond a reasonable doubt that a molestation occurred. The circumstantial evidence instructions permitted and indeed encouraged the jury to convict appellant upon a finding that the prosecution's theory was reasonable, rather than that it had been proven beyond a reasonable doubt.

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced appellant in another way – by requiring that he prove his defense was reasonable before the jury could deem it credible. Of course, "[t]he accused has no burden of

proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.)

For all these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant's guilt on a standard that is less than constitutionally required.

B. Other Instructions Also Vitiated The Reasonable Doubt Standard (CALJIC Nos. 2.01, 2.21.1, 2.21.2,2.22, 2.27 & 8.20).

The trial court gave other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 2.01 regarding circumstantial evidence of guilt (2 CT 401, 9 RT 2004); CALJIC No. 2.21.1, regarding discrepancies in testimony (2 CT 406; 9 RT 2008); CALJIC No. 2.21.2 regarding willfully false testimony (2 CT 406; 9 RT 2009); CALJIC No. 2.22, regarding weighing conflicting testimony (2 CT 406; 9 RT 2009); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (2 CT 403; 9 RT 2007); and CALJIC No. 8.20, regarding premeditation and deliberation (2 CT 417; 9 RT 2015-2016.) Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)

As a preliminary matter, CALJIC No. 2.01 violated appellant's

constitutional rights by misinforming the jurors that their duty was to decide whether appellant was guilty or innocent, rather than whether he had been shown to be guilty beyond a reasonable doubt. (See 2 CT 401; 9 RT 2005 [referring to jury's choice between "guilt" and "innocence"].) This instruction diminished the prosecution's burden by erroneously telling the jurors they were to decide between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt. It encouraged jurors to find appellant guilty because he had not proven that he was "innocent."[73]

Similarly, CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (2 CT 406; 9 RT 2009, italics added.) The instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be

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[73]As one court has stated:

> We recognize the semantic difference and appreciate the defense argument. We might even speculate that the instruction will be cleaned up eventually by the CALJIC committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect *standing alone.*

(*People v. Han* (2000) 78 Cal.App.4th 797, 809, original emphasis.) *Han* concluded there was no harm because the other standard instructions, particularly CALJIC No. 2.90, made the law on the point clear enough. (*Ibid.*, citing *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739.)

accepted based on a "probability" standard is "somewhat suspect"].)[74] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, the jurors were instructed:

> You are not bound to decide an issue or fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with *more convincing force*. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses [who have testified on the opposing sides]. The final test is not in the [relative] number of witnesses, but in the *convincing force* of the evidence.

(CALJIC No. 2.22; 2 CT 406; 9 RT 2009, italics added.)

This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, was more credible or more convincing than the other. In so doing, the instruction replaced the

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[74]The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." The *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (2 CT 403; 9 RT 3875-2007), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." CALJIC No. 2.27, by telling the jurors that testimony of a single witness whom they believed is "sufficient for the proof of that fact" and that they "should carefully review all the evidence upon which the proof of such fact depends" – without qualifying this language to apply only to *prosecution* witnesses – permitted reasonable jurors to conclude that (1) appellant himself had the burden of convincing them that he was not guilty and (2) that this burden is a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court

should find that it violated appellant's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

Finally, CALJIC No. 8.20, defining premeditation and deliberation, misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other conditions *precluding* the idea of deliberation. . . ." (2 CT 417; 9 RT 2016.) The use of the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, rather than to raise a reasonable doubt about that element. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "'absolutely prevent'"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction upon a lesser showing – that he or she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt.

The instructional errors mandate reversal under the Fifth, Sixth, Eighth and Fourteenth Amendments. The instructions as a whole fostered a verdict that was not in accord with the heightened reliability standard of the Eighth Amendment and created undue risk that the verdict and

subsequent death sentence were tainted by arbitrariness. (*Gardner v. Florida* (1977) 430 U.S. at 349, 361; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

C. The Court Should Reconsider Its Prior Rulings Upholding The Defective Instructions.

Although each one of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has previously rejected constitutional challenges to many of the instructions discussed here. (See, e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC No. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].) While recognizing the shortcomings of some of the instructions, this Court has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72), and there certainly is a reasonable likelihood that the jury applied the

challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra*, 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[75] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow

