S115284

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DUNG ~~DIHN~~ DINH AHN TRINH,

Defendant and Appellant.

Orange Co. Sup. Ct.
No. 99NF2555

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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DEATH PENALTY

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S115284

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DUNG DIHN AHN TRINH, Defendant and Appellant.	Orange Co. Sup. Ct. No. 99NF2555

APPELLANT'S OPENING BRIEF

INTRODUCTION

On September 14, 1999, just hours after his mother died, appellant shot and killed three hospital workers at West Anaheim Medical Center, and shot at but missed another. Although the incident was undeniably tragic, a review of the district attorney's decision to seek the death penalty in this case, and of the evidence relating to appellant's uniquely sympathetic life history, shows that the guilt verdicts and death judgment reached in this case were by no means inevitable.

The defense evidence painted the following portrait of appellant, one essentially conceded by the prosecution:

Appellant was 43 years old at the time of the shootings, and he had lived with his mother his entire life – from his boyhood as a fatherless outcast in Saigon, to an adulthood devoted to ensuring her well-

being. An array of witnesses testified that she was his sole companion and the center of his life, and that he had been an extraordinarily devoted son.

For at least several years prior to her death, appellant's mother had suffered from kidney failure, heart disease and diabetes. In May, 1999, she fractured her hip and was taken to West Anaheim Medical Center, where she spent the next 30 days. During her stay, her physical and mental condition rapidly deteriorated. She was subsequently admitted to La Palma Intercommunity Hospital, where her condition worsened. While at La Palma, she was placed in restraints on a number of occasions; in one instance, appellant became upset when he noticed that she had been tied to her bed.

Appellant visited his mother constantly during the time she was at West Anaheim Medical Center and La Palma Intercommunity Hospital. He fed, bathed and otherwise assisted in her care, sometimes because medical staff required his assistance. He was frequently enlisted to interpret and to learn the rigorous techniques necessary to assist his mother with basic physical tasks.

In addition to serving as his mother's primary caretaker, appellant had to work full time and contend with a series of financial setbacks. In fact, less than three weeks before the shootings, appellant filed for bankruptcy.

At some point during his mother's stay at West Anaheim Medical Center, appellant became angry with the nurses attending to her, believing that they had mistreated and ridiculed her. He was also angry with the nursing staff at La Palma Intercommunity Hospital, believing that they too had played a part in her decline.

On September 14, 1999, appellant's mother collapsed and was transported to Martin Luther Hospital, where she was pronounced dead. When appellant was informed of her death, he became visibly distraught. He subsequently drove to West Anaheim Medical Center, armed with guns and ammunition.

The defense theory at the guilt phase was that appellant committed the shootings while in the heat of passion. The defense theory at the penalty phase was that life imprisonment without parole was the appropriate sentence because, among other things: appellant killed out of pain and grief, not for some baser motive; he had long demonstrated admirable character traits, such as love for his mother, kindness, and an exceptional work ethic; he did not fully understand the hospital procedures, leading to his mistaken belief that the hospital workers had harmed his mother; and, he committed the killings under extremely emotional circumstances, i.e., immediately after learning that his mother had died. In short, appellant was crushed by a mounting array of stressors and eventually "snapped."

In fact, appellant's case might not have been charged as a capital case at all but for the fact that Orange County District Attorney Tony Rackauckas's father had been a patient at West Anaheim Medical Center just days before the shooting. Reportedly upset by that fact, Rackauckas unilaterally implemented a new policy whereby rampage-killings in public places automatically were to be charged as capital cases. Had appellant not been denied a special circumstances review hearing, it is certainly possible that the sympathetic aspects of his case would have led the District Attorney's Office not to seek death.

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, §1239.)[1]

STATEMENT OF THE CASE

On July 14, 2000, the prosecution filed a four-count information against appellant. (CT Vol. 1 2-4.)[2] Count 1 alleged that appellant murdered Marlene Mustaffa. (§ 187, subd. (a).) Count 2 alleged that appellant murdered Vincent Rosetti. (§ 187, subd. (a).) Count 3 alleged that appellant murdered Ronald Robertson. (§ 187, subd. (a).) Count 4 charged appellant with the attempted murder of Milagros Salvador. (§§ 664/187, subd. (a).) The information further alleged that the attempted murder was committed willfully, deliberately and with premeditation. (§ 664, subd. (a).)

The information further alleged as a special circumstance that, as to Counts 1 through 3, appellant intentionally killed each victim by means of lying in wait. (§ 190.2, subd. (a)(15).) The information also alleged the special circumstance of multiple murder. (§ 190.2, subd. (a)(3).) Finally, the information alleged that appellant personally discharged a firearm causing death in the commission and attempted commission of Counts 1 through 3 (§ 12022.53, subd. (d)); personally used a firearm in the

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[1]All statutory references are to the Penal Code unless otherwise indicated.

[2] The Clerk's Transcript is referred to as "CT," the Supplemental Clerk's Transcript as "Supp. CT," the Jury Questionnaires/Exhibits Clerk's Transcript as "Quest./Exh. CT," and the Reporter's Transcript as "RT." Except where otherwise indicated, appellant cites to the record in the following manner: "[CT or RT] [volume number] [page number]." (Cal. Rules of Court, rule 8.204, subd. (a)(1)(C).)

commission and attempted commission of Counts 1 through 4 (§ 12022.5, subd. (a)); and, personally discharged a firearm in the commission and attempted commission of Count 4 (§ 12022.53, subd. (c)). (CT Vol. 1 3-4.)

On July 26, 2000, the Orange County District Attorney's Office sent a letter to appellant stating that it had decided to pursue the death penalty in his case. (CT Vol. 1 19-21.) In response, appellant sent an August 24, 2000, letter to the district attorney's office in which he observed that a "Livesay hearing" had not been conducted regarding his case.[3] In addition, appellant requested that the district attorney's office explain whether he had been denied such a hearing pursuant to District Attorney Tony Rackauckas's policy, first announced publicly during a September 16, 1999, press conference, that his office would seek the death penalty in all cases involving killings in public places. (CT Vol. 1 22.)

On August 28, 2000, appellant pled not guilty as to each count. (CT Vol. 1 23-24.)

On September 26, 2000, appellant filed a notice of motion to set aside the information pursuant to section 995. (CT Vol. 1 40.) On December 1, 2000, the matter was taken off calendar (CT Vol. 1 65), and apparently the motion was not pursued further.

On February 7, 2001, appellant filed a motion for discovery of information relating to the District Attorney's decision to seek the death penalty in this case. (CT Vol. 1 66-92.) The prosecution filed a response to appellant's discovery motion on February 21, 2001. (CT Vol. 1 93-99.) On

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[3] The Orange County District Attorney's Office referred to such hearings as Special Circumstances Review Hearings/Meetings. (CT Vol. 1 159-160.) Appellant describes such hearings in greater detail in Argument I, *post*.

February 23, 2001, the trial court denied the motion. (CT Vol. 1 104.)[4]

On October 23, 2001, appellant filed a motion to recuse the Orange County's District Attorney's Office. (CT Vol. 1 110-213.) On December 5, 2001, the Attorney General's Office filed an opinion asserting that appellant's recusal motion should be denied. (CT Vol. 1 221-242.) On that same date, the prosecution filed an opposition to appellant's recusal motion. (CT Vol. 1 243-252.)

On December 31, 2001, appellant filed a response to the pleadings opposing his recusal motion. (CT Vol. 1 254-277.) In further support of its opposition to appellant's motion, the prosecution filed a supplemental declaration by District Attorney Rackauckas on January 11, 2002. (CT Vol. 1 278-280.) That same date, the trial court denied appellant's recusal motion. (CT Vol. 1 281.)

On February 5, 2002, appellant filed a petition for writ of mandate/prohibition and request for immediate stay, arguing that the trial court erred when it denied petitioner an evidentiary hearing on the recusal motion. (Supp. CT Vol. 1 177-300; Supp. CT Vol. 2 301-560.) On March 1, 2002, both the Orange County District Attorney's Office and the Attorney General's Office filed informal replies to appellant's petition. (Supp. CT Vol. 2 565-580.)

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[4] Following the trial court's ruling, the defense unsuccessfully sought a writ of mandate/prohibition. (Supp. CT Vol. 1 4-113 [petition for writ of mandate/prohibition and request for immediate stay], 117-149 [prosecution's informal reply], 150-151 [order of Court of Appeal denying petition for writ of mandate/prohibition and request for immediate stay], 152-172 [petition for review], 176 [order of California Supreme Court denying petition for review].)

On April 11, 2002, the prosecution filed its first amended information, which was identical to the original information except that a lying-in-wait special circumstance was alleged only as to Count 1. (CT Vol. 2 335-337.)

On April 18, 2002, the Court of Appeal denied appellant's petition for writ of mandate/prohibition and request for immediate stay. (Supp. CT Vol. 2 581-582.)

On July 2, 2002, the prosecution moved to dismiss the lying-in-wait special circumstance as to Count 1, and the trial court granted the motion. (CT Vol. 2 390-391.)

Jury selection for appellant's first trial began on July 9, 2002. (CT Vol. 2 422.) The jury was sworn to try the case on July 17, 2002. (CT Vol. 2 451.)

The guilt phase of appellant's trial began on July 29, 2002. (CT Vol. 2 476.) On August 19, 2002, the jury commenced deliberations. (CT Vol. 3 738.) That same day, the jury returned verdicts of guilty as to Counts 1 through 4, and found the multiple murder special circumstance to be true. (CT Vol. 3 702-705, 738-741.) The jury found true the allegation that appellant acted willfully, deliberately and with premeditation in the commission of the attempted murder charged in Count 4. (CT Vol. 3 705.) The jury also found true the allegations that appellant personally used a firearm (§ 12022.5, subd. (a)) and personally discharged a firearm causing death (§ 12022.53, subd. (d)) in the commission of Counts 1 through 3. (CT Vol. 3 702-704, 739-740.) Finally, the jury also found true the allegations that appellant personally used a firearm (§ 12022.5, subd. (a)) and personally discharged a firearm (§ 12022.53, subd. (c)) in the commission of Count 4. (CT Vol. 3 705, 740.)

On August 21, 2002, the prosecution filed its notice of evidence in aggravation pursuant to Penal Code section 190.3; the prosecution noted that it intended to present aggravating evidence, including victim impact evidence, under factor (a) of that section. (CT Vol. 3 747-748.) That same day, appellant filed a "trial brief" regarding the permissible parameters of victim impact evidence. (CT Vol. 3 742-746.) Also that same day, the trial court heard and denied appellant's "trial brief." (RT Vol. 12 2675-2682; CT Vol. 3 749-750.)

On August 26, 2002, the penalty phase of appellant's trial commenced. (CT Vol. 3 751.) The jury began deliberating on August 28, 2002. (CT Vol. 3 764-765.) On September 3, 2002, the third day of deliberations, the jury advised the trial court that it had reached an impasse in its deliberations, and the trial court declared a mistrial. (CT Vol. 3 765, 773, 832-834.) At the time the trial court declared the mistrial, the jurors were split 10-2 in favor of life without possibility of parole. (RT Vol. 14 3156-3157; RT Vol. 20 4715, 4719-4720; CT Vol. 4 1120-1121; CT Vol. 6 1564.)

On September 26, 2002, the prosecution filed an amended notice of evidence in aggravation pursuant to section 190.3. The amended notice was identical to the original notice, except that it indicated that the prosecution also intended to present evidence regarding appellant's alleged plan/attempt to hijack a vehicle and kill additional victims. (CT Vol. 3 836-837.)

On October 21, 2002, appellant filed a motion requesting that the trial court reconsider its denial of appellant's motion to recuse the Orange County District Attorney's Office. (CT Vol. 4 841-1114.) In support of its motion, appellant attached several exhibits, including a copy of a recent grand jury report prepared in response to "a number of complaints and

letters sent to the outgoing 2000-2001 Grand Jury concerning alleged improprieties in the operation of the Orange County District Attorney's Office." (CT Vol. 4 1018.)

On October 24, 2002, appellant filed a motion to prohibit retrial of the penalty phase. (CT Vol. 4 1115-1121.)

On October 28, 2002, appellant filed a motion to strike the amended notice of evidence in aggravation. (CT Vol. 4 1123-1137.) The trial court denied the motion to strike the amended notice in aggravation on October 31, 2002. (RT Vol. 14 3175-3181.)

Jury selection for appellant's second penalty trial began on October 28, 2002. (CT Vol. 5 1138.)

On October 30, 2002, appellant filed a motion to exclude/limit the prosecution's redacted version of appellant's videotaped statements to the police. (CT Vol. 5 1144-1271.) Appellant also moved to exclude any references to statements he had made to police officer Thomas McManus; appellant further requested that the court at least exclude any references to Americans in his statement. (RT Vol. 14 3130-3137.) Appellant also renewed his motion to limit the number and scope of victim impact witnesses. (RT Vol. 14 3153-3159; CT Vol. 5 1304.)

That same day, the trial court denied: (1) appellant's request that it reconsider its denial of his motion to recuse the District Attorney's office; (2) appellant's motion to prohibit retrial of the penalty phase; and, (3) appellant's motion to exclude any references to his statements to Officer McManus. (RT Vol. 14 3129-3144; CT Vol. 5 1304.) The following day, the trial court denied appellant's motion to limit the number and scope of victim impact witnesses. (RT Vol. 14 3185-3186; CT Vol. 5 1314.)

On November 4, 2002, appellant filed an in limine motion to exclude his statements to police as involuntary. (CT Vol. 5 1315-1326.) That same day, the prosecution filed points and authorities in support of admission of those statements. (CT Vol. 5 1327-1332.) Also that day, the trial court granted appellant's motion to exclude appellant's statements to the police, finding that the interrogating officer had ignored appellant's unequivocal request for an attorney. (RT Vol. 14 3195; CT Vol. 5 1335.) The court further found that the statement was voluntary and that there had been no coercion. (RT Vol. 14 3195-3196.) Finally, the court ruled that appellant's statement could not be used in aggravation. (RT Vol. 14 3196.)

The jury was sworn to try the second penalty trial on November 5, 2002. (CT Vol. 5 1347.) The second penalty trial commenced on November 6, 2002. (CT Vol. 5 1354.)

On November 7, 2002, appellant renewed his motion to limit the number of victim impact witnesses, which the court denied. (RT Vol. 16 3807-3811; CT Vol. 5 1362.)

The jury began deliberating on November 21, 2002. (CT Vol. 6 1451.) On December 4, 2002, the fourth day of deliberations, the jury advised the trial court that it had reached an impasse in its deliberations, and the trial court declared a mistrial. (CT Vol. 6 1451-1452, 1456, 1460-1461, 1463-1464.) At the time the trial court declared the mistrial, the jury was split 11-1 in favor of death. (RT Vol. 20 4715, 4718-4791; CT Vol. 6 1564.)[5]

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[5] As appellant explains in Argument V, *post*, the defense presented evidence that, until several jurors engaged in serious misconduct, the jury had been split 8-4 for death.

On December 18, 2002, appellant filed a motion requesting that the court impose a sentence of life imprisonment without the possibility of parole pursuant to Penal Code section 190.4, subdivision (b). (CT Vol. 6 1563-1594.) The trial court denied appellant's motion the following day. (RT Vol. 20 4713-4720; CT Vol. 6 1595.)

On February 20, 2003, at the request of defense counsel, the trial court renewed its ruling that evidence regarding appellant's views on Communism, American involvement in the Vietnam War, and similar matters were irrelevant and constituted improper aggravating evidence. (RT Vol. 21 4730-4734; CT Vol. 6 1616; see also RT Vol. 19 4460-4473; CT Vol. 5 1418.)

Jury selection for appellant's third penalty trial began on February 24, 2003. (CT Vol. 6 1617.)

On February 25, 2003, appellant renewed his motion to limit victim impact testimony and the number of victim impact witnesses. (CT Vol. 6 1625-1678, 1682.)

On February 27, 2003, appellant orally renewed his challenge to the constitutionality of a penalty retrial, relying on the motion he had raised at the second retrial. (RT Vol. 21 4777, 4780-4781; CT Vol. 6 1684.) Appellant also moved to delete any reference to Americans from his statement to Officer McManus. (RT Vol. 21 4797-4800; CT Vol. 6 1685.) That same day, the trial court: (1) denied appellant's motion challenging the constitutionality of a retrial; (2) partially granted appellant's motion regarding victim impact evidence; and, (3) excluded any reference to Americans from Officer McManus' testimony. (RT Vol. 21 4780-4781, 4797-4800; CT Vol. 6 1684-1685.)

The jury was sworn to try appellant's third penalty trial on March 5, 2003. That same day, the penalty retrial commenced. (CT Vol. 6 1711-1713.)

The jury began deliberating on March 18, 2003. (CT Vol. 7 2007.) On March 19, 2003, after approximately three and a half hours of deliberation, the jury reached a verdict of death. (CT Vol. 7 2007; CT Vol. 8 2092-2093.)

On April 9, 2003, appellant filed the following motions: (1) a motion for a new trial (CT Vol. 8 2120-2140); (2) a motion requesting that the court modify his sentence to life imprisonment without parole pursuant to Penal Code sections 190.4, subdivision (e), and 1181, subdivision (7) (CT Vol. 8 2141-2152); and, (3) a motion requesting that the trial court impose a sentence of life imprisonment without parole based upon the trial court's improper granting of a third penalty trial (CT Vol. 8 2153-2158).

On April 14, 2003, the trial court denied appellant's motion for a new trial and his motions requesting modification of the death verdict. (RT Vol. 27 6406-6429; CT Vol. 8 2181-2190.) The trial court then imposed a sentence of death as to Counts 1 through 3. As to Count 1, the court imposed a term of 25 years to life for the section 12022.53, subdivision (d), enhancement, to be served consecutively to the sentence on that count. As to Count 2, the court imposed a term of 25 years to life for the section 12022.53, subdivision (d), enhancement, to be served consecutively to the sentence on that count. As to Count 3, the court imposed a term of 25 years to life for the section 12022.53, subdivision (d), enhancement, to be served consecutively to the sentence on that count. As to Count 4, the court imposed a term of life imprisonment without possibility of parole; the court also imposed a term of 20 years for the section 12022.53, subdivision (c),

enhancement, to be served consecutively to the sentence on that count. The court ruled that the sentence on Count 4 was to be served concurrently to the sentences imposed for Counts 1 through 3. In addition, the trial court ordered that appellant pay a restitution fine of $200.00 pursuant to section 1202.4, subdivision (b).[6] Finally, appellant was given 1,199 days of actual credit for time served. (RT Vol. 27 6431, 6437-6440, 6443; CT Vol. 8 2191-2193.)

Appellant's appeal to this Court is automatic. (§ 1239.)

STATEMENT OF FACTS

I. Guilt Phase Evidence

A. Evidence Regarding the Shootings

At 5:43 a.m. on September 14, 1999, appellant called 911 from the apartment he shared with his mother, Mot Trinh. He reported that she had stopped breathing, and that she was conscious but choking. As the dispatcher instructed appellant how to perform cardio-pulmonary resuscitation ("CPR"), appellant stated that his mother's face was turning blue and that blood was coming out of her mouth. (RT Vol. 5 1264, 1270; RT Vol. 7 1670, 1696-1697, 1699; Exhibits X [audiotape of 911 call] and Y [transcript].)

Matthew Maxson and Robert Peterson, firefighter-paramedics for the Anaheim Fire Department, responded to the scene. (RT Vol. 8 1884-1885; RT Vol. 9 2015.) Appellant met them at the door and asked them to hurry.

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[6] On October 7, 2009, the trial court entered an order nunc pro tunc that the section 12022.53, subdivision (a), enhancements as to Counts 1 through 4 were "stricken for purposes of sentencing only." (CT Vol. 8 2192-2193; see also RT Vol. 27 6430 [during the sentencing hearing, the court and prosecutor agreed that the enhancements must be stricken].)

He then went back inside to perform CPR. He was in a panic and was not performing the procedure properly. At that point, Maxson and Peterson attempted to resuscitate her. (RT Vol. 7 1669-1671; RT Vol. 8 1886; RT Vol. 9 2016-2017.)

Appellant was trying to be helpful, but it was difficult to understand him because he was extremely upset and spoke in broken English. As they treated her, he paced around the apartment. (RT Vol. 8 1886; RT Vol. 9 2017.)

Appellant's mother appeared to be deceased, although she was not actually dead. (RT Vol. 8 1888.) After about 20 minutes, Maxson and Peterson transported her to Martin Luther Hospital in Anaheim. (RT Vol. 7 1686; RT Vol. 8 1887.) Despite their efforts to revive her, she was pronounced dead at around 6:43 a.m. (RT Vol. 7 1673-1676, 1687, 1694.) They did not see appellant while en route to the hospital, nor did they see him during the approximately 30 to 45 minutes they were at the hospital. (RT Vol. 8 1887-1888; RT Vol. 9 2018.)

After Maxson and Peterson left, appellant asked another firefighter-paramedic, David Allen Youngs, how his mother was doing. (RT Vol. 7 1669-1672, 1675.) Appellant appeared to be somewhat distraught. (RT Vol. 7 1674.) Youngs explained that the situation was very serious, that they were "beating her heart and breathing for her," and that they would not know her condition until they got to the hospital. Youngs also provided appellant with directions to the hospital.[7] (RT Vol. 7 1672, 1675, 1677.)

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[7] Alan Clow, a defense investigator, testified that he followed the directions Youngs provided to appellant. The address written on the note was 1830 West La Palma Avenue, but the hospital's address was 1830 West (continued...)

At around 8:00 a.m., appellant arrived at Martin Luther Hospital and asked to see his mother. (RT Vol. 7 1686-1688, 1694; RT Vol. 8 1737-1739.) When Dr. Jai Ho informed him that his mother had died, appellant responded, "She is okay, right?" (RT Vol. 7 1688-1690; RT Vol. 9 2143-2145.) He then started crying, very distraught. (RT Vol. 9 2144.)

Appellant entered the room where his mother's body lay, then fell to his knees and cried. He held her hand as his forehead rested against a gurney. A nurse, Karen Fry, checked on him periodically. He was still crying each time she entered the room. (RT Vol. 7 1686, 1690-1692; RT Vol. 9 2145, 2147.)

When Fry asked appellant if she could call anyone for him, he replied that there was nobody to call, and that everybody was still in Vietnam. With clenched teeth and an angry tone, he said, "Just leave me alone. I want to be with my mother." (RT Vol. 7 1693, 1695-1696.) He was still crying and holding his mother's hand. (RT Vol. 7 1692, 1695.)

Around 10:05 a.m., appellant backed into a parking space at West Anaheim Medical Center and sat in his truck. He then entered the hospital. After walking around the hospital for some time, he returned to his truck. (RT Vol. 7 1563, 1567; Exhibit 50.)

At about 10:30 or 10:40 a.m., appellant entered the east wing of the hospital's second floor. His arms were crossed, with each hand on the opposite shoulder. (RT Vol. 5 1195, 1210; RT Vol. 6 1475-1476.) As appellant passed Vinita Kothari, a registered nurse, she gave him a half-

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[7](...continued)
Romneya Avenue. Clow explained that if one looked for 1830 West La Palma Avenue rather than follow the directions, one would not find the hospital. (RT Vol. 9 2085-2093.)

smile. He looked at her and also gave a half-smile. (RT Vol. 6 1476-1477.) Kothari stepped down from her chair to stop him, but he was walking too fast. (RT Vol. 6 1478.)[8]

Appellant walked to the end of the hallway, where Milagros (Mila) Salvador's office was located. (RT Vol. 5 1197; RT Vol. 6 1478, 1482.) Salvador, who headed the nursing staff, was seated at her desk, talking to Marlene Mustaffa, a nurses' aide. Mustaffa was standing just inside her office, next to the open doorway. (RT Vol. 5 1255-1258, 1267.)[9]

Appellant shot Mustaffa from just outside the office, and Mustaffa fell to the floor in front of Salvador's desk. (RT Vol. 5 1257-1259, 1275-1276; RT Vol. 6 1478.)[10] Salvador had not seen or heard appellant prior to the gunshot. (RT Vol. 5 1258, 1273.) Appellant then moved towards Salvador and fired a shot at her, but the bullet passed over her head. (RT Vol. 5 1258-1259, 1275-1276; RT Vol. 6 1392, 1408-1409, 1435, 1440-1441.)

Dr. Joseph Halka, a forensic pathologist who later conducted the autopsies of the victims, observed a gunshot wound to Mustaffa's left

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[8] Both Kothari and Mitchell Watson, a respiratory care practitioner, testified that appellant was walking very quickly. (RT Vol. 5 1195, 1197; RT Vol. 6 1476.) However, another witness, registered nurse Eli Bolado, testified that appellant was walking at a normal pace. (RT Vol. 9 1951, 1965.)

[9] Mot Trinh's medical records indicated that Mustaffa attended to her on June 9 and June 17, 1999. Her medical records also indicate that appellant visited his mother on one of those two days, but did not indicate whether he visited while Mustaffa was attending to his mother. (RT Vol. 10 22246-2247, 2253-2255, 2260.)

[10] The guilt-phase record is silent as to when appellant had armed himself.

temple. He determined that the cause of her death was fragmentation of the brain due to skull fracture and the gunshot wound to the head. (RT Vol. 7 1537-1543, 1555-1556.) Jimmy Ernest Turner, a firearms examiner with the Orange County Sheriff Forensic Science Services, opined that the gunshot had been fired from no more than 12 inches away. (RT Vol. 6 1505, 1517.)

After shooting at Salvador, appellant backed out of her office. (RT Vol. 5 1199, 1212, 1260.) As he walked towards the west side of the hospital, Salvador looked outside her office and screamed for help. Appellant, who was walking at a fast pace and pointing a gun skyward, turned and looked at her.[11] Salvador closed and blocked the door to her office; she had to move Mustaffa's body to do so. (RT Vol. 5 1260-1262, 1272; RT Vol. 6 1479, 1482.)[12]

Appellant walked towards Kothari and pointed the gun towards her head. (RT Vol. 6 1479-1480, 1482-1483.)[13] However, he walked away

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[11] Following the incident, Salvador apparently told the police that appellant *ran* away after firing the gunshots. (RT Vol. 5 1272-1273.)

[12] Prior to the shooting, Salvador had had no contact with appellant or his mother. (RT Vol. 5 1264-1265, 1270.) Salvador also testified that, since the shooting, she had attended counseling and had been unable to return to work. (RT Vol. 5 1272, 1275.)

[13] Kothari acknowledged that when she spoke to the police following the shootings, she may have said that appellant did not point a gun at her. According to Kothari, she told the police some time later that he had pointed a gun at her. (RT Vol. 6 1484-1486, 1493-1494.) However, Sergeant Kelly Jung of the Anaheim Police Department, who interviewed Kothari, testified that Kothari said that appellant had pointed the gun into the air; she did not tell Jung that appellant had pointed a gun at her. At the end of the interview, Jung asked whether she could think of anything else.

(continued...)

without saying anything. (RT Vol. 6 1480.)[14]

Appellant jogged past the nurse's station, trying to stuff his gun into a shoulder bag. As soon as he passed the nurse's station, he went towards the elevator or stairs near the hospital's west wing. (RT Vol. 9 1951, 1968-1969.)

Rosa Maria Augustin, a certified nursing assistant, had been stripping a hospital bed when she heard the two gunshots. (RT Vol. 5 1199-1200.) Augustin saw appellant "running around like crazy" near the elevators, and he ran towards her. The look on his face and his body movements made her think he was in a panic. Appellant was looking everywhere, as if he did not know where to go. Appellant's arm was outstretched and he was pointing a silver gun upwards. (RT Vol. 5 1236-1239, 1247-1252, 1254.) Augustin ran towards the nurse's station. As she ran, she heard the stairwell door open but did not see who opened it. (RT Vol. 5 1239-1241, 1248-1249, 1253.)[15]

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[13](...continued)
Kothari said she could not, and that the incident was pretty fresh in her mind. Jung provided a business card and said Kothari could call if she remembered anything else. Kothari never called. (RT Vol. 7 1593-1598.)

[14] Kothari testified on direct examination that she did not know appellant or his mother, but on cross-examination acknowledged that she had discharged appellant's mother from West Anaheim Medical Center. Athough Kothari did not remember whether she had contact with appellant's mother on the discharge date, she explained that she would have had to examine her in order to discharge her. (RT Vol. 6 1481, 1486-1492, 1494-1499.) Bolado testified that he attended to appellant's mother in May and June, 1999, and frequently saw appellant during that time. (RT Vol. 9 1951, 1954, 1974-1978.)

[15] Prior to the shooting, Augustin had had no contact with appellant
(continued...)

Andrew Armenta, a biomedical engineer, was walking in a corridor on the first floor when he heard a Code Gray, a signal indicating that the assistance of male staff members was needed. (RT Vol. 5 1219-1220, 1224-1225, 1289.) As he walked down a hallway, he saw Vincent Rosetti running in response to the Code Gray. (RT Vol. 5 1219-1221, 1224-1226.)

Rosetti, who was about 50 feet ahead of Armenta, entered a stairwell. (RT Vol. 5 1221-1222, 1229.) Appellant encountered Rosetti in the stairwell and shot him near the top of his skull, through his left lip, and through the lateral left neck. Dr. Halka later determined that the cause of Rosetti's death was both cerebral and cerebellar lacerations due to the gunshot wounds. (RT Vol. 7 1543-1549, 1557-1558.) Armenta recalled hearing a gunshot, followed about a second later by two more gunshots. (RT Vol. 5 1222-1226, 1230, 1232-1233.)

Firearms examiner Turner estimated that the gunshots to Rosetti's head and chest were fired from distances not exceeding 12 inches, and that the gunshot to his chin was fired from a distance not exceeding 24 inches. (RT Vol. 6 1518.)

Brenda Fillinger, who was in a room on the second floor, heard two groups of gunshots. She then heard someone loudly say something to the effect of, "You killed my mother." (RT Vol. 7 1628-1637.)[16]

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[15](...continued)
or his mother. (RT Vol. 5 1248.)

[16] During his cross-examination of Fillinger, the prosecutor asked, "Do you recall telling the police that whoever said something about his mother just said something about his mother; you didn't give an exact quote?" Fillinger responded, "That's the way he wrote it down so it must be what I said." (RT Vol. 7 1635.) She then explained that she was under
(continued...)

When Norman Bryan, the supervisor of the hospital's Cardiovascular Diagnostic Lab, heard the Code Gray, he ran into a hallway, where he saw Ron Robertson. (RT Vol. 5 1278-1279, 1284.) They proceeded quickly to the stairwell near the elevator bank. As they neared the stairwell, they heard a gunshot. (RT Vol. 5 1280-1281, 1285-1286.) Bryan returned to his department, and subsequently heard two quick gunshots, then a third. (RT Vol. 5 1281, 1286-1287.)

Faith Perry, who was seated in the lobby, saw Robertson close a lobby door. Appellant ran toward Robertson, holding a gun in his hand. As Robertson was about to close the second lobby door, appellant shot him in the chest. (RT Vol. 6 1293-1297, 1299, 1301, 1304, 1306.) Robertson grabbed appellant and they fell to the floor. As they wrestled, appellant shot him twice more. (RT Vol. 6 1297-1298, 1306-1307, 1312.)

A patient, Joseph Nuzzo, entered the lobby where he saw appellant and Robertson spinning around, struggling. When Nuzzo was about 15 or 20 feet away from them, the gun was fired twice. The two men continued to struggle. (RT Vol. 6 1358-1360, 1363-1364, 1367-1368.) John Riordan Collins, the hospital's controller, grabbed appellant from behind and pulled him down, and Robertson fell, too. (RT Vol. 6 1313-1317, 1320, 1322, 1329-1330, 1341, 1364-1365.) Nuzzo also grabbed appellant. (RT Vol. 6 1298, 1307, 1317-1319, 1322, 1331, 1334, 1337, 1361-1362.) Appellant stopped struggling after Collins and Nuzzo took hold of him. (RT Vol. 6 1323, 1333, 1365, 1374.)

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[16](...continued)
stress at the time of the incident; not only was her husband in the hospital due to chest pains, but the quote was "as exact as [she could] recall amid a lot of tears, crying, running, noise." (RT Vol. 7 1636.)

While Collins was holding him, appellant said something to the effect of, "They killed my mother. You killed my mother." Eventually, the police arrived and arrested appellant. (RT Vol. 6 1317, 1319, 1335-1336, 1338.) According to Nuzzo, appellant said, "You killed my mother" probably twice after the police took him into custody, and his statements were directed at Robertson. (RT Vol. 6 1368-1369, 1375.)

George Wilhelm, the hospital's director of human resources, heard the commotion and responded to the scene. Appellant looked at him with a vacant expression. Appellant's eyes looked huge and dark. Wilhelm later told the police that appellant's eyes looked as if he had seen a ghost. (RT Vol. 6 1339-1341, 1350-1356.)

Wilhelm removed a nickel-plated .38, short-barreled revolver from Robertson's hands.[17] Another handgun lay about six to eight inches away. (RT Vol. 6 1341-1343, 1348-1349, 1366.) Also scattered on the floor were a pouch and some bullets. (RT Vol. 6 1366-1367.) Wilhelm gathered the guns and the pouch and placed them in Rosetti's office. (RT Vol. 6 1317-1319, 1322, 1331, 1334, 1337, 1344, 1345, 1349, 1437.)

Robertson was taken to the emergency room, where he died. (RT Vol. 5 1207-1209, 1286.) When he later conducted an autopsy of Robertson, Dr. Halka found two chest wounds about one or two inches apart. (RT Vol. 7 1550-1552, 1559-1560.) The cause of Robertson's death

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[17] Gunshot residue was later found on both appellant and Robertson. According to Steven Guluzian, a forensic scientist for the Orange County Sheriff's Department, when a gun is fired, gunshot residue may be transferred in a variety of ways. For instance, residue may land on a person when he or she crawls through the area where the gun was fired, handles the gun, or touches someone who is covered with gunshot residue. (RT Vol. 9 2077, 2084.)

was blood loss due to the gunshot wounds to the right lung and surrounding veins. (RT Vol. 7 1552-1554.) According to Turner, the firearms examiner, the wound to Robertson's chest was caused by a gun that had been fired from a distance not exceeding 12 inches. (RT Vol. 6 1518.)

Thomas McManus, who was then an officer with the Anaheim Police Department, placed appellant in the back seat of his squad car. (RT Vol. 6 1376-1378, 1387-1388.) Officer McManus asked appellant for his name, address, and confirmation that his driver's license actually belonged to him. (RT Vol. 6 1383, 1386, 1388.) Appellant replied, "I don't want to talk to you till I talk to a friend. I don't want to talk to you." (RT Vol. 6 1382, 1386-1387.) Appellant then said angrily, "You American people kill my mother. Now I kill you. You kill my people. I kill you. You know, you just kill my mother. Right now she lay at Martin Luther Hospital by herself. You kill her." He was looking straight ahead, not at Officer McManus. (RT Vol. 6 1379-1380, 1385.)

A photograph of appellant was taken at the police station. He was wearing a holster. (RT Vol. 6 1381-1382.)

Police personnel identified the scenes where the shootings occurred as Scenes A through C, and appellant's vehicle was identified as Scene D. (RT Vol. 6 1390-1392, 1433-1435.)

Scene A was the location where Mustaffa was shot. (RT Vol. 6 1392.) Kimberly Edelbrock, a forensic specialist who collected evidence at the scene, determined that the distance from the edge of Salvador's desk to the rear wall was 8 feet, 11 inches. (RT Vol. 6 1467-1469, 1491.) According to Patrick Nolte, who was a crime scene investigator for the Anaheim Police Department on the date of the shooting, and who had also participated in evidence collection, the bullet fired at Salvador was never

located. (RT Vol. 6 1390-1391, 1408-1409.)

Scene B was the stairwell where Rosetti was shot. (RT Vol. 6 1392, 1435, 1463-1464.) Edelbrock found three spent casings and a pool of blood there. (RT Vol. 6 1437, 1464-1466.)

Scene C was the location where Robertson was shot and appellant was apprehended. (RT Vol. 6 1392, 1435.) Among the items found on the floor there were: cartridges, which were strewn all over the floor; a spent metal-jacketed, hollow point bullet; hospital forms, one of which bore the name Mot Trinh;[18] and, a large brown leather pouch. (RT Vol. 6 1394-1404, 1413, 1423.) The following evidence was also found at the scene: two holes in the wall between the hallway and the pharmacy, one of which turned out to be a bullet hole, and one of which was not; a bloodstain located high on a hallway wall; and, an expended bullet which was found lodged in a wall. (RT Vol. 6 1398, 1404, 1410, 1412, 1417-1423, 1430-1431.)[19]

James Conley, supervisor of the Forensic Services Detail of the Anaheim Police Department, photographed and collected the two guns and the pouch. One of the guns, a Charter Arms, was fully loaded. The other gun, a Smith & Wesson, had five spent casings in the chambers. The pouch contained an ammunition box and about 103 live .38 rounds, including several safety slugs (that is, bullets designed not to penetrate walls). (RT

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[18] Appellant's fingerprint was later found on one of the forms. (RT Vol. 6 1424-1429.)

[19] Nolte testified that, about a year and a half later, workers remodeling the hospital lobby found what appeared to be damage from a bullet. It was subsequently determined that a bullet had entered the drywall inside the ceiling and fallen down, damaging duct work. The bullet itself was not located. (RT Vol. 6 1404-1407.)

Vol. 6 1433, 1437-1439, 1442-1443, 1445-1446, 1451, 1456.)[20]

Conley also inspected appellant's vehicle (Scene D). A paper towel was draped over the steering column, covering the ignition switch. (RT Vol. 6 1441-1442.) Among the other items Conley found inside the vehicle were: a Thomas Guide map on which Martin Luther Hospital was circled; and, empty boxes of ammunition. (RT Vol. 6 1446-1455, 1457-1459, 1574-1575.) Ammunition matching the brand names on the boxes was also recovered from the truck. (RT Vol. 6 1459.)

Turner, the firearms examiner, examined the handguns and ammunition. He concluded that the Smith & Wesson functioned normally. (RT Vol. 6 1506, 1509, 1521, 1531.) Turner found no indication that the Charter Arms had been fired. (RT Vol. 6 1521.) Turner also tested ammunition recovered at the crime scenes. He determined, among other things, that projectiles recovered from Scene B and Scene C had been fired from the Smith & Wesson. (RT Vol. 6 1511-1515.)

B. Evidence That Appellant Was Acting in the Heat of Passion at the Time of the Shootings

In support of the defense that appellant was acting in the heat of passion at the time of the shootings, defense counsel presented evidence that, prior to the shootings, he had faced a mounting array of stressors, including the following: the decline in his mother's physical and cognitive health; the increasing burden involved in caring for her, some of it placed on him by West Anaheim Medical Center and other medical providers; a series of financial setbacks; and, the profound grief he experienced when

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[20] The parties stipulated that appellant had legally purchased and registered the two firearms, one in 1986, the other in 1988. (RT Vol. 9 1949-1950.)

she died, which reflected their extraordinarily strong bond.

1. Evidence Regarding Appellant's Mother's Deterioration and Eventual Death, and His Role as Her Primary Caregiver

Appellant and his mother left Vietnam in April, 1975. (RT Vol. 9 2149.) At the time of her death, appellant's mother spoke very little English. (RT Vol. 7 1712, 1715; RT Vol. 10 2318.)

Appellant's mother had been in poor health at least as far back as 1996 or 1997, when Dr. Van Vu began treating her for kidney failure due to heart disease and diabetes. Even then, she was very thin and frail. (RT Vol. 9 2116-2118, 2120-2123, 2130, 2137-2139.)

By January, 1999, appellant's mother was undergoing twice-weekly dialysis treatments at Gambro Healthcare. (RT Vol. 7 1575-1576, 1580, 1582, 1585.) Appellant was his mother's only source of support, and Gambro social workers Marcy Diane Hauer and Sharyl Vu noted that he was very concerned about her well-being. He was present for the dialysis sessions more often than the family members of most of the other patients. (RT Vol. 7 1580, 1582-1584, 1591, 1616-1620.)

On May 26, 1999, appellant called 911 after his mother collapsed and fell unconscious. (RT Vol. 7 1646-1648; Exhibits S [tape of 911 call] and T [transcript].) She was taken to West Anaheim Medical Center, where she spent the next 30 days due to a hip fracture. (RT Vol. 7 1710; RT Vol. 10 2244-2245.)

Throughout her stay at West Anaheim Medical Center, appellant's mother was in severe pain, so much so that: hospital staff documented instances in which she moaned, cried, screamed, or called out for appellant; she was unable to perform very basic physical therapy exercises on her own; and, she was repeatedly given pain medication. (RT Vol. 7 1704-

1708, 1710, 1712-1713, 1718; RT Vol. 8 1936-1937, 1942.)