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[75]A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Appellant's jury heard numerous instructions containing plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: CALJIC No. 2.90. This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson* (1992) 3 Cal.4th 926, 943, citations omitted.) Under this principle, it cannot seriously be maintained that a single instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

D. Reversal Is Required.

The determination of prejudice from the delivery of erroneous instructions is to be made on the facts of each case. For all instructional error claims, the evidence is viewed in a light most favorable to the claim of instructional error. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673-674; *Clement v. State Reclamation Board* (1950) 35 Cal.2d 628, 643-644.) This standard was restated in *Logacz v. Limansky* (1999) 71 Cal.App.4th 1149:

> With respect to our review of issues relating to . . . an issue [of legal instructional error], as well as the question of their prejudicial impact, we do not view the evidence in a light most favorable to the successful [respondent] and draw all inference in favor the judgment. Rather, we must assume

> that the jury, had it been given proper instructions, might have drawn different inferences more favorable to the [appellant] and render a verdict in [appellant's] favor on those issues as to which it was misdirected.

(*Id.* at p. 1156, citations omitted.)

In this case, the instructional errors, taken singly and together, would have confused a "reasonable juror" (*People v. Ashmus* (1991) 54 Cal.3d 932, 940, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117) and they mandate reversal under the Fifth, Sixth, Eighth and Fourteenth Amendments. The instructions as a whole fostered a verdict that was not in accord with the heightened reliability standard of the Eighth Amendment and created undue risk that the verdict and subsequent death sentence were tainted by arbitrariness. (*Gardner v. Florida*, *supra*, 430 U.S. at p. 361; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible *per se*. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) Here, that showing cannot be made. Appellant contested the first degree murder charge and the truth of the special circumstance. Accordingly, the dilution of the reasonable-doubt requirement by the guilt-phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*,

supra, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.)

The conviction, the special circumstance finding and the death judgment must be reversed.

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VIII.

PROSECUTORIAL MISCONDUCT REQUIRES THAT THE DEATH JUDGMENT BE REVERSED.

A. Introduction and Factual Background.

Ghobrial's trial began inauspiciously. On the second day of jury selection, terrorists attacked the Twin Towers World Trade Center and the Pentagon; anti-Muslim and anti-Arab sentiment was profound and widespread.[76] Recognizing that it would difficult if not impossible to find fair jurors in this environment, defense counsel requested a continuance of the trial. (2 RT 404.) The trial court denied the motion (2 RT 414, 507), but on the first day of voir dire following September 11, it posed the following question to the prospective jurors:

> Does any juror at this time because of the recent events or any other reason, harbor any bias against the defendant at this time; and does any juror believe that these events will in any manner impact or affect your decisions in this case. . . .

(2 RT 523.)

After 17 prospective jurors expressed bias, the prosecutor stipulated to a continuance, stating:

> I will just tell the court, I am frankly shocked at the number of people who did, I am disappointed in the jury pool we have, that that number of people would have expressed that. If there had been one or two, I would not have felt that it was necessarily a systemic problem, but because that many people came forward I believe it is more than just what we just heard, I believe it probably is the tip of the iceberg.

(2 RT 537.)

In open court the court granted a joint motion to continue,

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[76]Ghobrial is a Coptic Christian, but at least one prospective juror was skeptical of this claim. Prospective juror 746 stated concern that Ghobrial was not truthful about being Christian. (3 RT 746.)

concluding that "the events of September the 11th are still having a sufficient impact on our getting a sufficient number of jurors to proceed in this case, that we are not going to be able to proceed with this number of jurors at this time, and also with the atmosphere that seems to be pervading at this time." (2 RT 539.)

Jury selection resumed on October 29, 2001 (2 CT 341; 3 RT 557), just 48 days after September 11. However, as the trial court recognized at the time, the effects of that tragedy, and the anti-Arab prejudice it engendered, are enduring.[77] Given this atmosphere, the prosecutor, as a representative of the state, should have done what he could to defuse any lingering bias against Ghobrial. Instead, he fueled anti-Arab sentiment by improperly and prejudicially comparing Ghobrial to terrorists and referring to September 11 and Osama bin Laden during his examination of witnesses and closing argument. In his zeal to obtain a death verdict, the prosecutor crossed the line between zealous advocacy and patent misconduct.