Appellant's mother also exhibited deteriorating functioning. On May 28, 1999, she exhibited a rapid, abnormal heart rhythm, but several days later, her heart rate was low. (RT Vol. 9 2208-2209.) On June 8th, she became unresponsive during a physical therapy session. During that episode, she was pale and dazed, her left arm and shoulder twitched, and her eyes rolled back. After regaining responsiveness, she was transferred to the intensive care unit. (RT Vol. 8 1934-1936; RT Vol. 9 1951, 1955-1956.) On June 10th, a nurse observed that she was staring as if in a daze. (RT Vol. 7 1713.) That same day, while appellant was at his mother's bedside, she was lethargic and unresponsive. She was treated, and began to respond somewhat after about 20 minutes. However, she became unresponsive a short time later and was again transferred to the intensive care unit. (RT Vol. 8 1933-1934, 1938, 1942; RT Vol. 9 2020-2024.) On June 21st, her level of consciousness declined to the point that she responded only to painful tactile stimuli. (RT Vol. 7 1719.) On the day she was discharged from West Anaheim Medical Center, her physical therapist assessed her condition; he found that, although she had made some progress, she was still in pain and was too sleepy to respond to some of his questions. (RT Vol. 8 1939-1941.)[21]

On several occasions, appellant's mother resisted treatment. For instance, she pulled out a saline lock (a device similar to an intravenous tube); pulled out a Foley catheter and telemonitoring equipment attached to her body; pulled out an intravenous tube; and, refused to undergo a CAT

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[21] The physical therapist, Justin Le, acknowledged that he did not know whether she was sleepy because she was on medication, because her condition was deteriorating, or for some other reason. (RT Vol. 8 1941.)

scan. (RT Vol. 7 1705-1706; RT Vol. 9 2206-2207, 2210.)

West Anaheim Medical Center records documented 18 visits by appellant during the 30 days his mother was hospitalized there. (RT Vol. 10 2244-2245.) During that time, he often fed her or otherwise assisted in her care. (RT Vol. 7 1705, 1708-1712, 1714-1718; RT Vol. 8 1930-1933; RT Vol. 9 1954, 1962-1963.)

In June, 1999, appellant's mother was transferred to La Palma Intercommunity Hospital. (RT Vol. 7 1600-1601, 1678; RT Vol. 10 2246.) During her stay at that hospital, her physical and cognitive health continued to decline. For instance, she was lethargic and displayed intermittent confusion and "markedly impaired" memory. (RT Vol. 7 1605-1608, 1610; RT Vol. 9 2151-2152, 2192.) She also fell a number of times. (RT Vol. 9 2156, 2159.) A speech therapist stopped working with her after about two weeks because she was not making any progress. (RT Vol. 7 1600, 1609-1611.) A doctor noted that she was restless whenever appellant was not present. (RT Vol. 9 2159.)

Moreover, she continued to be in great pain. At the time she was admitted to La Palma, she had developed "skin breakdown" (i.e., pressure sores and related problems). (RT Vol. 9 2189-2191, 2201-2202.) On another occasion, she was found trying to get out of bed; when asked whether she was in pain, she tearfully nodded and was then medicated. (RT Vol. 9 2158.) On yet another occasion, she started yelling out, complaining of pain to her legs; she was given pain medication and repositioned in the bed. (RT Vol. 9 2158-2159.)

Because appellant's mother was frail, her caregivers had to be careful with her. (RT Vol. 10 2238.) Moreover, because she was both frail and suffered cognitive problems, she was unable to follow "hip

precautions" – that is, rules as to how a patient should move without dislocating her hip – on her own. Therefore, a physical therapist, Sylvia Weber, taught appellant how to properly assist his mother with those tasks. (RT Vol. 10 2224-2228, 2230-2231, 2234.) Among other things, Weber taught appellant how to reposition his mother, which had to be done every two hours; how to prevent his mother from bending her knee or hip beyond a certain point; how to get his mother out of bed by propping her on her elbows, then keeping her legs straight as he gradually slid them off the bed; and, how to perform a standing pivot with a walker to get in and out of a car, a maneuver which can be particularly risky for a patient with a hip injury. (RT Vol. 10 2228-2237.)

An occupational therapist, Marella Mabaquiao, taught appellant and his mother similar techniques for carrying out basic tasks, such as dressing, bathing, and getting on and off a toilet. (RT Vol. 9 2065-2074.) Mabaquiao recalled that appellant never complained or got upset when she asked him to practice the hip precautions. (RT Vol. 9 2072-2073.) Nor did he ever complain to her about the hospital personnel or the care his mother was receiving. (RT Vol. 9 2073.)

Appellant's mother did not have much endurance, and required moderate to maximum assistance even with basic tasks. (RT Vol. 9 2152; RT Vol. 10 2239.) Prior to learning the techniques taught by Weber and Mabaquiao, appellant had been lifting her whenever she needed to be moved. (RT Vol. 10 2236.) Even with those techniques, however, her caregivers had to expend at least 75 percent of the effort necessary to move her. (RT Vol. 10 2236.)

While at La Palma, appellant's mother repeatedly resisted treatment or became agitated. Among other things, she tried to get out of bed,

shouting, "Where is my son?"; continuously yelled, "Will you help me?"; screamed until she was medicated with a sleeping aid; tried to hit a caretaker; refused to be placed in a restraint; tried to climb over the side rails of her bed; and, removed intravenous tubes and other equipment. (RT Vol. 9 2152-2157, 2159, 2184-2185, 2192-2201; RT Vol. 10 2250.) Appellant was aware of at least some of these incidents. (RT Vol. 9 2155.)

Appellant's mother was restrained on at least nine days during the time she was hospitalized at La Palma, sometimes because of her impulsive behavior, sometimes because she was slipping out of her bed.[22] (RT Vol. 9 2157; RT Vol. 10 2248-2251.) At least two kinds of restraints were used, including a "Posey vest," which is placed around the patient's torso, secured in the back and tied on each side. (RT Vol. 9 2152-2153, 2155-2157, 2159, 2192-2201; RT Vol. 10 2250.)

On one occasion, appellant became upset when he saw that his mother had been tied to her bed. A nurse explained why she had been restrained, and assured him that she had not been hurt. Appellant thanked the nurse for explaining the situation, but asked to speak to her supervisor. (RT Vol. 9 2156, 2197-2199.)

During his mother's 29-day stay at La Palma, appellant made 26 documented visits, sometimes staying with his mother most or all of the day. (RT Vol. 7 1601; RT Vol. 9 2137, 2160; RT Vol. 10 2246.) Among other things, he sometimes assisted in feeding and bathing her. (RT Vol. 9 2149-2160, 2187-2188.) A speech therapist recalled that he was polite and gracious. (RT Vol. 7 1603.)

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[22] The records indicate that there were other dates on which restraints had been ordered, but there was no documentation showing that she was actually restrained on those dates. (RT Vol. 10 2248.)

In August, 1999, Sharal Vu of Gambro Healthcare evaluated appellant's mother, observing that she seemed more confused than she had several months earlier. Vu also noted that appellant continued to support his mother. (RT Vol. 7 1620-1623.) In September, 1999, Vu again described appellant's mother as confused. (RT Vol. 7 1624-1626.)

On August 4, 1999, Dr. Van Vu saw appellant's mother at her home. (RT Vol. 9 2125-2126, 2130, 2133-2134.) He prescribed home health care workers to visit her. He also prescribed a hospital bed and bedside commode. (RT Vol. 9 2123-2127.)

That same day, Ernesto Vina, a registered nurse employed by Darnell Home Health Services, visited appellant's mother to assess her need for home care nursing. (RT Vol. 11 2402-2404, 2413, 2423.) Vina noted that she was weak, in constant pain, and needed assistance with basic tasks such as brushing her teeth, eating, and using the restroom. She could not read small print, such as a newspaper. (RT Vol. 11 2404-2408, 2416, 2423.) She could not walk a distance of even 10 feet; at most, she could move from her wheelchair to her bed. (RT Vol. 11 2410-2411.)

Vina also indicated that appellant's mother suffered from insomnia and short-term memory loss, and she displayed impaired decision-making. She required prompting, repetition and reminders under stressful or unfamiliar conditions, and she was anxious as a result of her illness. (RT Vol. 11 2409-2410, 2420-2421.)

Finally, Vina noted that appellant was at high risk for "caregiver role strain." He concluded that a home health case nurse would help both appellant and his mother cope with their problems. (RT Vol. 11 2411,

2421-2423.)[23]

On September 13, 1999, the day before the shootings, appellant visited a pharmacy in Santa Ana, where he routinely picked up his mother's medication. She was taking medication to help her sleep, two pain medications, one to treat a stomach ulcer, and one to treat bone problems. (RT Vol. 7 1661-1666; see also RT Vol. 9 2094-2099.) That same day, appellant brought his mother to visit Dr. Vu. She was very weak and just sat on her wheelchair. (RT Vol. 9 2125, 2136.)

The following day, Dr. Vu received a telephone call from the police, who put appellant on the phone. Appellant told him that he had gotten in trouble and that his mother had died that morning. He asked Dr. Vu to take care of her burial. (RT Vol. 9 2126, 2128-2129.)

2. Appellant Was Repeatedly Called Upon to Act as a Translator and Otherwise Assist in His Mother's Medical Care

During the time appellant's mother was undergoing treatment at Gambro Healthcare, either appellant or one of Gambro's two Vietnamese-speaking staff members had to translate for her. (RT Vol. 7 1581, 1601.)[24] At the request of a Gambro social worker, appellant convinced his mother to resume dialysis sessions after she had refused to come in for treatment. He even began bringing her to the facility even though the center provided transportation for its patients. (RT Vol. 7 1582, 1588-1589.)

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[23] Vina acknowledged that he ordinarily indicated that caregivers were at high risk for "caregiver role strain," and that he did not remember anything specific to this case suggesting that appellant was at greater than normal risk. (RT Vol. 11 2421-2423.)

[24] One of those staff members was a nurse; apparently, the other was a technician. (RT Vol. 7 1581.)

During his mother's stay at West Anaheim Medical Center, appellant was frequently called upon to interpret for and/or discuss his mother's case with hospital staff. (RT Vol. 7 1677-1678, 1703, 1708-1712, 1714, 1716, 1717, 1719; RT Vol. 9 1958, 2140-2142, 2211-2212.) At one point, Eli Bolado, a nurse who had taken a course on caring for a diverse patient population, suggested that the hospital obtain an interpreter for her. (RT Vol. 9 1952-1954, 1958.) Bolado testified that the hospital kept a list of people who could be used to interpret; the list included hospital housekeepers. Bolado further testified that if he had used someone other than appellant to translate, he would have noted it. (RT Vol. 9 1959.)

Appellant was similarly called upon to assist La Palma staff members. For instance, he was repeatedly utilized as an interpreter. (RT Vol. 7 1601; RT Vol. 9 2061, 2064-2065, 2073. 2150, 2154, 2189.) A speech therapist asked him to translate written instructions. (RT Vol. 7 1601-1604.) He also was asked to educate his mother with respect to "hip precautions." (RT Vol. 9 2150; RT Vol. 10 2239-2241.)[25]

Finally, Ernesto Vina of Darnell Home Health Services testified that whenever he did not understand appellant's mother, he asked appellant to help interpret. (RT Vol. 11 2423.)

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[25] On one occasion, when appellant was not present, a doctor noted that he was unable to communicate with, and conduct an assessment of, appellant's mother due to the language barrier. (RT Vol. 9 2151.) On another occasion appellant's mother continuously yelled, "Will you help me?" However, because she mostly spoke Vietnamese, she was unable to explain what she needed. (RT Vol. 9 2153.)

3. The Failure to Transfer Appellant's Mother to a Hospital Equipped to Provide Culturally-Appropriate Care

Perhaps twice while under Dr. Vu's care, appellant's mother had been hospitalized at Fountain Valley Hospital. (RT Vol. 9 2117, 2119-2120.) According to Lana Le, the Director of Vietnamese Patient Liaison at Fountain Valley Hospital, the following services were among those available to Vietnamese patients at that hospital, at least as of 1999: Vietnamese interpreters; Vietnamese-language consent forms and menus; hospital signs were partly written in Vietnamese; and, over 100 Vietnamese doctors were affiliated with the hospital. (RT Vol. 9 2111-2114.) Dr. Vu himself was fluent in Vietnamese, and provided Vietnamese-language documents to his patients. (RT Vol. 9 2117, 2120.)

In May, 1999, appellant requested that his mother be released to the care of Dr. Vu following her discharge from West Anaheim Medical Center. (RT Vol. 7 1719; RT Vol. 9 2166, 2177-2180.) That same month, Dr. Vu received a call from West Anaheim Medical Center saying that appellant's mother had been admitted there. He was also asked where he wished to treat her. Dr. Vu requested that she be transferred to Fountain Valley Hospital, but he was told later that she was not being transferred. (RT Vol. 9 2123, 2131-2132.)

About a month later, a nurse from West Anaheim Medical Center called Dr. Vu and asked if he would accept appellant's mother for patient follow-up. Dr. Vu responded that he could do so if she were transferred to Garden Park, a skilled nursing facility with which he was affiliated. (RT Vol. 9 2131-2133.) Nellie McCain, a case manager at West Anaheim Medical Center, arranged for the transfer, but, for reasons unknown to her, appellant's mother was not sent there. (RT Vol. 7 1719; RT Vol. 9 2132-

2133, 2166, 2177-2180.)

4. Financial Burdens and Setbacks

In January, 1999, appellant and his mother were living in an apartment in Anaheim, California. (RT Vol. 6 1646-1648; RT Vol. 7 1698-1699.) They had lived there for "a long time," according to the property manager, and appellant always paid his rent on time. (RT Vol. 7 1699, 1701.)

Appellant worked at Hometown Buffet, where he had been employed since December 1992. He made $7.25 an hour, and his biweekly net pay was $348.60. (RT Vol. 10 2318-2319.)

On August 13, 1999, appellant was notified that, as of September 13, 1999, his rent would be increased by $20.00 per month. (RT Vol. 7 1698-1702.) Three days later, appellant left his job at Hometown Buffet. (RT Vol. 10 2318-2319.) On August 18, 1999, appellant received a parking ticket in the amount of $24.00. (RT Vol. 9 2055-2058; Exhibit HH.)

On August 26, 1999, an attorney filed a bankruptcy petition on appellant's behalf. At that time, appellant's total assets were $4,545, while his total liabilities were $8,710. (RT Vol. 9 2148-2149.)

5. Expert Testimony Regarding Culturally Competent Care, Caregiver Stress, and Grief

Marjorie Ann Muecke, an adjunct professor in the Anthropology and Health Services Departments at the University of Washington, testified regarding Vietnamese and Southeast Asian culture, particularly with respect to attitudes and beliefs regarding health care. (RT Vol. 8 1740-1741, 17876-1787, 1789, 1823.) Muecke's educational and professional background included extensive work with Vietnamese refugees both in the United States and Southeast Asia, and her primary area of research was

health care in Southeast Asia, including Vietnam. (RT Vol. 8 1742-1753, 1785-1786, 1791-1793, 1826.)[26]

Muecke identified several factors bearing on the experience of Vietnamese refugees in the American medical care system. First, Vietnamese generally express emotions indirectly because it is considered important that one be composed and not embarrass oneself or one's family. (RT Vol. 8 1783-1784.)

Second, a Vietnamese person is more likely than an American to view himself or herself as part of a family, rather than as an individual. (RT Vol. 8 1778, 1817, 1828.) Therefore, the experience of being alone generally is more frightening for Vietnamese than it is for Americans. (RT Vol. 8 1778-1779.)

Third, members of Vietnamese families are expected to support one another. For example, it is viewed as extremely important that children, particularly sons, take care of their parents. (RT Vol. 8 1778.) In addition, a Vietnamese patient rarely visits a doctor alone, but is usually accompanied by one or more family members. (RT Vol. 8 1761.)

Fourth, Vietnamese beliefs regarding medicine have been highly informed by traditional methods of healing, such as herbal medicine, as well as by Taoist, Buddhist and Confucianist beliefs. For instance, some Vietnamese believe that if one's body is cut into, one's spirit will wander forever in purgatory; for such people, the prospect of undergoing surgery

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[26] Muecke explained the distinction between an "immigrant" and a "refugee," noting that an immigrant leaves his native country voluntarily, usually with a choice as to when to leave and where to go, whereas a refugee is forced to flee abruptly due to some threat. (RT Vol. 8 1752-1753.)

would be frightening. Western methods of medical care, on the other hand, were largely unknown in Vietnam until relatively recently. (RT Vol. 8 1756-1758, 1774-1775.)

Lastly, the older a refugee was when he or she came to the United States, the more likely he or she would find it difficult to adjust to life in this country. An uneducated refugee, or one from a rural or war-torn area, would likely find it especially difficult to adjust. (RT Vol. 8 1794-1796, 1818-1822, 1827.)

Because the differences between the American and Southeast Asian cultures are so great, many Southeast Asian refugees have had confusing, even tragic, experiences with the American health care system. (RT Vol. 8 1780-1781.) Among other things, former refugees may revert to their native cultural beliefs or practices in times of stress, even those who have lived in the United States for many years; if a family member is stressed, his or her command of English may wane; and, where a family member is used to interpret, it is likely that the doctor's intentions will be misunderstood. The use of family members as interpreters has often resulted in substandard care, even tragedy. (RT Vol. 8 1767-1769, 1771, 1776-1777, 1783, 1799, 1828)

In order to address such issues, during the 1980s Muecke became involved in a successful legal challenge against university hospitals in the state of Washington regarding their failure to provide professionally-trained medical interpreters. (RT Vol. 8 1765-1766.) She also wrote an article to help health care providers better understand Vietnamese patients. (RT Vol. 8 1759, 1762.) She concluded, among other things, that a health care provider must understand the patient's language; therefore, a doctor may need to use a translator or interpreter who has had medical training and who

understands both the patient's language and the doctor's language, as well as the cultural and regional variations involved. (RT Vol. 8 1765-1767.)

Carol Aneshensel, a professor of community health sciences in the School of Public Health at UCLA, testified regarding the phenomenon of "caregiver stress." (RT Vol. 8 1832-1839, 1858.) In describing her educational and professional background, Aneshensel explained that she and her colleagues had conducted a considerable amount of research regarding caregiving (i.e., caring for an elderly and/or disabled family member) and caregiver stress. (RT Vol. 8 1832, 1864-1867.)[27]

Aneshensel explained that caregiving generally involves a very demanding set of circumstances. (RT Vol. 8 1840-1842, 1873.) In contrast to ordinary parenting, for example, most people are unprepared to become caregivers. (RT Vol. 8 1865-1867, 1879-1880.) Moreover, caregiver stress is chronic, representing a pervasive, continuing set of circumstances that tends to erode and overwhelm the caregiver's life. The stress tends to proliferate, penetrating work, relationships, finances, and other aspects of one's life. (RT Vol. 8 1840-1848, 1854, 1857, 1879, 1882.)

A number of factors contribute to caregiver stress, including: the actual demands on the caregiver; the feeling of being overwhelmed ("role overload"); the sense of being trapped in the role of caregiver ("role captivity"); and, secondary stressors such as financial strain, physical strain and interference with the caregiver's employment. (RT Vol. 8 1856.) The level of a caregiver's subjective distress also depends on his or her gender,

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[27] Aneshensel defined "stress" as involving (1) a set of circumstances which exceeds a person's ability to cope and (2) an obstruction of one's goals that the person believes he or she cannot surmount. (RT Vol. 8 1839-1840.)

education, occupation, and ethnic/cultural background. (RT Vol. 8 1841-1848, 1854, 1857.) How well a caregiver copes depends upon, for example, whether he or she has a social network, diverse coping strategies, financial resources, and an awareness of and access to outside resources. (RT Vol. 8 1850-1853.)

To the extent that the constellation of stressors is high in intensity or long in duration, the caregiver faces a variety of negative outcomes, such as substance abuse, depression, anxiety, and anger. (RT Vol. 8 1848-1849, 1856, 1864-1865, 1867-1869, 1873.) Addressing a hypothetical set of stressors consistent with those actually faced by appellant, Aneshensel opined that a caregiver facing those stressors would be at higher risk than most other caregivers. (RT Vol. 8 1855-1856, 1872.)

Dr. Giao Hoang testified as an expert on culturally-appropriate care, particularly with respect to Vietnamese patients. (RT Vol. 8 1922, 1926.) Dr. Hoang had earned a medical degree in Vietnam in 1969. (RT Vol. 8 1890.) In 1971, he earned a master's degree at Tulane University. (RT Vol. 8 1891.) Until 1975, he maintained a clinical practice in Vietnam and, because the country was at war, also served in the army. (RT Vol. 8 1891.)

Dr. Hoang left Vietnam in 1975 and, after spending three days in a refugee camp, the United States accepted his petition for refugee status. (RT Vol. 8 1892-1893, 1927.) He subsequently obtained a job at a hospital in Connecticut. (RT Vol. 8 1893-1894.)

Around 1979, when Dr. Hoang was starting his own practice, there was an influx of Vietnamese into the United States. (RT Vol. 8 1894, 1906.) Dr. Hoang began receiving requests for assistance from American doctors who were struggling with language and cultural barriers in treating Vietnamese patients. (RT Vol. 8 1895.) Consequently, Dr. Hoang had

advocated for, and had helped other doctors provide, culturally-appropriate care since the early 1980s. (RT Vol. 8 1895-1896, 1901, 1909, 1916, 1927-1928.)

Dr. Hoang explained that it is important that a doctor understand a patient's language and culture; for that reason, there must be someone to correctly convey information between the patient and his or her doctor. In the absence of properly trained interpreters, there have been significant misunderstandings between doctors and patients. Consequently, culturally-sensitive care is becoming increasingly accepted as a standard of health care. (RT Vol. 8 1897-1898, 1916, 1918, 1923-1925.)

Among other things, doctors should be aware that the family is the most important unit in Vietnamese culture. For instance, Vietnamese believe that any decent (Vietnamese) man must demonstrate filial piety, that is, respect for one's elders and ancestors. (RT Vol. 8 1897, 1899-1900, 1919.)

Similarly, Vietnamese have a strong sense of heirarchy. For instance, Vietnamese patients rarely question doctors, whom they see as father figures. Sometimes a Vietnamese patient will simply smile to avoid disagreeing with the doctor, who may mistakenly assume that the patient agrees with him. (RT Vol. 8 1904-1906, 1908, 1913.)

Dr. Hoang also explained that Vietnamese and Americans describe medical problems differently. Consequently, a doctor and patient may have different understandings of the same word. In addition, a patient may say something that would strike his or her doctor as untrue unless the doctor is familiar with the patient's understanding of disease. (RT Vol. 8 1913-1915.)

Myrna Jean Gilbert, a medical anthropologist, testified regarding culturally-appropriate standards of health care. Her educational and professional background included the following: she earned a Ph.D. in cultural anthropology, with a specialization in medical anthropology; from 1993 through 2000, she was the director of Cultural Competence for Kaiser Permanente, and in that capacity developed the hospital system's standards for culturally-appropriate care; she served on a board which drafted national "class standards" – i.e., the standards for culturally- and linguistically-appropriate health care – which were issued by the Department of Health and Human Services; and, she currently was teaching clinical anthropology, health and healing, and medical anthropology at California State University, Long Beach. (RT Vol. 9 1980-1994, 1992, 2010, 2014.)

Gilbert explained that qualified interpreters are necessary for various reasons.[28] Her opinion on that point was generally consistent with the opinions of Muecke and Dr. Hoang. (RT Vol. 9 1992-1999.)[29]

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[28] Gilbert explained that, in 1998, the federal government issued a memorandum clarifying the obligations of federally-funded organizations under Title VI of the Civil Rights Act of 1964. Among other things, the memorandum made clear that qualified interpreters must be provided to persons who speak little or no English, and that family members are not to be used as interpreters. (RT Vol. 9 1985-1986, 1989-1992, 1996-1997, 2012.) In California, a state law requires that health care providers funded by Medi-Cal are bound to provide both medical interpreters (i.e., interpreters familiar with medical terminology in both English and the patient's native language) and general interpreters. That law went into effect around eight or nine years before appellant's trial. (RT Vol. 9 1986-1989, 1991, 1996-1997, 2001-2002, 2012-2013.)

[29] Gilbert also opined that: (1) the patient information guide used by West Anaheim Medical Center only minimally met the state standards and 1998 federal standards; and, (2) that, based upon notations culled from Mot

(continued...)

Carola Green, an interpreter and trainer of interpreters, explained that there is a difference between medical interpretation and other types of interpreting. Her opinion as to why it is critical that a medical interpreter be familiar with both cultures and with medical terminology in both languages was generally consistent with the opinions of Muecke, Dr. Hoang and Gilbert. (RT Vol. 9 2041-2043, 2025-2032, 2034-2040, 2047-2050.)

Ronald Keith Barrett, a professor of psychology at Loyola Marymount University, testified about the grieving process. Barrett's specialty was thanatology (i.e., the study of death and dying), and his educational and professional background included giving a training on multicultural concerns involving end-of-life care. (RT Vol. 10 2262-2267, 2294-2295.)

Barrett explained that grief involves several phases, including denial, shock, anger, guilt, depression, stress, psychosomatic symptoms, and recovery. (RT Vol. 10 2273-2275.) Because grief is fairly individualized, these phases do not happen in any particular order, and they are experienced in varying degrees of intensity. (RT Vol. 10 2273-2275, 2291.)

According to Barrett, a number of factors determine the manner and depth of one's grief, including the following: the nature of the relationship

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[29](...continued)
Trinh's medical records as to when bilingual staff or interpreters were used, the hospital's interpreter services were deficient (e.g., because appellant and members of the housekeeping staff were used to interpret). (RT Vol. 9 2004-2009; Exhibits EE and FF.) Gilbert acknowledged that she had not reviewed Mot Trinh's medical records themselves or interviewed any hospital employees regarding the hospital's policy with respect to interpreter services. Moreover, she did not know whether the inadequate interpreter services resulted in any medical errors, or in the exchange of inaccurate or incomplete information. (RT Vol. 9 2010-2011.)

between the survivor and the deceased; the cause of death; the manner of notification; the availability of support; the survivor's age and level of development; his or her personality; his or her culture;[30] and, his or her personal experience. (RT Vol. 10 2269-2271, 2276.) The greater the survivor's bond to the deceased, the more intense his or her sorrow and grief will be. (RT Vol. 10 2271.)

For most people, the death of a parent is very challenging and involves the loss of the roles played by the parent, e.g., a source of emotional and spiritual support. When there is no one to step into those roles, the sense of emptiness can be devastating. How well a child heals from that loss depends on his or her developmental maturity and personality, the closeness of the relationship, and the availability of social support. (RT Vol. 10 2271-2272, 2275, 2280-2282, 2296-2297.) Moreover, how quickly a person recovers may depend on how many other stressors he or she is facing. (RT Vol. 10 2277-2278, 2283-2286, 2302, 2305-2309.)

For many people, the cause of a loved one's death is a significant factor in how they grieve. For example, if one believes that the death was easily preventable, or the result of someone else's fault or intention, it is generally more difficult to accept. A person's ability to recover may be hindered by anger or resentment. The experience may be so intense that the person is unaware of what he or she is feeling, including anger. (RT Vol. 10 2278-2279, 2305.) However, it is unusual that a person kills another out of grief, so Barrett could not estimate how often such killings occur. (RT

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[30] Barrett testified that culture plays a significant role with respect to grief, but he acknowledged that he had no direct experience with Vietnamese culture. (RT Vol. 10 2295, 2303-2304.)

Vol. 10 2297-2298, 2301.)

According to Barrett, the phenomenon of caregiver burnout reflects the tremendous stress associated with providing care to the terminally ill. Among other things, a caregiver may not get enough sleep, may not eat enough, or may be saddled with financial burdens (e.g., the cost of in-home caretakers, medical supplies and treatment). (RT Vol. 10 2287-2288, 2292.) Even caregivers without a familial relationship to the patient (e.g., hospice workers) may suffer caregiver burnout, but a family member who assumes the burden of care is most at risk. (RT Vol. 10 2289-2290.) Caregiver burnout occurs in a progressive and insidious manner. (RT Vol. 10 2291.)

Paul Leung, a psychiatrist employed at the Oregon Health Sciences University for 21 years and specializing in cross-cultural psychiatry, testified regarding Vietnamese culture and mental illness among Vietnamese refugees. (RT Vol. 11 2427-2433.) Dr. Leung lived in Vietnam until he was two years old, and again from ages six to eight. He traveled to Asia (including Vietnam) several times a year in connection with his work. (RT Vol. 11 2431-2432, 2457-2459.) Dr. Leung described the committees and boards on which he had served and conference presentations he had given, which focused on culture, especially Asian cultures, and mental health. (RT Vol. 11 2432-2433, 2468-2470.)

With respect to his clinical practice, 166 of his patients were Vietnamese. (RT Vol. 11 2435.) Dr. Leung also managed the Intercultural Psychiatric Program, one of three centers in the country specializing in the treatment of mental illness among Asians. Of the 450 Vietnamese patients in the clinic, approximately 60 to 70 percent retained very traditional cultural values and had not acculturated. Of that 60-70 percent, perhaps

half came to the United States between 1975 and 1985. (RT Vol. 11 2439-2441.)

The patients in his program suffered from serious mental problems. About 30 percent of Dr. Leung's patients who arrived as refugees between 1975 and 1978 continued to suffer depression as a consequence of losing everything at home (possessions, prestige, careers, etc.), dislocation, and having to start anew in the United States, burdens which came all at once. Many such people never recovered from depression. (RT Vol. 11 2446-2448, 2457, 2466-2467.)

Dr. Leung explained that Vietnamese culture, especially traditional Vietnamese culture, is very heavily influenced by Confucianism. (RT Vol. 11 2431.) As such, a person is primarily considered to be part of, and is lost without, his or her family. Filial piety, the absolute duty to honor one's parents, affects one's life every day. A child is obligated to take care of everything his or her parents need, and one who fails to do so is considered to be lower than an animal. (RT Vol. 11 2437-2438, 2442.)[31]

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[31] Each of the experts testified that he or she had not interviewed appellant or reviewed documents relating to his case, and that he or she was not rendering any opinion about appellant specifically, but instead was testifying in general terms only. (RT Vol. 8 1751, 1788, 1793, 1795, 1797, 1800-1801, 1814, 1820, 1823 [Muecke]; RT Vol. 8 1857, 1859-1860, 1864, 1870, 1873-1874 [Aneshensel]; RT Vol. 8 1896-1897, 1922 [Dr. Hoang]; RT Vol. 9 1982-1983, 2010-2011 [Gilbert]; RT Vol. 9 2026, 2049 [Green]; RT Vol. 10 2267, 2298-2299, 2315 [Barrett]; RT Vol. 11 2450-2456, 2461 [Dr. Leung].)

II. Penalty Phase Evidence

A. Evidence in Aggravation[32]

1. Evidence Regarding the Shootings

The jury which heard the third penalty phase trial was not the jury which had heard the guilt phase. Therefore, the prosecution called many of the same witnesses it had called at the guilt phase, to testify about the circumstances surrounding the shootings.

Mila Salvador testified regarding appellant's attempt to shoot her and his shooting of Marlene Mustaffa. (RT Vol. 23 5401-5419.) Her testimony was generally consistent with her guilt phase testimony except in the following respects: at the guilt phase, she had testified that approximately two seconds elapsed between the two gunshots, but she now testified that they came one right after the other (RT Vol. 5 1259; RT Vol. 23 5405); and, at the guilt phase, she had testified that she tried to resuscitate Mustaffa after moving her body, but she now testified that she knew Mustaffa was dead even before moving her body (RT Vol. 5 1262-1263; RT Vol. 23 5405-5406). Salvador also testified regarding the impact the shootings had had on her life, as described in greater detail below. (Section II.A.3 and Argument VII, *post.*)

Mitchell Watson testified regarding his observation of appellant prior to the shooting of Mustaffa and attempted shooting of Salvador, and his subsequent attempts to assist Mustaffa and Robertson. (RT Vol. 23 5420-5434.) His testimony was generally consistent with his guilt phase

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[32] As appellant summarizes below, the evidence in aggravation related to the circumstances of the crime and to victim impact evidence. The prosecution presented no evidence that appellant had engaged in prior criminal conduct.

testimony except that his descriptions of their injuries were now more detailed and graphic. (RT Vol. 5 1205-1209; RT Vol. 23 5427-5429.)

Rosa Maria Augustin testified that, after hearing gunshots, she saw appellant. He had a panicked, hysterical look on his face and was running back and forth on the second floor of the hospital, as if he did not know where to go. Her testimony was generally consistent with her guilt phase testimony. (RT Vol. 24 5599-5610.)

Andrew Armenta testified that, while responding to a Code Gray, he followed Rosetti into a stairwell, where he heard gunshots. His testimony was generally consistent with his guilt phase testimony. (RT Vol. 24 5531-5539.) However, at the guilt phase he had testified that he heard Ron Robertson talking, but at the penalty phase he testified that he might have told the police that he heard Robertson tell people to close the door. (RT Vol. 5 1227; RT Vol. 24 5538.)

Norman Bryan testified that he encountered Robertson while they were both responding to the Code Gray. After Bryan left Robertson and returned to his department, he heard two gunshots, followed very quickly by a third. His testimony was generally consistent with his guilt phase testimony. (RT Vol. 24 5524-5530.)

Faith Perry testified that she observed appellant approach and shoot Robertson, who was trying to close a lobby door. (RT Vol. 24 5540-5549.) Her testimony was generally consistent with her guilt phase testimony except in the following respects: at the guilt phase, she had testified that three men restrained appellant after Robertson fell, but she now testified that only two men restrained him (RT Vol. 6 1298; RT Vol. 24 5544); and, at the guilt phase, she had testified that she saw appellant fire the first gunshot, but she now testified that she only heard the first gunshot (RT Vol.

6 1296-1297, 1299, 1312; RT Vol. 24 5548-5549).

John Riordan Collins testified that he observed appellant and Robertson struggling, that he helped subdue appellant, and that appellant said something to the effect of "You killed my mother" or "They killed my mother." Collins' testimony was generally consistent with his guilt phase testimony. (RT Vol. 24 5507-5524.)

Thomas McManus's testimony regarding the statement appellant made while seated in the back of a squad car was generally consistent with his guilt phase testimony. (RT Vol. 24 5462-5468.)[33]

Dr. Joseph Halka's testimony regarding the autopsies of Mustaffa, Rosetti and Robertson was generally consistent with his guilt phase testimony. (RT Vol. 24 5444-5461.)

James Edward Conley of the Anaheim Police Department's Forensic Services Detail testified that he videotaped and gathered evidence at the crime scenes. (RT Vol. 24 5469-5502.) His testimony was generally consistent with his testimony at the guilt phase.

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[33] During the third penalty trial, the trial court granted defense counsel's motion to redact the word "Americans" from appellant's statement, i.e., "You Americans killed my people." (RT Vol. 21 4797-4800.) Accordingly, at the third penalty trial, Officer McManus testified that appellant stated the following:

> "You people kill my mother." He paused. "Now I kill you. You kill my people." He paused again. "I kill you." Another pause. "You know, you just kill my mother. Right now she lay at Martin Luther Hospital by herself." Pause. "You kill her." After he said that, he didn't say anything else.

(RT Vol. 24 5466.)

2. Appellant's Testimony from the Second Penalty Trial

With the agreement of defense counsel, the prosecutor also introduced appellant's testimony from the second penalty trial. (RT Vol. 24 5550-5596.)

Appellant testified that, among other things: he entered the hospital with a plan and a clear, sound mind (RT Vol. 24 5553); he executed the three victims intentionally and with premeditation and deliberation (RT Vol. 24 5554-5555, 5563); while he might have been remorseful three years or three months earlier, he was not remorseful now (12 RT 5554-5555, 5561, 5564); he lived by a credo of life for a life, and now he accepted the consequences (12 RT 5554, 5567-5568); after his mother died, he felt like everything was ruined and that there was nothing left for him, and he also felt anger and a desire for revenge (RT Vol. 24 5565-5566); he wished to be sentenced to death, and he was happy when the first jury returned verdicts making him eligible for the death penalty (RT Vol. 24 5566-5567); and, he had dared the first jury to give him death (RT Vol. 24 5568).[34]

Appellant acknowledged that on the day of the shootings he may have told a detective: that from the bottom of his heart, he felt sorry for the two men (Robertson and Rosetti) and he hoped they survived; and, that he only shot them because he was trying to get away and they surprised him when they intervened. (RT Vol. 24 5556-5563.) He also acknowledged that, at one point during the interview, he was crying, looked up at the

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[34] Appellant frequently testified in narrative fashion and resisted defense counsel's attempts to direct the examination. (See RT Vol. 24 5553-5555, 5557-5559, 5561-5566, 5568.) A reading of appellant's testimony makes clear that he was attempting to inflame the jurors and prompt them to vote for death.

ceiling with his hands together, and said, "Please forgive me, wherever you are, please forgive me, I don't mean to kill you." (RT Vol. 24 5562.) He admitted that, three months before his present testimony, he had apologized to the jury and the victims' families for the hurt and harm he had caused. (RT Vol. 24 5564-5565.)

On cross-examination, appellant testified that: he had decided to seek revenge when he checked his mother out of La Palma Intercommunity Hospital, but because he had to take care of her, he was not free to act until she died (RT Vol. 24 5581-5582); he blamed certain hospital employees for his mother's death, and he only sought revenge against those individuals (RT Vol. 24 5570, 5573, 5594-5595); he did not blame or seek to kill any doctors, to whom he felt grateful (RT Vol. 24 5574); one reason he was angry was that he believed nurses laughed at him and his mother, though he could not otherwise explain what they did wrong (RT Vol. 24 5575, 5578); he believed it would have done no good to complain to anyone at West Anaheim Medical Center because he and his mother were Vietnamese and because they lacked private insurance (RT Vol. 24 5590-5592); he killed Mustaffa and shot at Salvador for revenge, but he realized about two days later that he had targeted the wrong women (RT Vol. 24 5568-5570, 5594); he had intended to carjack someone, drive to La Palma Intercommunity Hospital, and kill nurses there (RT Vol. 24 5576, 5578, 5580, 5595); and, if he had another chance, he would not hesitate to execute the victims again, and he would execute the others on his list as well (RT Vol. 24 5570-5571, 5592). Appellant explained that he wanted to die because he had no reason to live and he wanted to be with his mother in the next life. (RT Vol. 24 5580-5581.)

According to appellant, he did not follow the paramedics to the

hospital (i.e., Martin Luther Hospital), but instead gathered his guns and ammunition because he was going to kill people (RT Vol. 24 5583-5585); he drank a beer and, on the way to West Anaheim Medical Center, stopped at a Circle-K store to buy something to drink (RT Vol. 24 5585-5586); he walked into the hospital but could not find any of the people he was looking for (RT Vol. 24 5586); he returned to his car and tried to forget his plan, but there was nothing left to go back to, so he re-entered the hospital (RT Vol. 24 5586-5587); he did not intend to kill Rosetti initially, but Rosetti angered him by intervening (RT Vol. 24 5572-5573); appellant shot at Rosetti twice, then, after Rosetti fell, shot him in the head (RT Vol. 24 5571-5573); Robertson leapt at him after hiding behind a door, and appellant shot him (RT Vol. 24 5595-5596); and, after Robertson placed his hands on appellant's arm, appellant fired another two or three shots (RT Vol. 24 5595-5596).

Finally, appellant testified on cross-examination that he had quit his job in July or August of 1999 in order to take care of his mother. (RT Vol. 24 5588.) He acknowledged that he had seen Dr. Van the day before the shooting, and that he could have asked Dr. Van anything he wanted;[35] and, he was getting help with the hospital bills, the dialysis was paid for, and a van transported his mother to and from her dialysis sessions. (RT Vol. 24 5593.)

3. Victim Impact Evidence

The prosecutor introduced the testimony of the following witnesses regarding the character of each victim and the impact of their deaths on

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[35] Appellant and the prosecutor (who conducted the cross-examination at the second penalty trial) obviously were referring to Dr. Van Vu. (See RT Vol. 9 2116, 2125-2126.)

their respective families and others: Dave Mustaffa, Marlene Mustaffa's husband (RT Vol. 24 5611-5616); Debbie Marshall, Vince Rosetti's sister (RT Vol. 24 5617-5620); Michael Rosetti, Rosetti's brother (RT Vol. 24 5621-5625); Angela Rosetti-Smith and Becky Rosetti, Rosetti's daughters (RT Vol. 24 5626-5633); Agnes Rosetti, Rosetti's mother (RT Vol. 24 5634-5637); Suzanne Robertson, Ron Robertson's wife (RT Vol. 24 5638-5643); and, Derek Robertson, Robertson's son (RT Vol. 24 5659-5662.) Mila Salvador also testified regarding the impact the incident had had on her life. (RT Vol. 23 5411-5412.)[36]

B. Evidence in Mitigation

1. Testimony Regarding Appellant's Background and Character

Thi Hoa Nguyen lived next door to appellant and his mother in 1969 and 1970, when they lived in Saigon. They rented a room from Nguyen's uncle. (RT Vol. 26 6230-6232, 6235-6236.) Appellant's mother took appellant to school, then worked all day. They did not return until the late afternoon or evening. (RT Vol. 26 6232-6234.)

Appellant's mother was very strict. She watched him very carefully and did not let him play with other children. (RT Vol. 26 6233-6234.) Nguyen never saw anyone who appeared to be a relative visit them. (RT Vol. 26 6234.)

Le Hang Bui, now a novelist residing in Australia, was appellant's teacher in 1971 or 1972. (RT Vol. 26 6237-6238.) Bui recalled that appellant was small, thin and shy, and he lived in a very poor section of Saigon. (RT Vol. 26 6241.) She had to seat appellant in the front of the

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[36] Appellant summarizes the victim impact testimony in greater detail in Argument VII, *post*.

classroom because he was being bullied. He did not play with other children during recess and always walked home alone. (RT Vol. 26 6241-6243, 6246.)