B. The Special Role Of The Prosecutor And The Standard Of Review.

The role of a prosecutor is not simply to obtain convictions but to see that those accused of crime are afforded a fair trial. This obligation "far transcends the objective of high scores of conviction . . . ." (*People v. Andrews* (1970) 14 Cal.App.3d 40, 48.) A prosecutor is held to an "elevated standard of conduct" because he or she exercises the sovereign powers of the state. (*People v. Hill* (1997) 17 Cal.4th 800, 819; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) As the United States Supreme Court has explained:

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[77]The court doubted that a month-long continuance would really make a difference. (2 RT 406, 413-414.) "The impact of this is going to be so long lasting." (2 RT 407.)

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocents suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

(*Berger v. United States* (1935) 295 U.S. 78, 88, overruled on other grounds, *Stirone v. United States* (1960) 361 U.S. 212.)

Put differently: "The prosecutor's job isn't just to win, but to win fairly, staying well within the rules." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323; accord, *United States v. Blueford* (9th Cir. 2002), 312 F.3d 962, 968; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 648-649 (disn. opn. of Douglas, J.) ["The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws that give those accused of a crime a fair trial"].)

Misconduct by a prosecutor may deprive a criminal defendant of the guarantee of fundamental fairness and thereby violate the Due Process Clause of the Fifth and Fourteenth Amendments. (*Darden v. Wainwright* (1986) 477 U.S. 168, 178-179; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Hill*, *supra*, 17 Cal.4th at p. 819, internal

quotations omitted.) Misconduct by a prosecutor may also violate a defendant's right to a reliable determination of penalty under the Eighth Amendment. (*Darden v. Wainwright*, *supra,* 477 U.S. at pp. 178-179.)

In addition, a prosecutor's behavior is misconduct under California law when it involves the use of "deceptive or reprehensible methods to attempt to persuade either the court or the jury," even if such action does not render the trial fundamentally unfair. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Earp* (1999) 20 Cal.4th 826, 858; *People v. Espinoza, supra,* 3 Cal.4th at p. 820.) A showing of bad faith or knowledge of the wrongfulness of his or her conduct is not required to establish prosecutorial misconduct. (*People v. Hill*, *supra,* 17 Cal.4th at pp. 822-823 & fn.1; accord, *People v. Smithey* (1999) 20 Cal.4th 936, 961.)[78] When a claim of misconduct focuses upon comments made by the prosecutor before the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Smithey*, *supra,* 20 Cal.4th at p. 960.)

In this case, there is more than a reasonable likelihood that in the

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[78]To the extent that it can be argued that the prosecutor's repeated references to the terrorist attacks were not made in bad faith, they are stark evidence of the pervasive impact of the attacks. If the prosecutor could not distinguish between them and Ghobrial's case or restrain himself from references to the attacks, the jurors could hardly be expected to do so. (Cf. *United States v. Sherlock* (9th Cir. 1989) 962 F.2d 1349, 1361 [The prosecutor's use of another's "admission" against Sherlock reveals that not even he could apply the limiting instructions or that he understood, and intended, his misconduct. Although the court gave the limiting instructions before closing argument, the prosecutor's improper use of the statement removed any reasonable expectation that the jury would follow the instructions given before argument].)

first few months following September 11, the jurors imposed a death sentence based on improper influences.

C. The Prosecutor's Repeated References to September 11, Were Severely Prejudicial, Violated Ghobrial's Due Process Rights and Resulted in an Unreliable Death Judgment.

The prosecutor's references to September 11 began innocuously, but unnecessarily recalled the incident to the jurors' minds. During his guilt phase closing argument, the prosecutor leveled a backhanded compliment to the F.B.I., criticizing but excusing its sperm identification protocol standards by explaining he would not take a "shot at" the F.B.I. because it was "right now . . . out there trying to hunt down terrorists." (8 RT 1929.) Any reference to terrorism was gratuitous in a case such as this one, but had that been the only reference, it may have been excused. It was not. The prosecutor's rhetoric only escalated.