In Vietnam, it is considered disgraceful to be an illegitimate child. Using a crude, cruel phrase, appellant's classmates teased him constantly because he did not have a father. (RT Vol. 26 6241-6243, 6246.)

During the Tet holiday, the school held a music concert. Unlike most of the parents, appellant's mother refused to attend the concert. Appellant had to go to the concert alone. (RT Vol. 26 6243-6244.)

Appellant visited Bui's house on three occasions, bearing a gift each time. He just stood outside her house the first time he visited, reluctant to approach. When Bui noticed him, she invited him in. He had brought clothes for her newborn baby. He brought American candy on his second visit, and baby shoes on his third. (RT Vol. 26 6244-6245.)

Appellant played with her baby. He loved babies and children. Bui once told him that if he were lucky, he would have children of his own someday. (RT Vol. 26 6246.)

Tai Le, a doctor of natural healing, testified that he befriended appellant and his mother in 1975, when they were placed in a refugee camp in Guam. (RT Vol. 24 5715, 5717.) Appellant called him Anh Tai, a term of respect meaning "older brother," and treated Le with the respect due an older brother. (RT Vol. 24 5719-5720.)

Le explained that in Vietnamese culture, it is very important that sons respect their mothers. However, appellant was the most devoted son he had ever met. Appellant had no father or siblings, and he treated his mother as his "one and only." He did whatever she asked. In fact, appellant was getting food for her when Le first met him. (RT Vol. 24

5715-5717, 5720-5722, 5737.)

At some point, Le received word that he was being sent to Camp Pendleton. Appellant became very upset when he learned they had to part, and told Le, "Whenever the globe still spins around, we will meet each other again." Appellant's words comforted Le as he left for an unfamiliar place. (RT Vol. 24 5723-5724.) Sometime around April, 1975, Le was in a mess hall at Camp Pendleton when appellant tapped him on the shoulder; he had arrived with his mother. Le was very happy to see him. (RT Vol. 24 5725; RT Vol. 25 5904.) Appellant was excited to be in the United States. (RT Vol. 24 5737.)

Appellant continued to treat Le with respect, and their friendship grew very strong. Le was addicted to nicotine and, to his shame, collected cigarette butts. Appellant began collecting cigarette butts for Le; he preferred to shame himself to seeing his friend shamed. (RT Vol. 24 5726-5727.) Appellant also continued to cared for his mother devotedly. He obtained food, water and other things for her every chance he had. (RT Vol. 24 5727-5728.)

When Le obtained a sponsor, he again had to part with appellant. On the day he left, he only had two pairs of clothes – what he was wearing and an extra pair he had received from the American Red Cross. Appellant climbed into a dumpster and retrieved an empty box, which he fashioned into a makeshift suitcase. Le believed that appellant did that because appellant had a good heart and cared for him. Recalling the incident still made Le emotional. (RT Vol. 24 5728-5729.)

Le explained that Vietnamese do not hug or kiss one another when they part, as Europeans might. All he could say to appellant was, "Goodbye, I have to go now." Appellant again said that when the globe

still spins, they would see each other again. Le thought about that as he sat alone on a bus. (RT Vol. 24 5730.)

While appellant was still at Camp Pendleton, he stayed in contact with Le. Appellant enclosed a bunch of cigarette butts with his first letter. His letters and phone calls comforted Le. (RT Vol. 24 5730-5731.)

Le married and eventually lost contact with appellant. In 1977 or 1978, Le received a telephone call from appellant. He and his mother were at a bus station, and appellant asked Le to pick them up. They stayed with Le and his wife for almost three months. During that time, appellant and his mother helped out around the house, and appellant treated Le's wife with respect. (RT Vol. 24 5732-5735, 5737.)

Eventually, appellant told Le that they were leaving because his mother was lonely and wanted to return to a different state, where they used to live. (RT Vol. 24 5735.) Le lost contact with appellant until his 2002 trial. During the intervening years, Le had tried unsuccessfully to locate him. (RT Vol. 24 5735-5738.)

Marjorie Schiller and her husband, Erich, owned a restaurant from about 1984 until 1992 or 1994. (RT Vol. 26 6253-6254, 6258-6259, 6265, 6269.)[37] Their children, Dennis and Dena, worked there as well. (RT Vol. 26 6254-6256.) Appellant worked at their restaurant for about six or six and a half years. (RT Vol. 26 6254, 6269.)

The Schillers hired appellant as a busboy, but he ended up doing everything. Among other things, he washed dishes, cleaned the windows and floors, served as a prep cook, and greeted and served the customers.

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[37] According to Dennis Schiller, the restaurant closed in 1992. (RT Vol. 26 6258.) According to Marjorie, however, it closed in 1994. (RT Vol. 26 6259.)

(RT Vol. 26 6254, 6259.) According to Dennis, appellant did so many things it was amazing. (RT Vol. 26 6254.)

According to Marjorie, Erich and Dennis, appellant was an awesome worker. He was reliable, responsible, and always on time. He frequently stayed late and did extra work. He was polite to the Schillers and to their customers, and the customers loved him. Appellant never called in sick unless there was a family holiday or because he needed to take care of his mother, and the Schillers and their customers became concerned whenever he was not there. It also made their jobs a lot harder, as appellant could do the work of four people. Although Marjorie had owned several businesses, no one could compare to him. Dennis similarly believed appellant to be the best employee he had ever seen by far. (RT Vol. 26 6254-6255, 6257, 6260, 6269-6270.)

Appellant was almost like part of their family, and he showed them tremendous respect and loyalty. He was always welcome at their house, and he visited on occasion. The Schillers occasionally exchanged gifts with appellant. Marjorie once tried to give him a watch, but he refused it. Appellant gave her a bracelet, flowers, a potted plant, and a "blue bird of happiness" for her table. He treated Dena like a sister, joking around with and teasing her. He was also protective of Marjorie and Dena; for instance, he escorted them to their cars. They often joked about adopting him, though Marjorie was not really joking. (RT Vol. 26 6255-6257, 6260-6262, 6270.)

The Schillers trusted appellant completely. They could trust him with the cash register and to take care of the restaurant while they were out on errands. They sometimes tried to overpay him as a bonus, but he would say that he could not accept it or that he did not deserve it. He would take

the money only after they insisted. (RT Vol. 26 6261-6262, 6270-6271.)

Appellant was the son every mother would dream of. It was beautiful to see how devoted and loving he was. His mother was his entire focus, his guiding light, everything he had in life. (RT Vol. 26 6256-6257, 6262, 6264, 6272.) According to Erich, appellant took care of her like no other son he had ever seen. (RT Vol. 26 6272.)

Appellant lived in unsafe neighborhoods, and he expressed concern about that. He wanted to live in a safer area for his mother. The Schillers occasionally visited his apartment, which appellant and his mother always shared with two or three other families. The apartment was sparsely furnished but immaculate, and he made Marjorie feel right at home. (RT Vol. 26 6256, 6263-6264, 6271.)

When their restaurant closed, the Schillers had to let appellant go. For a couple of years after the restaurant closed, they spoke to appellant and exchanged Christmas cards. Marjorie wrote in one of her cards, "Trinh, we love you and know we were blessed since the first day we met. We hope your holidays are the happiest ever." The Schillers subsequently moved and lost contact with him. (RT Vol. 26 6258-6259, 6264-6265.)

Dale Maxfield, who worked for Hometown Buffet's parent company, hired appellant in 1992. (RT Vol. 26 6040-6041.) Appellant started as a dishwasher, but was promoted very quickly to a position as a cook. Maxfield, who had daily contact with appellant, thought he was an exceptional employee, and he had never heard any complaints about him. Appellant was usually the first employee to show up, and he did his job very well. Maxfield did not recall appellant ever calling in sick during that time. (RT Vol. 26 6041-6042, 6044.)

At some point, appellant was certified to train new employees. At

another point, Maxfield wanted to transfer appellant to another restaurant; the transfer would have represented a promotion. However, appellant declined because of his mother. (RT Vol. 26 6042-6044.)

Cuu Nguyen testified that she rented a room to appellant and his mother for six months in 1994. (RT Vol. 26 6080.) Appellant and his mother slept on the floor of their apartment. (RT Vol. 26 6083.) Nguyen never saw any friends or family there. (RT Vol. 26 6086.)

Appellant took very good care of his mother. Because they lived in an upstairs apartment and his mother was usually tired, he carried her up and down the stairs. He took her to the doctor's office. He massaged her arms every night. He also made sure she had food and anything else she needed before he left. Whenever he heard about a good medicine, he bought it in the hope that it would make her feel better. (RT Vol. 26 6081, 6084-6086.)

Nguyen recalled that appellant was very respectful and good to her and her children. Whenever he watched television, he turned the volume down low to make sure he did not disturb her. He insisted on paying the electricity bill even though Nguyen said he did not have to do so. Whenever she was unable to accept his invitation to go out to eat, he brought food back for her. (RT Vol. 26 6081.)

Because it was difficult to care for his mother in that apartment, they moved out after six months. Appellant was afraid Nguyen would be unable to find a tenant in the month after he moved out, so he gave her extra money. (RT Vol. 26 6085-6086.)

Appellant once gave Nguyen a cassette of Vietnamese songs, which she still kept as a souvenir. Playing the cassette reminded her of appellant. She liked him and felt sorry for him. (RT Vol. 26 6083, 6086.)

Hai Duong Le testified that she worked for Darnell Home Health Services in 1998 and 1999. During three different stretches of one to two months each, she visited appellant's mother three times a week for about an hour at a time. (RT Vol. 25 5888-5889.)

According to Hai Le, appellant treated his mother with exceptional care and respect. Appellant kept the apartment very clean and neat; cooked for his mother; carried her on his back to and from his car; and, if he was home when his mother lost control of her bowels, he carried her to the bathtub, bathed her, changed her clothes, and carried her back to her wheelchair. Before he went to work, he prepared his mother's food, medication and water, set the table, and set up videotapes for her to watch. He also gave his mother bird seed so that she could feed their bird, telling his mother she would not be alone, that the bird was her friend. Le had never seen a Vietnamese man care for his mother the way appellant did. For a time, appellant's mother stayed at a nursing home, but she soon returned home, explaining that no one could take care of her the way her son did. (RT Vol. 25 5889-5894.)

Hai Le's visits were longer than ordinary because she wanted to make appellant feel better and have less work to do when he got home. (RT Vol. 25 5895.) At one point, Le wanted to introduce appellant to some of her female friends, but he declined, saying he wanted to concentrate on his mother. He told Le that his mother always came first and last. It appeared to Le that his mother was his entire world. (RT Vol. 25 5895-5896.)

Carolyn Le, who was employed by Darnell Home Health Services, also conducted home care visits in 1999. She visited appellant's mother about twice a week for about four or five weeks. (RT Vol. 25 5897-5899.)

According to Le, appellant was a devoted son. He cooked, he was

cooperative, and he listened to Le's instructions. Le taught him to monitor his mother's blood sugar, vital signs and anything that happened in case of emergency. She also gave him information concerning his mother's diet. (RT Vol. 25 5898, 5901.)

Before Le arrived, he had everything ready for her. For example, he always checked his mother's sugar level and provided supplies for wound care. (RT Vol. 25 5900-5901.) He told Le that he only had free time when his mother went for dialysis sessions, during which he ran errands. (RT Vol. 25 5903.) Because his neighborhood was unsafe, he always accompanied Le to her car following her visits. (RT Vol. 25 5903-5904.)

Appellant once told Le that some of the staff at West Anaheim Medical Center had mistreated his mother. However, he did not give specific details and she did not pay much attention to what he said. He said that if something happened to her again, he would take her to Fountain Valley or some other hospital. He said his mother had liked Fountain Valley Hospital. (RT Vol. 25 5901-5902.)

Sinh Hoang testified that he met appellant in 1999, when he was a regular customer at Hometown Buffet. They sometimes conversed and occasionally ate together. Appellant told Hoang that he did not have any friends or relatives. Appellant also said that he was busy taking care of his mother and that he did nothing else. (RT Vol. 26 6076-6077.)

Chieu Nguyen was appellant's neighbor in 1999. On about 10 occasions, Nguyen saw appellant carry his mother to and from his car. Appellant cradled her in his arms, as if he were carrying a baby. It appeared to Nguyen that it was difficult for appellant to carry her. Nguyen never saw appellant with any other relatives or friends. (RT Vol. 26 6184-6186.)

Nghiem Tam Nguyen worked at Viet Vong, a restaurant in Orange

County where appellant took his mother on about ten occasions. (RT Vol. 26 6249-6250.) Nguyen disliked appellant at first because he had so many tattoos. However, Nguyen came to like appellant when he saw how well he cared for his mother. Appellant held her hand and guided her into the restaurant, straightened her clothes, and read the menu to her. He fed her, then cleaned her mouth and hands. Only then would he start eating. (RT Vol. 26 6250-6251.)

On their last few visits to the restaurant, appellant carried his mother like a baby. Nguyen commended him for being so devoted. Appellant told Nguyen that he had to take care of her because she was all he had in this country. Although Nguyen considered himself to be an excellent son, he believed appellant was an even better one. (RT Vol. 26 6251-6252.)[38]

Hector Flores, a general manager for Hometown Buffet in Garden Grove, supervised appellant from 1996 until 1999. Appellant worked there as a cook. (RT Vol. 26 6028-6029.) According to Flores, appellant was a very good employee, cooperative and punctual. He was friendly to a degree, but very reserved, respectful and quiet. (RT Vol. 26 6029-6030.)

At some point, appellant was chosen to train new employees. To be selected as a certified trainer, an employee must have a positive attitude and be very good at his or her job. As a trainer, appellant was very courteous with other employees, and he liked to share his knowledge. (RT Vol. 26 6029-6031.)

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[38] At the conclusion of his testimony, Nguyen stated the following, apparently addressing appellant: "I bid you good health. I see you, and it remind me of my mother. And I feel very sad." After defense counsel thanked him, Nguyen resumed by saying, "I feel –" The trial court excused him at that point. (RT Vol. 26 6253.)

Appellant was proud of an award he received for working at Hometown Buffet for five years. However, he had declined to take a jacket presented to him in recognition of his third anniversary as an employee; when Flores tried to give him the jacket, he explained, "No, thank you. I don't need it. I have my own. Thanks." On yet another occasion, appellant declined to accept a complimentary meal, something Flores offered to reward good employees; appellant paid for the meal. (RT Vol. 26 6031-6032.)

Appellant only called in sick several times, each time because his mother was sick. In 1999, appellant resigned because he needed to take care of her. Flores was sorry to lose such a valued employee, and he told appellant that the door would always be open if he wished to return. (RT Vol. 26 6032-6033.)

Randy Hernandez, the kitchen manager at Hometown Buffet, was appellant's direct supervisor and worked with him every day from 1997 to 1999. They did not talk very much, as appellant just came in and did his job. However, when Hernandez was transferred to another restaurant, appellant gave him a card and a bottle of Cognac as a going-away present. (RT Vol. 26 6034-6036, 6038.)

According to Hernandez, appellant was an excellent employee who only asked for time off when his mother was sick. Hernandez recalled that appellant's mother was in the hospital in the spring or summer of 1999, and that appellant was worried. (RT Vol. 26 6036-6037.) Appellant came in to the restaurant the day before the shootings to pick up his final paycheck. He did not appear to be angry. (RT Vol. 26 6038.)

Cathy Clausen, a paralegal employed by the Orange County Public Defender's Office, testified that she visited appellant's apartment on

September 29, 1999. (RT Vol. 25 5743-5744.) Clausen photographed and/or collected various family mementos, including the following items: a banner depicting a man, a woman, and two praying children; various photographs of a young boy, including one commemorating his First Communion and another in which he stood next to four nuns; photographs of a young boy and a woman, one of which bore an inscription in Vietnamese reading, "My dear son, let's keep the souvenir of your mom. Mom kisses you"; a photograph of a woman and a young man standing in a field, apparently at Camp Pendleton; a Polaroid photograph of appellant, dated 1990; a photograph of a woman cooking; and, a photograph of a woman wearing a lace veil, on which was written in Vietnamese, "A souvenir of your life. I kiss you a lot. Don't you ever forget a mother who lived because of you." (RT Vol. 25 5745-5750; see also Exhibits 308-316, 319, and 322-323.)[39]

Clausen also collected several documents relating to appellant's military service in the Republic of Vietnam, including documents reflecting a 29-day medical leave and his discharge due to lung illness; two folders reading "New Life Boarding Pass," containing flight numbers and line numbers; a Christmas card; a newspaper article with a photograph of a woman, apparently Le Hang Bui; a 1999 wall calender; and, numerous pill bottles. (RT Vol. 25 5750-5752, 5754; see also Exhibits 324-327, 330, and 331-337.)

Finally, Clausen collected two religious cards. One card depicted a Sacred Heart; on the back of the card, the following was written in

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[39] The photographs and banner apparently depicted appellant and his mother, although there was no express testimony to that effect.

Vietnamese, "In memory of the days during the operation in Vo Dat. The days filled with hardship and sadness, but I never lose my faith. I put both my body and my soul in your hand, merciful Lord, Jesus. You will always be in my soul, John Maria. Dung." On the back of the other card, the following was written in Vietnamese, "Vo Dat, 1-25-75. In memory of the days during the operation in Vo Dat. Holy Virgin of Fatima, bless my life and my mom and give us peace. You are the only comfort in my life. Dung." (RT Vol. 25 5753-5754; see also Exhibits 328 and 329.)

2. Evidence Regarding Stressors Faced By Appellant Prior to the Shootings

On April 4, 1996, appellant's mother telephoned 911. Although she was evidently distressed – e.g., she was frequently inaudible, and she reported that she had difficulty breathing and that her legs were paralyzed – she repeatedly asked the dispatcher to contact appellant, who was at work. (RT Vol. 25 5905-5906; CT Vol. 6 1429-1443; Exhibits 354 [911 tape] and 355 [transcript].)

Glen Steven Evans, a captain with the Anaheim Fire Department, responded to the 911 call at about 8:15 a.m. (RT Vol. 25 5806, 5809.) When he arrived, he noticed appellant's mother standing next to three police officers. He tried to speak to her, but the police officers explained that she was waiting for her son. (RT Vol. 25 5807-5808, 5810.) Although she was suffering from a leg abscess and "general body illness," she seemed afraid and did not want him to treat her. (RT Vol. 25 5807, 5809-5810.) Ordinarily, Stevens would have bandaged the abscess and transported her to the hospital. (RT Vol. 25 5808-5809.) However, when appellant arrived, he said that she did not want any medical services, signed a medical release form, and said he would take care of her. (RT Vol. 25 5808.)

Dr. Van Vu, her primary care physician, testified about her medical condition. (RT Vol. 25 5964-5979.) His testimony was generally consistent with his testimony at the guilt phase, except in the following respects, which were either different from or more detailed than his prior testimony: he now testified that he began treating her around February 1998, whereas at the guilt phase he had testified that he began treating her in 1996 or 1997 (RT Vol. 9 2118; RT Vol. 25 5965); in February, 1998, she was admitted to Fountain Valley Hospital due to a heart condition (RT Vol. 25 5966); two months later, she was admitted there due to a skin reaction (RT Vol. 25 5967); in 1998 and 1999, she was chronically ill due to end-stage renal disease, for which she was undergoing hemodialysis, and she also had diabetes and coronary artery disease (RT Vol. 25 5967-5968, 5979); even prior to her May, 1999, hip injury, she was frail, weighing about 70 or 80 pounds, and always looked ill (RT Vol. 25 5979); and, he noted that appellant was very dedicated to his mother (RT Vol. 25 5977).

Appellant presented the testimony of Marcy Diane Hauer and Sharyl Vu of Gambro Healthcare, regarding the decline in Mot Trinh's medical condition during 1998 and 1999, as well as appellant's constant support. (RT Vol. 26 6061-6070.) Their testimony was generally consistent with their testimony at the guilt phase.

The defense also introduced evidence regarding appellant's May 26, 1999, 911 call and his mother's subsequent stay at West Anaheim Medical Center from May 26, 1999, until June 24, 1999. In particular, appellant introduced evidence regarding his mother's declining medical and mental condition; appellant's constant support of and presence with his mother at the hospital; the hospital's failure to provide culturally-competent care, including the staff's reliance upon appellant to interpret; and the hospital's

failure to transfer her to a facility equipped to provide culturally-competent care. The evidence was presented by way of stipulations and the testimony of Eli Bolado, Cynthia Henry, and Nellie McCain. (RT Vol. 25 5759-5778; RT Vol. 26 6053-6055, 6203-6229; Exhibits 366 and 367.)

This evidence was generally consistent with the evidence presented at the guilt phase except in the following respects: as he did at the guilt phase trial, Bolado testified about a June 8, 1999, incident in which appellant's mother became unresponsive, but he now testified that appellant was not present during the incident (RT Vol. 25 5762-5764, 5774); and, he now testified that appellant's mother was very frail and ill and did not communicate much with the nurses or staff (RT Vol. 25 5773).

Appellant also introduced evidence regarding his mother's stay at La Palma Intercommunity Hospital in June and July, 1999, particularly with respect to the following: her medical and behavioral problems (including memory impairment, impulsive behavior, and agitation); the hospital's use of restraints; the hospital's failure to provide culturally competent care, including the staff's reliance upon appellant to interpret and translate; and, appellant's constant support of and presence with his mother at the hospital. The evidence was presented by way of stipulations and the testimony of Ruth Hardcastle, Jacqueline Bostrom, Cynthia Henry, Marella Mabaquiao, and Sylvia Weber, and was generally consistent with evidence presented at the guilt phase. (RT Vol. 25 5786-5801, 5947-5963; RT Vol. 26 6052-6055, 6057, 6123-6133, 6187-6202.)

In addition, Mabaquiao testified that when she first met appellant, his tattoos scared her, but she came to realize that he wanted to help his mother and that he was kind, attentive, polite and courteous. (RT Vol. 26 6130-6131, 6201.) Weber also testified that appellant seemed eager to learn

the "hip precautions," and she did not recall him ever losing his temper when practicing them; he appeared to be devoted to his mother; and, she did not remember any instances in which he complained about the care at La Palma, though she had heard people say since then that they had heard about complaints he had made. (RT Vol. 26 6201-6202.)

Appellant again introduced evidence that in August, 1999, he received notice that his rent would be increased beginning the following month, and that he filed for bankruptcy. (RT Vol. 26 5985-5986, 6058-6060.)

Ladan Khamseh, who was employed by Cal Optima, the medical insurance agency for Orange County residents who belonged to Medi-Cal, testified that appellant called the agency on September 10, 1999, and asked for help in taking care of a bill from the fire department. Appellant explained that, after he called 911, paramedics and fire department personnel arrived at the same time as paramedics, and he later received a bill from the fire department. He had tried to take care of the bill but was not getting anywhere. (RT Vol. 25 5803-5805.) That same day, appellant received a parking citation in the amount of $24.00. (RT Vol. 25 5910; Exhibit 368.)

Appellant also introduced evidence regarding his September 14, 1999, 911 call and his mother's death shortly thereafter, including the following: evidence that a paramedic provided appellant with inaccurate directions to Martin Luther Hospital; testimony that when a doctor informed appellant that his mother had died, appellant responded, "She's okay, right?"; and, testimony that appellant then grieved at his mother's side for some time. This evidence was introduced by way of exhibits and the testimony of Matthew Maxson, David Allen Youngs, Alan Clow, Star

Cisneros, Dr. Jai Ho and Karen Fry. (RT Vol. 25 5913-5927; RT Vol. 26 5986-5987, 6070-6075, 6087-6090; Exhibits 346 and 347.)

This evidence was consistent with evidence presented at the guilt phase except that Cisneros now testified that appellant did not look angry or otherwise unusual, and that he had a pouch. (RT Vol. 25 5927.)

When appellant resigned on August 16, 1999, his biweekly gross pay was $415.17 for 59.31 hours. His net pay was $348.68. (RT Vol. 26 6044.)

3. Mitigating Evidence Regarding the Shootings

a. Evidence Relating to Appellant's Mental Condition at the Time of the Shootings

Appellant introduced evidence regarding the shootings, including the following: Brenda Fillinger's testimony that she heard someone say something to the effect of, "You killed my mother"; and, George Wilhelm's testimony that, after appellant was subdued, he had a vacant expression and his eyes were large and very dark, "like they had seen a ghost." (RT Vol. 25 5768-5774, 5776-5778, 5928-5945; RT Vol. 26 5983-5985.) This evidence was consistent with the guilt phase testimony regarding the shootings.

b. Appellant's Testimony from the First Penalty Trial

The defense introduced appellant's testimony from the first penalty trial. (RT Vol. 25 5862-5881; see also RT Vol. 12 2775-2799, 2804-2810.) On direct examination at that proceeding, appellant testified that: his mind was clear and sound on the morning of the shootings, he walked into the hospital to intentionally and deliberately kill, and he took three innocent lives; it was too late to say anything because nothing he could say would bring anything back; and, he believed in the principle of eye for an eye and accepted a death sentence as payment for his debt. (RT Vol. 25 5862-5863,

5869, 5872.)

He addressed the victims' loved ones, saying, "I accept the death penalty. And not because I say I am sorry to you, to those family who lost your loved ones because of me. And I know for what I did hurt all your feelings. And not only I insult you, but I hurt your family. And to me, I bow my head before all of you and apologize. And I am sorry for that." (RT Vol. 25 5863.)

On cross-examination, appellant testified, among other things, that: he shot Mustaffa and shot at Salvador because he thought they were among the people he was looking for, but he realized too late that they had had nothing to do with him, and he took full responsibility for that (RT Vol. 25 5863-5864); he gathered his guns and ammunition right after the paramedics took his mother, as he had a feeling she was not going to survive (RT Vol. 25 5866, 5874);[40] he drank a beer before he left his apartment, and drank another after learning that his mother had died (RT Vol. 25 5867-5868); because he was confused by the directions provided by the paramedic, he got lost on his way to Martin Luther Hospital (RT Vol. 25 5877); on his way to West Anaheim Medical Center, he stopped at a store to buy something to drink, but he lost interest and proceeded to the hospital (RT Vol. 25 5868); he went into the hospital looking for people to shoot but did not see any familiar faces, so he walked back to his truck and tried to go home, but he knew he had nothing left (RT Vol. 25 5869-5871); he did not say anything to anyone, nor did anyone say anything to him, before he started shooting (RT Vol. 25 5870); and, he planned to kill himself at the

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[40] The parties stipulated that appellant legally had purchased and registered the two firearms. (RT Vol. 25 5905; see also fn. 20, *ante*.)

end of this (RT Vol. 25 5871).

Appellant further testified that, from the day his mother had left La Palma Hospital, he had planned to "make those whose responsibility for my mom health and to reserve until the day she died, you know, and that is why then I keep that in my mind for two, three week until she is gone, and I let it out, and I don't deny that." (RT Vol. 25 5864; see also RT Vol. 25 5875.) He did not want to kill every nurse who had taken care of his mother, just those he blamed for doing bad things to her. (RT Vol. 25 5869, 5873, 5875-5877.)

Appellant testified also that he was not sorry "that he had killed" the two women. (RT Vol. 25 5865.)[41] He did exactly what he meant to do, and was sorry only that he had killed the wrong people. (RT Vol. 25 5869-5870, 5876.) According to appellant, "[i]f I kill them, I enjoy, just like they enjoy to what they did to me." (RT Vol. 25 5873.) He acknowledged that he told the police that if he had to do it all over again, he would do the exact same thing except that he would make sure he got "the right one." (RT Vol. 25 5878; see also RT Vol. 25 5872.)

However, appellant also testified that he did not shoot employees whom he knew had nothing to do with his mother's death. (RT Vol. 25 5873.) Moreover, he was sorry that he had killed Robertson and Rosetti. He had not been looking for them, and he killed them only because he became angry when they tried to stop him. (RT Vol. 25 5865-5866, 5868-5869.) He reiterated that no matter how much he apologized to the victims' families, it would not bring anything back. (RT Vol. 25 5872.)

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[41] Inadvertently suggesting that appellant had killed both Mustaffa and Salvador, defense counsel asked, "And afterwards you weren't sorry that you had killed the women?" (RT Vol. 25 5865.)

On redirect examination, appellant stated that he was upset when the trial court informed the jury that he was pleading not guilty to the charges, and he was pleased when the jury returned verdicts of guilty. When defense counsel asked whether he was pleased by the guilt verdicts because he wanted to die, appellant answered as follows: "Yes, because like I just said minutes ago, that is the kind of life I live. I owe you; I pay you. But if someone owe me, I am going to get it back. And because –" After defense counsel interrupted him to ask another question, appellant continued, "Between me and those folks who lost their loved ones, I owe them for life. For life. And I owe them." (RT Vol. 25 5879.)

After appellant requested to further address the jury, he testified in narrative fashion that: he was willing to pay for the decision he made three years ago; he knew he had hurt the victims' loved ones and he apologized; he knew it was too late and that he was saying too little, but he hoped that they would one day accept his apology. (RT Vol. 25 5880.) He concluded his address as follows:

> To you, Mr. Prosecutor, and to all of you, ladies and gentlemen of the jury, Mr. Prosecutor, as the prosecutor you represent the justice and also you represent the system and to all of you ladies and gentlemen of the jury, you represent the justice, and you also represent the system. You know what to do. Please go ahead and do it. Do the right thing. And for me, I am here; I am ready for it. Life for life. I am ready for it. Please do it. Make the right – make your decision, make your recommendation to the judge; send me to death. I am more than happy to receive it. I am more than happy to accept it. Because like I said, I took someone's life, that is nothing. I can't bring them back. There is nothing I can say. Too late, too little now. I pay them back with my life.
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> Like I say, Mr. Prosecutor, I dare you, I dare you send me to death. And I dare you make the recommendation to the

judge, so he can send me to death. And also to all of you ladies and gentlemen, that is, if it seemed that way, I dare all of you. I dare all of you to send me to death. I dare all of you to make the recommendation to the judge so he can send me to death, I have no objection because I deserve death. I not only deserve death, I need it. I want it. I pay for what I owe. Simple as that, you know.

I am sorry and I apologize to those family – to them I bow my head before all of you, I am sorry. To all of you ladies and gentlemen of the jury, you represent the justice; you represent the system; you know what to do. Go ahead. Please go ahead. Please, I am ready for it. Life for life. Please, I am ready for it.

That is it. Thank you very much Your Honor.

(RT Vol. 25 5880-5881.)

c. Appellant's Testimony During the Instant Penalty Trial

During the instant penalty phase, appellant testified about the shootings as follows: he decided to walk into the hospital and execute three "U.S. citizen[s]" (RT Vol. 24 5703); he accepted full responsibility and had not come up with any reason to excuse his actions (RT Vol. 24 5703); he had nothing to apologize for (24 RT 5704, 5710); he accepted being executed in return (RT Vol. 24 5704, 5710-5711); some American citizens had supported the government's genocide against the Vietnamese people, and by executing American citizens he was doing his duty as a Vietnamese citizen, a son, and a comrade (RT Vol. 24 5704-5705, 5710-5711); he was happy when the first jury returned verdicts making him eligible for the death penalty, and he had dared that jury to return a death verdict (RT Vol. 24 5708-5709); during the second penalty trial, he had testified that he carried out a plan and executed three people, and that he felt no remorse

(RT Vol. 24 5707); and, if he had another chance, he would do it again (RT Vol. 24 5710).

Appellant acknowledged that he apologized for his acts when he spoke to a detective on September 14, 1999. (RT Vol. 24 5705). Appellant refused to answer when defense counsel asked him to confirm that: he did not tell the detective that he was doing his duty as a Vietnamese citizen when he committed the shootings (RT Vol. 24 5711-5712); during the first penalty trial, he bowed his head and apologized to the victims (RT Vol. 24 5706); and, he testified at the first penalty trial that he felt remorse for the victims (RT Vol. 24 5712-5713).[42]

d. Evidence Regarding Appellant's Prior Expressions of Remorse and Grief

Appellant also introduced videotapes of the two interviews of appellant by Anaheim Police Detectives Bill Boone and Karen Schroepfer on the afternoon and evening of September 14, 1999. (25 RT 5781-5783,

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[42] As he did at the second penalty phase, appellant repeatedly testified in narrative fashion and resisted defense counsel's attempts to direct the examination, in an even more transparent attempt to inflame the jurors so that they would vote for death. Among other things, appellant repeatedly insisted that he was not remorseful about his actions, that he had nothing to apologize for, and that he did not "give a damn" (RT Vol. 24 5703-5704, 5707, 5709, 5712); and, he now claimed that he had acted to seek revenge for a genocide committed by the American government in Vietnam (RT Vol. 24 5704-5705, 5707-5708, 5710-5712). After defense counsel concluded his examination and the prosecutor said he had no questions for appellant, appellant interjected, "May I say to all of you, down with the U.S. government, down with the capitalism, down with the –." After the court struck his testimony, appellant continued, "Long live Communist, Viva Socialist." Again the court interrupted him, but appellant stated, "Do your job, thank you." (RT Vol. 24 5713.) The court did not explicitly strike appellant's final two statements.

5785, 5811; CT Vol. 7 1893-2005; Exhibits 371, 372 and 374 [videotapes]; Exhibits 373 and 375 [transcripts].) Appellant's account of the shootings was basically consistent with his testimony and other evidence presented at the three penalty phases. However, appellant repeatedly made clear to the police that his sole motivation was to avenge what he believed was the mistreatment and death of his mother at the hands of nurses at West Anaheim Medical Center and La Palma Intercommunity Hospital. (CT Vol. 7 1900-1911, 1914-1920, 1929, 1931-1933, 1937-1943, 1948, 1952, 1960-1965, 1969, 1980-1987, 1989, 1994-1997, 1999-2001, 2003-2004.)

The videotapes and transcripts of the interviews show, among other things, that: appellant cried throughout the interviews (CT Vol. 7 1902, 1932-1933, 1950, 1983); he expressed remorse over, and asked forgiveness for, the shootings of Rosetti and Robertson, whom he believed to be innocent (CT Vol. 7 1900-1903, 1906-1907, 1919-1921, 1933, 1948, 1952, 1962-1963, 1969, 1980-1981, 1983, 1987, 2001, 2003-2004); and, because his mother had died, he now felt he had nothing to live for and would accept whatever happened to him (CT Vol. 7 1950, 1960, 1963-1964, 1966, 1983, 2000).

Susan Webster, a retired nurse formerly employed by the Orange County Mental Health Department, testified about several conversations she had with appellant while working in the Orange County Jail. (RT Vol. 25 5883-5884.) On September 29, 1999, they had a conversation in which appellant was tearful and feeling overwhelmed by the events. He cried when he discussed the victims and he was concerned about their family members, describing them as good, innocent people. He also described himself as a low-life. (RT Vol. 25 5884-5885.) On October 12, 1999, appellant indicated that he continued to have dreams about happy times

with his mother. He expressed remorse, saying, "I will miss my mom, and now I caused others to miss their family." (RT Vol. 25 5885.) He continued to refer himself as a low-life who deserved whatever he got and that he needed to take it like a man. In November, he again referred to himself as a low-life. Finally, on February 4, 2000, he said, "Family members of victims suffered over Christmas and New Year's." He added that he deserved to suffer tomorrow, referring to the beginning of the Chinese New Year, which was to begin the following day. (RT Vol. 25 5886.)

Chau Stotelmyre, a state-certified Vietnamese interpreter, testified that she had interpreted for appellant at a conditional examination of Marjorie Schiller, which took place roughly a month before the first trial. The conditional examination was conducted out of concern that she would not be healthy enough to testify at trial. As Schiller was leaving, she and appellant addressed one another, perhaps to say hello. But the last three words appellant said to Schilling were, "Please forgive me." (RT Vol. 26 6266-6267.)

Anne Marie Nguyen, the confirmation director at St. Callistus in Garden Grove, testified that she had visited appellant at the Orange County Jail approximately 13 times since December, 2000. (RT Vol. 26 6047-6048, 6051.) She began visiting him because a defense investigator had asked her to do so. (RT Vol. 26 6049-6050.)

Appellant was in tears every time they talked about his mother. (RT Vol. 26 6048.) He was extremely remorseful. He told Nguyen that the victims were innocent, good people. He also told her that he was very sorry for the victims' families and that he had been praying that they would have a good life. Appellant said he knew that what he had done was wrong, and

that the only way to pay for the crime was to die. (RT Vol. 26 6048-6049.) Appellant made all of those statements before either Nguyen or appellant knew that she was going to testify. (RT Vol. 26 6050.)

e. Expert Testimony and Other Evidence Regarding Caregiver Stress and Culturally Competent Care

Professor Carol Aneshensel again testified regarding caregiver stress. (RT Vol. 26 5987-6027.) Aneshensel's testimony was generally consistent with her testimony at the guilt phase.

Dr. Giao Hoang testified as an expert on culturally-appropriate care, particularly as related to Vietnamese patients. (RT Vol. 24 5663-5700.) His testimony was generally consistent with his testimony at the guilt phase.

Lana Le, the Vietnamese Patient Liaison at Fountain Valley Regional Hospital, testified about interpreter services and other programs available to Vietnamese patients at that hospital. (RT Vol. 25 5819-5824.) Her testimony was generally consistent with her guilt phase testimony.

Karin Hwang Wang, vice president of the Asian Pacific Legal Center and a former deputy regional manager at the U.S. Dept. of Health and Human Services (DHSS) Office for Civil Rights, testified regarding state and federal laws requiring the provision of interpreters to persons with limited English proficiency. (RT Vol. 25 5825-5837, 5846-5847.) Her testimony on that point was consistent with the guilt-phase testimony of Myrna Jean Gilbert.

Alice Huanmei Chen, a physician in internal medicine who also engaged in work pertaining to the public policy with respect to language access, testified regarding the importance of trained medical interpreters. (RT Vol. 25 5838-5845, 5848-5849, 5854, 5858, 5860.) Her opinion as to why it is important that trained interpreters be used was consistent with the

guilt-phase opinions of Marjorie Muecke, Dr. Giao Hoang, Myrna Jean Gilbert, and Carola Green. (RT Vol. 9 2041-2043, 2025-2032, 2034-2040, 2047-2050.)

Marjorie Muecke again testified regarding Vietnamese and Southeast Asian culture, particularly with respect to attitudes and beliefs regarding health care. (RT Vol. 26 6134-6167.) Her testimony was generally consistent with her testimony at the guilt phase.

Dr. Paul Leung, a psychiatrist, again testified regarding Vietnamese culture and mental illness among Vietnamese refugees. (RT Vol. 26 6092-6122.) His testimony was generally consistent with his testimony at the guilt phase.[43]

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[43] Several of the experts testified that he or she had not interviewed appellant or reviewed documents relating to his case, and that he or she was not rendering an opinion regarding appellant specifically, but rather was testifying only in general terms. (RT Vol. 24 5693 [Dr. Hoang]; RT Vol. 25 5831 [Wang]; RT Vol. 25 5851, 5853, 5855 [Dr. Chen]; RT Vol. 26 5994, 6012-6019, 6023 [Aneshensel]; RT Vol. 26 6112, 6117-6121 [Dr. Leung]; RT Vol. 26 6158-6167 [Muecke].)

ARGUMENTS

I

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO RECUSE THE ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE

Appellant was charged with three counts of murder and one count of attempted murder arising from shootings which took place at West Anaheim Medical Center on September 14, 1999. (CT Vol. 1 2-4.) On September 16, 1999, Orange County District Attorney Tony Rackauckas announced that persons prosecuted for killings committed during rampages in public places would automatically face the death penalty (CT Vol. 1 134-136), breaking with existing policy under which a committee of senior prosecutors reviewed evidence and made a recommendation as to whether the Orange County District Attorney's Office should seek a death sentence.[44] Appellant subsequently moved to recuse the Orange County District Attorney's Office, arguing that Rackauckas had a conflict of interest preventing him from properly exercising his discretionary function; specifically, appellant argued that Rackauckas's decision was motivated by his anger that the shootings took place at the very hospital where his father had been a patient just days before. (CT Vol. 1 110-213.)

As appellant demonstrates below, the trial court abused its discretion in denying his motion, violating his constitutional rights to due process, equal protection, and a reliable adjudication at all stages of a death penalty

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[44] The Orange County District Attorney's Office referred to such hearings as Special Circumstances Review Hearings/Meetings (hereafter, "SCRH"). (CT Vol. 1 159-160.) During the proceedings below, appellant occasionally referred to such hearings as "Livesay" hearings. (CT Vol. 1 22, 112, 114, 160.)

case, and violating the constitutional prohibitions against cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15 and 17.)

A. Procedural Background

Appellant litigated his motion to recuse the Orange County District Attorney's Office at each phase of his trial, as explained in the procedural history set forth below.

On October 23, 2001, appellant filed a motion to recuse the Orange County District Attorney's Office on the following grounds: (1) Rackauckas's capricious decision to seek death against appellant demonstrated a conflict of interest rendering it unlikely that he would receive a fair trial; (2) the standardless decision to seek death in appellant's case violated his rights to due process under the state and federal Constitutions; (3) appellant was deliberately singled out on the basis of invidious criteria in violation of the equal protection clauses of the state and federal Constitutions; and, (4) Rackauckas's decision to seek the death penalty in this case violated the Eighth Amendment's prohibition against cruel and unusual punishment. (CT Vol. 1 110-213.)