During the penalty phase of trial, Dr. Jose Flores-Lopez testified that in his opinion, Ghobrial suffered from a psychosis, specifically schizoaffective disorder, and that he would most likely have it for the rest of his life. (10 RT 2496-2498, 2501.) During cross examination the prosecutor repeatedly questioned Dr. Flores-Lopez regarding evil:

> [Prosecutor] And the fact that [Ghobrial] has symptoms of schizophrenia . . . does not stop him from being an evil person if he wants to be an evil person, does it?
> [Defense] Objection, outside the scope of direct.
> [The Court] Sustained.
> [Prosecutor] Nothings stops him from doing intentional evil acts if [he] wants to do it, does it?
> [Witness] I'm not sure what you mean by evil.
> [Prosecutor] You don't know what the word means?
> [Witness] Not in your context.

[Prosecutor] What context? Is Osama bin Laden an evil man?
[Defense] I'm going to object. It's irrelevant.
[The Court] Sustained.
[Prosecutor] What does evil mean to you?
[Defense] I'm going to object to the whole line of questioning.
[The Court] Sustained.

(10 RT 2509-2510.)

During closing argument the prosecutor explained that we are a compassionate people: "We have, out of the tragedy that happened in September, we found out how compassionate we are. There's just an outpouring of support and patriotism, whatever you want to call it, we have that in our makeup." (11 RT 2660.) The prosecutor not only referenced September 11, he also, within a few pages, contrasted "our" patriotism with Ghobrial's foreignness. "Mr. Ghobrial came into this country and within a short period of time he committed the ultimate crime." (11 RT 2663; see also 11 RT 2701 [Ghobrial "managed to immigrate to America. He managed to get out of Egypt and to work his way here. [] To beg for money"].)

Shortly after that, the prosecutor returned to the idea that one could be psychotic and evil at the same time. The prosecutor observed that each of the religions of the world has accounts that modern psychiatrists would label delusional: God speaking to Moses from a burning bush; the finger of God writing the Ten Commandment; Islam given to Mohammed in a dream. (11 RT 2674-2675.) He continued:

> I'm not trying to make more of this than it is, but, . . . these people in Al Qaeda, they're all schizophrenic because they all became suicide bombers because they had this vision that there's going to be 48 or 50 virgins waiting for them on the other side. And maybe they were. Maybe they were because the numbers are so great of people who are – you know.

> Who are schizophrenic. But it doesn't stop them from doing evil acts. And nothing about the defendant's mental disturbance stopped him doing evil acts.

(11 RT 2675-2676.)

The prosecutor may have claimed not to want to make "more of this than it is," but he likened Ghobrial to the Al Qaeda suicide bombers who had just changed the world for most Americans, and he equated their terrorism with schizophrenia. He could not have conjured up a more damaging, prejudicial and wholly irrelevant image or leveled a more contemptuous dismissal of severe mental illness.

Later, during his closing, the prosecutor referred to his examination of Dr. Flores-Lopez, repeating the questions and answers regarding evil, to which objections had been sustained. (See 11 RT 2699-2700.)[79]

In this case, tried less than two months after the terrorist attacks, the prosecutor's repeated references to September 11, his comments regarding terrorists, his comparison of Ghobrial to suicide bombers, his usupported assertion that the bombers were all schizophrenic and his description of Ghobrial as an immigrant who came to this country to beg for money, all likely influenced the jurors to vote for death.

The prosecutor's references fueled an already incendiary situation: he encouraged the jurors to act on latent biases and permitted them to use inadmissible and unadmitted evidence in aggravation in violation of appellant's rights under the Fifth, Eighth and Fourteenth Amendments.

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[79]The prosecutor repeated his question, "nothing stops [Ghobrial] from doing intentional evil acts if he wants to do it, does it?" And he repeated Dr. Flores-Lopez's response that he was not sure what the prosecutor meant by evil, "[n]ot in your context." (11 RT 3699-2700.) That led the prosecutor to argue: "What did he know what my context was? They just don't want to call it. They just don't want to call evil evil." (*Ibid.*)

(See *Dawson v. Delaware* (1992) 503 U.S. 159, 165 (receipt into evidence at the penalty phase of a stipulation regarding defendant's membership in the Aryan Brotherhood was constitutional error]; *People v. Boyd* (1985) 38 Cal.3d 762, 773-774 [Evidence of defendant's background, character, or conduct that is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation].)