On December 5, 2001, the Attorney General filed an opinion asserting that: (1) appellant's motion to recuse must be denied because he had not shown that an actual conflict of interest existed such as would render it unlikely he would be treated fairly; (2) there is no due process requirement that a prosecutor follow certain standards in determining whether to seek the death penalty, and absent a showing of invidious discrimination such a determination is not subject to judicial scrutiny; and, (3) the District Attorney's decision to seek the death penalty in this case did not violate the Eighth Amendment. (CT Vol. 1 221-242.)

That same day, the prosecution filed an opposition to appellant's motion, arguing that: (1) the fact that Rackauckas's father had been a patient at the hospital where the shootings took place did not establish a disabling conflict of interest; and, (2) the lack of a SCRH did not justify recusal. (CT Vol. 1 243-252.) In support of their opposition, the prosecution attached a declaration from Rackauckas. (CT Vol. 1 251-252.)

On December 31, 2001, appellant filed a response to the pleadings in opposition to his motion to recuse. (CT Vol. 1 254-277.) In his response, appellant argued that: (1) the Attorney General's opinion misstated both the law regarding recusal and the defense argument; and, (2) the prosecution's argument misstated the law, was contradicted by the record, and was not supported by declarations from other percipient witnesses. (CT Vol. 1 269.) In support of his response, appellant attached several exhibits rebutting a number of assertions made in Rackauckas's declaration.

In further support of its opposition to appellant's motion, the prosecution filed a supplemental declaration by Rackauckas on January 11, 2002.[45]

That same day, Judge Robert Fitzgerald heard the matter. After counsel submitted on the pleadings without further argument (RT Vol. 1 66), Judge Fitzgerald ruled as follows:

> Motion to recuse denied. Defendant has not shown actual conflict exists rendering it unlikely defendant will be treated unfairly. No showing of arbitrary and invidious discrimination. No violation of the 8th Amendment prohibition against cruel and unusual punishment.

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[45] The exhibits attached to appellant's motions and the pleadings filed by the prosecution in opposition thereto are described in Section C, *post*.

Tentative ruling entered, now denied.

(RT Vol. 1 67.) Deputy District Attorney Brian Gurwitz, appearing for the purpose of arguing the prosecution's opposition, interjected as follows:

> If I can get one thing clarified. Some language in the [*People v.*] *Eubanks* [(1996) 14 Cal.4th 580] decision is somewhat unclear as to whether an actual conflict is required. I want to make sure that the court ruling, even if this is an apparent conflict, the court ruling is based on the likelihood of unfair treatment. Would that be accurate?

Judge Fitzgerald responded, "Yes. I also make that finding." (RT Vol. 1 67.) He added, "There is no showing of an appearance of a conflict. That's what you were asking to make, right?" Gurwitz responded, "Yes." Judge Fitzgerald then turned to unrelated scheduling matters. (RT Vol. 1 68.)

On February 5, 2002, appellant filed a petition for writ of mandate/prohibition and request for immediate stay, arguing that the trial court erred when it denied him an evidentiary hearing on the motion to recuse. (Supp. CT Vol. 1 177-300; Supp. CT Vol. 2 301-560; see also Supp. CT Vol. 2 565-569 [District Attorney's informal reply], 570-580 [Attorney General's informal reply].) The Court of Appeal denied appellant's petition on April 18, 2002. (Supp. CT Vol. 2 581-582.)

On October 21, 2002, prior to the second penalty trial, appellant filed a motion requesting that the trial court reconsider the recusal motion. (CT Vol. 4 841-1114.) In support of his motion, appellant submitted a June, 2002, grand jury report prepared in response to "a number of complaints and letters sent to the outgoing 2000-2001 Grand Jury concerning alleged improprieties in the operation of the Orange County District Attorney's Office." (CT Vol. 4 1018.)

On October 30, 2002, the trial court (Judge John Ryan) heard

arguments on appellant's motion to reconsider the recusal motion. (RT Vol. 14 3129-3144; CT Vol. 5 1304.) During that hearing, defense counsel stated,

> [W]e would just submit, Your Honor.
>
> I believe that the gist of the issues are hopefully succinctly stated. And that is, that without any further information, the prior court had ruled that we would not get the hearing for the recusal. We can only assume it is because without more – there was a question of credibility without more to assume that, perhaps, Mr. Rackauckas would do something for personal interest as opposed to solely professionally.
>
> The grand jury report came out subsequently to that. There is some language in that that I felt the Court should consider in the motion to recuse.
>
> Other than that, we would submit.

(RT Vol. 14 3139.)

Gurwitz challenged defense counsel's assertion that Judge Fitzgerald had denied the recusal motion on credibility grounds, arguing that he had made no specific findings as to why he was denying the motion. Gurwitz also argued that the arguments he and the Attorney General's Office had raised were clear: (1) Rackauckas's declaration "had so much credibility on its face"; and, (2) even if the facts alleged by the defense were true, "there wasn't a sufficient nexus between those facts and the inference that they were asking the court to draw with respect to whether the defendant would receive a fair trial or not." (RT Vol. 14 3140.)

Gurwitz then argued that: (1) appellant was not entitled to use the grand jury report as evidence in support of his motion; (2) the way the case

was handled, and the fact that there had been disputes within the District Attorney's Office over the way it was handled, did not

> translate[] into a district attorney who would want to take the life of somebody he otherwise wouldn't have wanted to kill because his father had been in the hospital a couple days before. . . . The defense also suggests that somehow this evidence is, I guess, evidence of dishonesty that would somehow impeach the declaration of Mr. Rackauckas and some of the facts, and that may well be true. If he were a witness, some of this may potentially be admissible. I don't know. It is on cross-examination for that purpose.
>
> . . .
>
> And, lastly, I would also say that in the event this court disagreed and did an evidentiary hearing, the People would offer evidence of Mr. Moore [the deputy district attorney prosecuting the case] who is not – well, of Mr. Moore who would testify that his decisions in this case were not guided by management. . . .

(RT Vol. 14 3141-3142.)

After the defense objected that information regarding Moore was hearsay, Gurwitz explained that he had raised the topic simply as an offer of proof. (RT Vol. 14 3142.)

The trial court then expressed doubt that it had the authority to reconsider the prior judge's ruling. (RT Vol. 14 3142.) The trial court also stated that the grand jury report did not add anything to what was known or available beforehand. (RT Vol. 14 3142-3143.) Finally, the trial court concluded that appellant did in fact receive a fair trial and would get another fair trial, and that there was no suggestion that anything affecting his rights occurred during the trial. (RT Vol. 14 3143.) The trial court stated that it was denying the motion for those reasons. (RT Vol. 14 3144.)

The trial court and counsel agreed that a trial judge has the authority to reconsider another superior court judge's ruling on a recusal motion where it is renewed based upon newly discovered evidence, but the trial court found that there was no newly discovered evidence in this case. The trial court further ruled that, even if newly-discovered evidence had been presented, its ruling would be the same. (RT Vol. 14 3144.)

On February 27, 2003, prior to the third penalty trial, the defense orally renewed the recusal motion. (RT Vol. 21 4777, 4780-4781; CT Vol. 6 1684.) Defense counsel asserted that they had fully litigated the matter, so they were renewing the motion now "just for the record." (RT Vol. 21 4777.) Defense counsel argued that the fact the case was being tried for a third time was further evidence that Rackauckas was treating this case differently. (RT Vol. 21 4780.) The trial court responded that "three times [is] not a record in a murder case." (RT Vol. 21 4781.)

Moore denied that Rackauckas was driving the retrial. According to Moore, he had never spoken to Rackauckas or any intermediaries about the case, and it was his (Moore's) call. The court accepted Moore's representation, adding that it was not sure it would make a difference if Rackauckas had had input in light of his duties as an elected official. The court then denied appellant's motion. (RT Vol. 21 4781.)

Consequently, the Orange County District Attorney's Office handled the case throughout the proceedings below.

B. Legal Standards

This Court has explained that

> [t]he importance, to the public as well as to individuals suspected or accused of crimes, that these discretionary functions [of the district attorney] be exercised "with the highest degree of integrity and impartiality, and with the

> appearance thereof" (*People v. Superior Court (Greer)* [(1977) 19 Cal.3d 255, 267]) cannot easily be overstated. The public prosecutor '"is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. 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 innocence suffer.'" (*Id.* at p. 266, quoting *Berger v. United States* (1935) 295 U.S. 78, 88 [79 L.Ed. 1314, 1321, 55, S.Ct. 629].)

(*People v. Eubanks* (1996) 14 Cal.4th 580, 589; see also *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 257, superceded by statute on another ground as stated in *People v. Conner* (1983) 34 Cal.3d 141, 147 ["A district attorney may thus prosecute vigorously, but both the accused and the public have a legitimate expectation that his zeal . . . will be born of objective and impartial consideration of each individual case."].)

Thus, under Penal Code section 1424, the prosecutor may be recused where "the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial."[46] As this

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[46] Section 1424, subdivision (a)(1), provides in pertinent part that:

> Notice of a motion to disqualify a district attorney from performing an authorized duty shall be served on the district attorney and the Attorney General at least 10 court days before the motion is heard. The notice of motion shall contain a statement of the facts setting forth the grounds for the claimed disqualification and the legal authorities relied upon by the moving party and shall be supported by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit. The district attorney or the Attorney General, or

(continued...)

Court has explained, section 1424 sets out a two-part test for determining whether recusal is appropriate:

> Under the first part, a court must determine whether a conflict exists, that is, whether "the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner." [Citations.] If such a conflict exists, the court must further determine whether the conflict is """so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings."""" [Citation.] Thus, the first half of the inquiry asks only whether a "reasonable possibility" of less than impartial treatment exists, while the second half of the inquiry asks whether any such possibility is so great that it is more likely than not the defendant will be treated unfairly during some portion of the criminal proceedings.

(*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 713.)

Upon a proper showing, a trial court has the power to recuse the entire staff of a district attorney's office prosecuting a criminal case. (*People v. Superior Court (Greer)*, *supra*, 19 Cal.3d at pp. 261-265; *People v. Lopez* (1984) 155 Cal.App.3d 813, 821.) While the court should exercise particular caution in cases where the issue is whether an entire prosecutorial office rather than a single prosecutor should be recused (*People v. Lopez*, *supra*, 155 Cal.App.3d at pp. 821-822), recusal of an entire office has been

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[46](...continued)
both, may file affidavits in opposition to the motion and may appear at the hearing on the motion and may file with the court hearing the motion a written opinion on the disqualification issue. The judge shall review the affidavits and determine whether or not an evidentiary hearing is necessary. The motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.

found appropriate where the district attorney is directly involved in the controversy (*People v. Choi* (2000) 80 Cal.App.4th 476, 482-483; *People v. Lepe* (1985) 164 Cal.App.3d 685, 688-689).

A trial court's decision to grant or deny a motion to recuse is reviewed for an abuse of discretion. (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 728; *Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at p. 711; *People v. Eubanks*, *supra*, 14 Cal.4th at p. 594.) Specifically, the trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible if it was arbitrary and capricious. (*Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at pp. 711-712; see also *People v. Gamache* (2010) 48 Cal.4th 347, 361-362 [reviewing court "must determine whether the trial court's findings were supported by substantial evidence and whether, in turn, those findings support the decision to deny recusal"].)

Reviewing courts traditionally have been reluctant to look behind a prosecutor's decision to exercise his or her discretion in selecting which cases are eligible for the death penalty because, "'[a]bsent a persuasive showing to the contrary, we must presume that the district attorney's decisions were legitimately founded on the complex considerations necessary for the effective and efficient administration of law enforcement.' [Citation.]" (*People v. Keenan* (1988) 46 Cal.3d 478, 506.) However, this Court has observed that, "Of course, an accused may show by direct or circumstantial evidence that prosecutorial discretion was exercised with *intentional and invidious discrimination in his case*. [Citations.]" (*Ibid.*; emphasis in original.)

C. The Trial Court Abused Its Discretion in Denying Appellant's Motion to Recuse the Entire District Attorney's Office

1. Judge Fitzgerald's January 11, 2002, Denial of Appellant's Recusal Motion Constituted An Abuse of Discretion

a. Evidence Supporting Recusal

In his motion to recuse the District Attorney's Office, appellant set forth a number of factors showing that Rackauckas did not exercise his discretionary function impartially, if he exercised it at all. Appellant submitted a number of exhibits in support of his motion, including the following: (1) two newspaper articles, both dated September 17, 1999, regarding Rackauckas's announcement of his new policy (CT Vol. 1 134-136); (2) a March 28, 1997, District Attorney's Office memorandum regarding the review process to be followed in all special circumstances cases, and which noted that "[i]n those few cases where the death penalty may be appropriate, the committee review process should be started no later than immediately after the preliminary hearing/Grand Jury indictment" (CT Vol. 1 201); (3) a September 1, 1999, District Attorney's Office memorandum, which was essentially identical to the 1997 memorandum (CT Vol. 1 138); (4) a newspaper article reporting that "[a] prosecutor announced plans . . . for a hearing to evaluate whether a death sentence should be sought against rampage-murder suspect Dung Trinh, even though District Attorney Tony Rackauckas has already made his decision in the case: death," and that the Assistant Public Defender commented that her staff was in a "quandary" as a result of the conflicting announcements (CT Vol. 1 167); (5) a July 26, 2000, letter from Deputy District Attorney Christopher Kralick informing defense counsel of the decision to seek the

death penalty against appellant (CT Vol. 1 169); (6) a hospital "data summary" documenting that Rackauckas's father, Anthony Rackauckas, Sr., was hospitalized at West Anaheim Medical Center from September 10 through September 12, 1999 (CT Vol. 1 173); (7) an August 25, 2000, memorandum from Rackauckas stating that he had decided that a special circumstance committee hearing was unnecessary in this case, pursuant to his policy that "where [a] person goes on a public rampage of indiscriminate killings, this office will seek death without the special circumstance committee convening to help make that decision" (CT Vol. 1 175); and, (8) a declaration from James Enright, who had been Chief Deputy District Attorney from 1966 until 1990, describing the creation of the special circumstance review committee in the early 1980s. (CT Vol. 1 211-212).

Appellant also submitted a memorandum from District Attorney's Office investigator C. Reece, whom Kralick had asked to inquire into whether Rackauckas, Sr., had been a patient at West Anaheim Medical Center around the time of the homicides. In his memorandum, Reese wrote that on October 12, 2000, hospital employee Janet Calliham left a message stating that no one by the last name of Rackauckas had been a patient there during that period of time; Kralick subsequently provided Reese with, among other things, the data summary regarding Rackauckas, Sr., and asked him to find out why they had received conflicting information; on October 30, 2000, Calliham informed Reese that, after the hospital received a subpoena duces tecum from the defense, another computer search was conducted and it was discovered that Rackauckas, Sr., had been a patient; and, according to Calliham, she did not know why his name did not come up during the initial search. (CT Vol. 1 177-178.)

Finally, appellant submitted a declaration of Mike Jacobs, who had been a prosecutor with the Orange County District Attorney's Office for approximately 25 years. Jacobs attested to the following facts, among others: he had actively supported Rackauckas's campaign for District Attorney; when Rackauckas took office, Jacobs was immediately promoted to Assistant District Attorney and assigned to head the Homicide Unit; Jacobs was head of the Homicide Unit from January, 1999, until October, 2000; special circumstances review hearings had been utilized since approximately 1981, and since 1984 or 1985 such hearings had included an opportunity for the defense to present mitigating facts; during a conference on September 16, 1999, Rackauckas told Kralick to hold off on appellant's arraignment until the afternoon; during the conference, Rackauckas also announced his new policy; when Jacobs and Chief Assistant District Attorney Chuck Middleton questioned Rackauckas regarding the reason and need for, and the timing of, the new policy, he responded that he had made up his mind and that he would announce the policy at a press conference following the arraignment; Rackauckas also said that the case was particularly upsetting to him because his father had been hospitalized at West Anaheim Medical Center, and that he had visited his father there immediately prior to the shooting; and, Rackauckas expressed concern about what the media would do if they discovered that his father had been a patient at the same hospital. (CT Vol. 1 159-163.)

Jacobs further attested that, during an August, 2000, meeting held at his request, Rackauckas said he was very upset because Kralick had stated to the press and the court that there was still a possibility that the defense could have a SCRH, contradicting Rackauckas's new policy; Rackauckas accused deputies in the Homicide Unit, particularly Jacobs and Kralick, of

insubordination for disagreeing with his new policy; when Jacobs replied that dissent and debate did not amount to insubordination, Rackauckas replied that the statements undermined his policy and therefore constituted insubordination; when Jacobs suggested that the new policy would almost certainly be deemed error by the Ninth Circuit Court of Appeals, Rackauckas replied, " So you mean that one of our cases could reversed in 15 to 20 years? Why should we care?"; and, when Jacobs suggested that Rackauckas would likely have to testify in connection to defense challenges to the new policy, he responded that he hoped they (the defense) did bring such a challenge, and he also may have said something to the effect of, "Bring it on." (CT Vol. 1 163-164.)

Finally, Jacobs attested to the circumstances surrounding his subsequent reassignment, placement on administrative leave, and eventual termination. Specifically, Jacobs declared that: he was reassigned from his position as head of the Homicide Unit approximately five or six weeks after the August, 2000, meeting, and he was given no explanation for the transfer; about two weeks later, he wrote a memorandum to Senior Assistant District Attorney Claudia Silbar explaining that he believed the information regarding Rackauckas, Sr., must be disclosed to the defense, and asking whether he should prepare a declaration; Silbar told him not to prepare a declaration, and that Rackauckas would take care of it; when a District Attorney's Office investigator contacted the hospital at Jacobs's request, he was told that they had not had an in-patient by the name Rackauckas, Sr., during the time frame in question; on April 2, 2001, Rackauckas placed Jacobs on administrative leave; and, on June 15, 2001, Jacobs received a letter of dismissal. (CT Vol. 1 164-165.)

In support of their December 5, 2001, opposition to appellant's

recusal motion, the prosecution attached a declaration from Rackauckas, who denied allegations that: his father's hospital stay affected his decision; that he had urged his staff to withhold the fact of his father's hospitalization; and, that he had said he did not care if his decision were reversed in the future. He also asserted that he did not believe a review hearing would have changed his charging decision; at no time did any member of his staff express an opinion that this was not an appropriate case in which to seek death; and, he informed a newspaper reporter, Stuart Pfeifer, within days of the shooting that his father had been a patient at the hospital. (CT Vol. 1 251-252.)

In support of his December 31, 2001 response to the opposition, appellant attached a December 20, 2001, internal memorandum by Deputy District Attorney Jim Mulgrew, who stated that, during the summer of 2000, he had several conversations with Jacobs regarding whether the District Attorney's Office had an ethical obligation to disclose the fact that Rackaukas' father had been a patient at the hospital where the shootings took place. Mulgrew also stated that, during those conversations, Jacobs told him the following: on the day of appellant's arraignment, Rackauckas said he hoped the media did not find out that he had visited his father at the hospital just before the shootings; and, when Jacobs suggested that the failure to disclose this information might lead to eventual reversal of a death sentence, Rackauckas responded that they need not care that the case might be reversed in 15 to 20 years. (CT Vol. 1 271 [Exhibit A].)

Appellant also attached two exhibits – i.e., a declaration from Assistant Public Defender Brooks Talley and a newspaper article by reporter Stuart Pfeifer – indicating that Rackaukas told Pfeifer in November, 2000, not September, 1999, that his father had been a patient at

West Anaheim Medical Center. (CT Vol. 1 272-276 [Exhibits B and B1].)

Finally, in the supplemental declaration submitted by the prosecution on January 11, 2002, Rackauckas acknowledged that his conversation with Pfeifer took place in November, 2000, not September, 1999. He also claimed that the September, 1999, conversation concerning his father's hospital stay may have been with another reporter, whose identity he could not now recall. (CT Vol. 1 278-280.)

b. Judge Fitzgerald Abused His Discretion in Denying Appellant's Recusal Motion

As appellant demonstrates below, the trial court abused its discretion in denying the recusal motion, having failed to appreciate that the evidence before it weighed overwhelmingly in favor of recusal under the standard set forth in section 1424.

First, the evidence demonstrated a conflict of interest, that is, "a reasonable possibility that the DA's office [did] not exercise its discretionary function in an evenhanded manner." (*Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at p. 713.) Among other things, there was evidence that: (1) within two days of the shootings, Rackauckas decided upon the new policy, which contravened longstanding office policy requiring an SCRH in any potential capital case; (2) Rackauckas implemented the new policy because he was "particularly upset[]" that the shootings occurred at the very hospital where his father recently had been a patient, and which he himself had visited; (3) he changed the policy by fiat, having failed to seek the input of other prosecutors; (4) as of the fall of 2000, the District Attorney's Office had failed to disclose to the defense that Rackauckas, Sr., had been a patient at the hospital; (5) Rackauckas was not only worried that the media would learn his father had been a patient at

the hospital, but he rejected the advice of Jacobs (whom he had assigned to head the Homicide Unit) that the information be disclosed; and, (6) Rackauckas was angered when underlings such as Jacobs and Kralick questioned and/or failed to follow the new policy, going so far as to reassign and eventually terminate Jacobs. (CT Vol. 1 133-212, 271-276.)