It is true that the court sustained numerous defense objections to questions about whether Dr. Flores-Lopez believed that Osama bin Laden was evil. (10 RT 2509-2510.) And defense counsel failed to object to the other instances discussed above. However, the court could do very little to ameliorate the situation once the prosecutor's statements were made.

This Court has ruled that under certain circumstances, defense counsel "must be excused from the legal obligation to continually object, state the grounds of his objection, and ask the jury be admonished. On this record, we are convinced any additional attempts on his part to do so would have been futile and counterproductive to his client. [Citations.]" (*People v. Hill, supra*, 17 Cal.4th at p. 821.) Here, the harm was done once September 11 references were injected into the equation. As this Court has recognized, "You can't unring a bell." (*Id.* at pp. 845-846, quoting *People v. Wein* (1958) 50 Cal.2d 383, 423 (dis. opn. of Carter, J.).) The harm could not have been cured by objection or curative instruction.

D. The Misconduct Requires Reversal.

The above-described misconduct violated Ghobrial's rights to due process of law, a fair jury trial and a reliable and nonarbitrary penalty determination, as guaranteed by the Fifth, Eighth and Fourteenth Amendments of the United States Constitution. (*Donnelly v.*

DeChristoforo, supra, 416 U.S. at p. 643; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Beck v. Alabama, supra*, 447 U.S. at p. 638; *People v. Bell* (1989) 49 Cal.3d 502, 534; *People v. Hill, supra*, 17 Cal.4th at p. 819.)

"[A]t the penalty phase a prosecutor commits misconduct under the federal standard by engaging in conduct that renders the trial so unfair as to constitute a denial of due process." (*People v. Dykes* (2009) 46 Cal.4th 731, 786; see *People v. Wallace* (2008) 44 Cal.4th 1032.) Under state law, it constitutes reversible misconduct for the prosecutor to employ deceptive or reprehensible methods to persuade the court or the jury (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1091), when "there is a reasonable possibility that without such misconduct, an outcome more favorable to the defendant would have resulted." (*People v. Riggs* (2008) 44 Cal.4th 248, 315; see *People v. Martinez* (2010) 47 Cal.4th 911.)

In *People v. Wallace*, *supra*, 44 Cal.4th at p. 1092, this Court stated, "[f]or prosecutorial misconduct at the penalty phase, we apply the reasonable-possibility standard of prejudice first articulated in *People v. Brown*, *supra*, 46 Cal.3d at page 448, . . . and which, as we have later explained, is the "same in substance and effect" as the beyond-a-reasonable-doubt test for prejudice articulated in *Chapman v. California* (1967) 386 U.S. 18."

It is difficult to think of any "more deceptive or reprehensible methods" to persuade a jury than those employed in this case. The prosecutor misconduct injected improper considerations into the sentencing calculus and encouraged the jurors to make a decision based on emotion rather than reason. His comments left the jurors with an image of Ghobrial as an Egyptian national who came to this country to beg for

money and commit evil acts. His schizophrenia was not a factor in mitigation, but evidence of his kinship with Al Qaeda suicide bombers. The misconduct unfairly added to the reasons why a death sentence should be imposed and thus violated appellant's Eighth Amendment right to a reliable, individualized, and non-arbitrary sentencing determination. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 329.)

If the scales had been more fairly balanced, it is likely that a life sentence would have been imposed. Therefore, the misconduct must be deemed prejudicial, and the judgment must be reversed.

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IX.

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

Many features of California's capital sentencing scheme violate the United States Constitution. 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. These claims of error are cognizable on appeal under Penal Code section 1259, even when appellant did not seek the specific instruction or raise the precise claim asserted here. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad.

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Meeting this criteria requires

a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (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 offense charged against appellant, Penal Code section 190.2 contained 21 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; 2 CT 550-551; 11 RT 2799-2800.) 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, overruled in part on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459; *People v. Brown* (2004) 33 Cal.4th 382, 401.) He urges the Court to reconsider this holding.

C. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof.

1. Appellant's Death Sentence is Unconstitutional Because it is Not Premised on Findings Made Beyond a Reasonable Doubt.

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; 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; 2 CT 550-551; CALJIC No. 8.88; 2 CT 558.)

Apprendi v. New Jersey, *supra*, 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona*, *supra*, 536 U.S. at p. 604, and *Cunningham v. California* (2007) 549 U.S. 270, 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; 2 CT 558; 11 RT 2805-2807.) 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 failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on other grounds, *People v. Flannel* (1972) 25 Cal.3d 668, 684, fn. 12; 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, supra,* 25 Cal.4th at p. 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 guarantee or the Eighth Amendment requirement for heightened reliability in capital proceedings requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the

mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof.

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and 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 jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (2 CT 550-551, 558; 11 RT 2799-2800, 2805-2807), 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.

a. Aggravating Factors.

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) 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., Pen. Code § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity.

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally

provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (2 CT 553 [CALJIC 8.87].) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi*, *supra*, 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 584-585.) Here, the prosecution presented evidence of appellant's alleged prior criminal activity under factor (b) (9 RT 2071-2076) and substantially relied on this evidence in his closing argument (11 RT 2683-2692).

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this claim in other contexts. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard.

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; 2 CT 558.) 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 previously 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.

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 Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole.

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) The court instructed the jury with CALJIC No. 8.88, which only informs the jury of the circumstances that permit the rendition of a death verdict. (2 CT 558; 11 RT 2805-2807.) By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts

with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances.

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 292-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that appellant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special

circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should be Instructed on the Presumption of Life.

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for 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. 14), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., Amends. 8th, 14th), and his right to the equal protection of the laws. (U.S. Const., Amend, 14th.)

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.

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*, *supra*, 428 U.S. at p. 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.

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 (2 CT 550-551; 11 RT 2799-2800), 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*, *supra*, 356 U.S. at p. 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*, *supra*, 543 U.S. at p. 554), appellant urges this Court to reconsider its previous decisions.

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X.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS.

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (*See Cooper v. Fitzharris* (9th Cir. 1987) (*en banc)* 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The failure to ensure Ghobrial's competency to stand trial, Instructional errors, and insufficiency of the evidence all combined to infect appellant's trial with unfairness and make the resulting conviction a denial of due process. (U.S. Const. amend. 14; Cal. Const. art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643. Appellant's conviction, therefore, must be reversed. (*See Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may

nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845 [reversal based on cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (*See People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (*See People v. Hamilton*, *supra*, 60 Cal.2d at pp. 136-137; *see also People v. Brown, supra*, 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

The errors committed at the penalty phase of appellant's trial included the exclusion of relevant evidence that denied Ghobrial the constitutional right to present evidence in his defense and prosecutorial misconduct designed to prejudice the jurors against Ghobrial by fueling their anger and fear following the September 11 tragedy. Reversal of the death judgment is mandated here because it cannot be shown that penalty

errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (*See Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

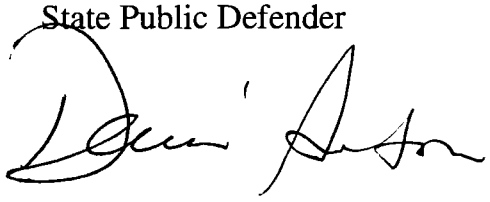
CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: May 26, 2011

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



DENISE ANTON
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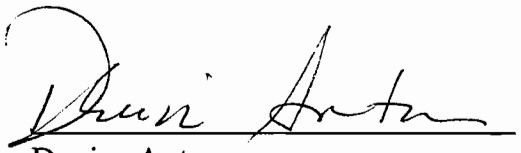
Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Denise Anton, am the Supervising Deputy State Public Defender assigned to represent appellant, John Ghobrial, 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 59,034 words in length excluding the tables and certificates.

Dated: May 26, 2011



Denise Anton

DECLARATION OF SERVICE

Re: *People v. Ghobrial*

Orange County Superior Ct
No. 98NF0906
CA Supreme Ct. No.S105908

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on the following, by placing same in an envelope addressed as follows:

Kamala Harris
Attorney General of the State of California
110 W. "A' Street, Suite 11000
San Diego, CA 92101

Habeas Corpus Resource Center
303 2nd Street, South 400
San Francisco, CA 94107

JOHN SAMUEL GHOBRIAL
Appellant

Merry Mahar
Capital Case Clerk
Orange County Superior Court
Room L-100
700 Civic Center Drive West
Santa Ana, CA 92702

Each said envelope was then, on May 26, 2011, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 26, 2011, at San Francisco, California.

Glenice Fuller
DECLARANT