Significantly, appellant's allegations were amply supported by the exhibits, while the prosecution failed to provide any evidentiary support for its position beyond the declarations of Rackauckas himself. For instance, several of Jacobs's statements regarding Rackauckas's resistance to disclosure of the information regarding his father were corroborated by Mulgrew. Moreover, the defense presented evidence belying Rackauckas's claim that he had disclosed the information to reporter Stuart Pfeifer in September, 1999; by contrast, the prosecution failed to present any evidence corroborating Rackauckas's claim that he may have disclosed the information to a reporter in September, 1999. (CT Vol. 1 133-212, 271-276.)

In sum, Rackauckas's immediate decision to seek the death penalty and his relentless pursuit of that goal demonstrated a conflict of interest, as it exceeded proper prosecutorial zeal and was not "born of objective and impartial consideration." (*People v. Superior Court* (*Greer*), *supra*, 19 Cal.3d at p. 257.)

Second, the evidence presented by appellant demonstrated that the conflict was " so grave as to render it unlikely that defendant [would] receive fair treatment during all portions of the criminal proceedings." (*Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at p. 713.) Rackauckas's personal bias and interest in this case precipitated his failure to exercise his prosecutorial discretion, resulting in an actual likelihood that appellant

would not receive a fair trial. Even assuming, arguendo, that he did not dictate Moore's handling of the trial, it cannot be assumed that his office would have sought the death penalty against appellant had it conducted a special circumstances review hearing/meeting. Among other things, defense counsel would have had an opportunity to present mitigating evidence to the special circumstances review committee in an effort to persuade the committee to recommend that the death penalty not be sought. (CT Vol. 1 139.)[47] Given the deeply sympathetic aspects of appellant's history and character – including the poverty, social isolation and turmoil he endured in Vietnam, his devotion as a son, his reputation as an extraordinary employee, and the emotional upheaval he experienced when his mother's health declined and, especially, when she died – it could not have been a foregone conclusion that the District Attorney's Office would seek the death penalty. (See CT Vol. 1 130, fn. 17 [noting that defense counsel had compiled "significant mitigating information . . . in an effort to convince the District Attorney's office not to seek the death penalty"].)

Moreover, the exhibits submitted by appellant demonstrated that recusal of the entire office was necessary. (See *People v. Petrisca* (2006) 138 Cal.App.4th 189, 195 [noting that "[d]isqualification of an entire prosecutorial office from a case is disfavored by the courts, absent a substantial reason related to the proper administration of justice"].) *People v. Lepe*, *supra*, 164 Cal.App.3d 685 is instructive. In that case, Thomas

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[47] According to a September 1, 1999, memorandum regarding the protocol to be followed by the Orange County District Attorney's Office in special circumstances cases, the Senior Assistant District Attorney (not the District Attorney) made the final decision whether or not to seek the death penalty. (CT Vol. 1 140.)

Storey had defended Lepe in two criminal cases before assuming the office of district attorney. In the first case, Lepe had been charged with assault on Betty Araujo, and Joe Luis Herrera and Jesse Daniel Rodriguez were witnesses. In the second case, Lepe was charged with intimidation of Herrera and Rodriguez. Later, as district attorney, acting through an assistant district attorney, Storey signed and filed an information charging Lepe with assault with a deadly weapon on Herrera and Rodriguez and infliction of great bodily injury on Herrera. (*Id.* at pp. 686-687.) Storey subsequently moved to amend the information to charge the prior assault conviction, which Lepe challenged on the ground of ineffective assistance of counsel. (*Id.* at p. 687, fn. 1.) Lepe's motion to recuse the entire district attorney's office was granted. (*Id.* at p. 687.)

> In upholding the recusal, the Court of Appeal pointed out that
>
> Storey would be inclined vigorously to amend the information to include the prior and to uphold its validity against Lepe's contention of constitutional infirmity for lack of proper lawyering by Storey. His prosecution of the charged offenses necessarily would be influenced by his knowledge of the victims and of Lepe, garnered during the earlier representations. The "evenhanded" manner required of the prosecution is missing. Storey's hand on the tiller of the prosecution, his hand on one of the scales of justice, is not the even hand required to assure justice - the end result of a criminal prosecution.
>
> As the deputies are hired by Storey, evaluated by Storey, promoted by Storey and fired by Storey, we cannot say the office can be sanitized such to assume the deputy who prosecutes the case will not be influenced by the considerations that bar Storey himself from participation in the case. [Citation.]

(*Id.* at p. 689.)

People v. Choi, *supra*, 80 Cal.App.4th 476 is similarly illustrative. In that case, Dennis Natali, a close personal friend of San Francisco District Attorney Terence Hallinan, was shot and killed. About eight minutes later, another man was shot and killed in the same general area. (*Id.* at p. 478.) Choi moved to recuse the entire district attorney's office based on Hallinan's friendship with Natali, as well as Hallinan's statements to the press suggesting that the shootings were connected. The recusal motion was denied based on representations of an assistant district attorney that Hallinan was not involved in the case. (*Ibid.*) During jury selection, Hallinan again stated to the press that he believed the slayings were connected, statements which conflicted with the trial court's instructions to the jury panel that they were unconnected. (*Id.* at p. 479.) After a mistrial was declared, Hallinan approached the trial judge in chambers unannounced and requested that the judge approve a letter that he wished to send to the editor of a local newspaper. (*Id.* at pp. 479-480.) The trial court subsequently granted Choi's renewed motion to recuse the entire San Francisco District Attorney's Office, finding that Natali's death had "adversely [a]ffected [Hallinan] in such a way that the [defendants'] right to a fair trial is endangered." (*Id.* at p. 480.) In recusing the entire office, the trial court relied on the analysis set forth in *People v. Lepe*, *supra*.

Here, Rackauckas was not only directly involved in the conflict of interest at issue, as in *Lepe* and *Choi*, but there was evidence that he improperly pressured underlings to prosecute the case in a way they may have believed to be inappropriate. Therefore, it cannot be assumed that Moore and other employees of the District Attorney's Office were not influenced by the considerations that should have been deemed to bar Rackauckas from participation in the case. (See *People v. Lepe*, *supra*, 164

Cal.App.3d at p. 689; see also *People v. Conner*, *supra*, 34 Cal.3d at pp. 144-145 [trial court did not abuse its discretion in recusing the entire Santa Clara County District Attorney's Office from prosecuting charges arising out of an attempted escape from the courtroom, during which the defendant swung a handgun toward the deputy district attorney and fired at him, and, following the incident, the deputy district attorney reported the incident to his supervisor, discussed his experience with 10 of the 25 felony prosecutors in his office, and further described the defendant as a dangerous felon and an escape risk during a news media interview].)

On the other hand, this case is distinguishable from decisions in which this Court held that the defendant failed to meet one or both prongs of the test set forth in section 1424. For instance, in *People v. Gamache*, *supra*, 48 Cal.4th at p. 362, the defendant moved to recuse the entire San Bernardino County District Attorney's Office because Peggy Williams, the surviving victim of the crimes, had been employed by that agency as a typist for 10 years. This Court recognized that the situation presented a "paradigmatic conflict," but held that substantial evidence supported the trial court's finding that Gamache had not shown a conflict rising to a level that would require recusal. (*Id.* at pp. 362-363.) In so holding, this Court noted, among other things: that the San Bernardino District Attorney's Office had 500 employees and 122 deputy district attorneys; the District Attorney's Office was divided into three administratively and operationally separate divisions; although the case was initially handled by prosecutors from the office where Williams worked, the case was reassigned to another division 70 miles away; and Deputy District Attorney Dennis Kottmeier, who was solely responsible for the decision to seek death in that case, barely knew Williams, had not hired her, had never had social contact with

her, did not know her by name, and did not know her husband (the deceased victim) at all. (*Id.* at pp. 363-366; see also *People v. Hamilton* (1989) 48 Cal.3d 1142, 1154-1156 [trial court did not abuse its discretion in denying motion to recuse entire district attorney's office where the prosecutor and a district attorney's investigator engaged in communications with the defendant and did not inform defense counsel until later, but defendant failed to show bias on the part of the district attorney or any other attorney from his office]; *People v. Griffin* (2004) 33 Cal.4th 536, 568 [trial court did not abuse its discretion in denying motion for order recusing the entire district attorney's office based on alleged conflict arising out of the fact that a district attorney's office investigator (who worked in the civil section of the juvenile division in a temporary position) had earlier worked as an investigator for defense counsel representing the defendant's brother in an unrelated case, and had also collaborated with an investigator who worked for defense counsel representing defendant; the investigator testified that she had not spoken to anyone in the district attorney's office regarding her former services].)

Under the circumstances described above, the trial court failed to recognize that the evidence showed clearly that Rackauckas had a conflict of interest which rendered it unlikely that appellant would receive a fair trial. Thus, the trial court's finding that appellant had not shown an actual conflict of interest and that it was unlikely he would be treated unfairly (RT Vol. 1 67-68) was not supported by substantial evidence. (See *People v. Gamache*, *supra*, 48 Cal.4th at pp. 362-263; *Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at pp. 711-712.) Even if its ruling constituted an application of the law to the facts, that ruling was arbitrary and capricious. (See *Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at pp. 711-712.)

Indeed, the court's failure to make findings of fact in support of its ruling (particularly with respect to disputed issues, such as when the District Attorney's Office disclosed the fact that Rackauckas, Sr., had been a patient at West Anaheim Medical Center) further demonstrates the arbitrariness of its ruling. (Cf. *People v. Jordan* (1986) 42 Cal.3d 308, 316 [concluding that "[i]t would be difficult to conclude from the sentencing judge's recital that he exercised his discretion in an arbitrary, capricious or unreasonable fashion" where, among other things, he explicitly addressed several proper mitigating circumstances apparently ignored by the Court of Appeal].)

For these reasons, recusal of the entire District Attorney's Office was required.

2. The Trial Court Further Abused Its Discretion In Its October 30, 2002, Denial of Appellant's Motion to Reconsider His Recusal Motion

As noted above (Section A, *ante*), the trial court denied appellant's motion to reconsider his recusal motion. In so ruling, the court expressed doubt that it had the authority to reconsider the prior judge's ruling, stated that the grand jury report proffered by appellant added nothing to what was known or available beforehand, and concluded that he had received a fair trial and would receive another one. (RT Vol. 14 3142-3143.) As appellant demonstrates below, each aspect of the trial court's ruling was an abuse of discretion.

First, the trial court's doubt as to whether it had the authority to review the prior ruling suggests that it failed to reconsider the recusal motion at all.[48] If so, the trial court's failure to reconsider appellant's

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[48] Indeed, five days earlier, defense counsel had advised the court (continued...)

motion was an abuse of discretion and clear error. (See *In re Cortez* (1971) 6 Cal.3d 78, 85-86 [noting that "'[t]o exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision.'"]; see also *Alvarez v. Superior Court*, *supra*, 117 Cal.App.4th at p. 1111 [trial court erred in declining to rule on merits of a supplemental discovery motion, in part because the defendant had presented "significant new evidence" in support of the motion].)

In any event, the trial court's conclusion that it lacked authority to review the prior judge's ruling was an erroneous conclusion of law (RT Vol. 14 3142), one which must be reviewed de novo by this Court. (*Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at pp. 711-712.) Although trial judges ordinarily "should decline to reverse or modify other trial judges' rulings unless there is a highly persuasive reason for doing so" (*People v. Riva* (2003) 112 Cal.App.4th 981, 993), a trial judge is entitled to

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[48](...continued)
that she had filed two motions, one of which was the motion for reconsideration of the motion to recuse. (RT Vol. 14 3094-1.) During a discussion regarding the scheduling of a hearing on the motions, the court commented as follows:

The Court:	I don't mind reading motions and then putting them over. I can read that interesting grand jury report –
Ms. Petrosino:	Yes.
The Court:	– which didn't appear very relevant.

(RT Vol. 14 3094-2.) The court's remark suggests that it had concluded the grand jury report was irrelevant even before reading it.

do so where a defendant "present[s] significant new evidence to the trial court" (see *Alvarez v. Superior Court*, *supra*, 117 Cal.App.4th at p. 1111).

Second, the trial court's finding that the grand jury report did not add anything to what was already known (RT Vol. 14 3142-3143) was not supported by substantial evidence. (*Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at pp. 711-712.) In fact, the grand jury report represented a significant volume of new evidence supporting appellant's claim that the District Attorney's Office should have been recused due to a conflict of interest. (CT Vol. 4 841-1114.) As noted above, the grand jury was convened to investigate numerous "alleged improprieties in the operation of the Orange County District Attorney's Office." (CT Vol. 4 1018.) In its report, the grand jury identified a number of improprieties which had occurred during Rackauckas's term as District Attorney. (See CT Vol. 4 1096-1105 ["List 1. Complete List of Findings"].)

Some of the improprieties found by the grand jury directly involved Rackauckas himself. For instance, the grand jury found that when he "assumed the position of district attorney, he treated three of the former District Attorney Mike Capizzi [Assistant District Attorneys] (upper management in the [District Attorney's] office) in an intimidating and unjustifiable manner, to the detriment of the office." (CT Vol. 4 1029.) Among other things, he attempted to coerce the three former Assistant District Attorneys into taking early retirement; one of the former Assistant District Attorneys was investigated for abuses of county resources, even though there had been no prior indications of abuse; Rackauckas placed one of the other former Assistant District Attorneys on an involuntary leave of absence, then later demoted him. (CT Vol. 4 1027-1028.) Moreover, the grand jury found that one effect of the restructure was to leave "an

impression throughout the organization that the intention was to selectively eliminate former District Attorney Mike Capizzi administration managers . . . ." (CT Vol. 4 1028.)

Moreover, in several instances, members of the District Attorney's Office management by-passed immediate supervisors, or even circumvented the chain of command structure altogether, in issuing job assignments (CT Vol. 4 1047); for example, the grand jury found that Rackauckas's wife, Deputy District Attorney Kay Rackauckas, had "been permitted a greater level of authority and influence than is characteristic of her job description, which [] resulted in circumventing the chain of command." (CT Vol. 4 1050; see also CT Vol. 4 1068-1072.) Similarly, several family members of friends and/or political supporters of Rackauckas were hired or given special consideration by the District Attorney's Office. (CT Vol. 4 1055.)

In addition, the computers assigned to election opponents of Rackauckas were removed and examined without good cause, and copies of the confidential notice of termination letter given to Jacobs and related documents were leaked to several newspapers. (CT Vol. 4 1063, 1065-1066.) The District Attorney's Office did not follow through on an investigator's recommendation that an internal investigation be conducted to determine who released the confidential letters. (CT Vol. 4 1066.)

The grand jury also examined Rackauckas's decision to order the District Attorney's Organized Crime Unit to investigate alleged extortion threats against Patrick DiCarlo, a "close personal friend[]" and political supporter. (CT Vol. 4 1078.) The grand jury found, among other things, that: "[t]he District Attorney's Office should not have investigated the extortion case (victim Mr. DiCarlo) nor assigned it to the Organized Crime Unit because of Mr. Rackauckas's close personal friendship with Mr.

DiCarlo, the DiCarlo family involvement in the District Attorney campaign, and the rancorous history between Mr. DiCarlo and the Organized Crime Unit" (CT Vol. 4 1080);[49] "[u]pper management's misleading statements to members of the Organized Crime Unit as to closing down the investigation fueled certain members of the Organized Crime Unit's distrust in the manner in which the administration would handle the DiCarlo case" (CT Vol. 4 1081); "[a]t the time that the lead investigator focused his suspicions upon Mr. DiCarlo, the case should have been immediately referred to another agency" (CT Vol. 4 1081); and, "Mr. Rackauckas gave, or assisted in the recording of a transfer of, a semiautomatic handgun to Mr. DiCarlo around the time that the Organized Crime Unit was investigating extortion threats and whether Mr. DiCarlo was engaged in criminal conduct" (CT Vol. 4 1081).

Finally, the grand jury report discussed two criminal cases involving intervention by Rauckackas and/or benefit to his supporters. (CT Vol. 4 1089-1094.) In one of the cases, Rackauckas agreed to dismiss a domestic violence case without consulting with the line deputy or the line deputy's supervisor, and did not inform them of his decision. The dismissal of the case was inconsistent with the standard practice of the District Attorney's Office in similar domestic violence cases, giving rise to an appearance of impropriety. (CT Vol. 4 1089, 1092.)

In the other case, a defense attorney (who had contributed to

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[49] In describing the long and "confrontational" history between DiCarlo and the District Attorney Office's Organized Crime Unit, the grand jury noted that members of the Unit investigated DiCarlo's possible criminal business dealings, until the District Attorney Office's upper management ordered that investigation of the alleged extortion threats and of DiCarlo himself be shut down. (CT Vol. 4 1078-1081.)

Rackauckas's political campaign and co-hosted a fundraiser for him) met with Rackauckas on behalf of his client, a defendant in a 16-count felony case. Thereafter, Devallis Rutledge, who was the Chief Assistant District Attorney at that time, agreed to a misdemeanor disposition without consulting with the deputies handling the case. (CT Vol. 4 1090-1092.) According to the grand jury, the terms of the disposition "were significantly less, as to the nature of the charges pled to, and the degree of punishment, as compared to similar multiple count felony cases." (CT Vol. 4 1092.)

In light of the significant evidence contained in the grand jury report, the trial court abused its discretion in denying appellant's motion to reconsider his recusal motion. First, the trial court was incorrect in denying the motion on the ground that the report contained no newly-discovered evidence. (RT Vol. 14 3142-3144.) Judge Fitzgerald denied appellant's original motion to recuse on January 11, 2002, but the grand jury report was not issued until June, 2002. (RT Vol. 1 66-68; CT Vol. 4 1014.)

Moreover, the trial court erred in asserting that the report did not add anything to what was known or available prior to the release of the report. (RT Vol. 14 3142-3143.) Appellant could not have uncovered the complaints and allegations which led to the grand jury investigation, which had been received by the outgoing grand jury (CT Vol. 4 1022) and presumably were not a matter of public record. A substantial portion of the report related to personnel issues and other internal or confidential matters. (CT Vol. 4 1022-1023.) Each witness who testified before the grand jury was admonished not to discuss his or her testimony outside of the jury room. (CT Vol. 4 1023.) And, of course, appellant could not have known the grand jury's factual findings until the report was issued.

Third, the trial court's conclusion that appellant received a fair trial

and would get another fair trial, and that there was no suggestion that anything affecting his rights occurred during the trial (RT Vol. 14 3143), was not supported by substantial evidence. (See *People v. Gamache*, *supra*, 48 Cal.4th at pp. 362-263; *Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at pp. 711-712.) Even if its ruling constituted an application of the law to the facts, that ruling was arbitrary and capricious. (See *Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at pp. 711-712.)

For instance, it cannot be presumed that the prosecution would have sought the death penalty had they followed the District Attorney's well-established protocol and conducted a special circumstances review hearing/meeting. (CT Vol. 1 138, 159-160, 201.) Similarly, in light of the grand jury's findings regarding Rackauckas's improper conduct against various underlings – e.g., coercive conduct against the former Assistant District Attorneys and baseless investigations of former election rivals – this Court can have little confidence in the prosecution's offer of proof that Deputy District Attorney Moore would testify that his decisions in this case were not guided by management. (RT Vol. 14 3141-3142.)[50] Therefore, notwithstanding the substantial showing of a conflict made by appellant in his initial motion, the grand jury report provided further evidence that Rackauckas's conduct in this case exceeded proper prosecutorial zeal and was not "born of objective and impartial consideration." (*People v. Superior Court (Greer)*, *supra*, 19 Cal.3d at p. 257.)

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[50] Indeed, in an introductory section, the grand jury observed, "These actions set the wrong tone, which continues to the present, that loyalty to the District Attorney, personally, is of prime importance, as compared to loyalty and dedication of prosecutors to the District Attorney's Office and its mission." (CT Vol. 4 1018.)

Accordingly, recusal of the entire District Attorney's Office was required.

3. The Trial Court Further Abused Its Discretion In Its February 27, 2003, Denial of Appellant's Renewed Recusal Motion

For the reasons set forth in Sections C.1 and C.2, *ante*, the trial court abused its discretion in denying appellant's renewed recusal motion prior to the third penalty trial.[51]

As defense counsel argued (RT Vol. 21 4780), the fact that the prosecution was trying the penalty phase for a third time demonstrated that Rackauckas was not treating appellant in an evenhanded manner. Rather, retrial of the penalty phase, despite the fact that the two previous penalty trials had ended in hung juries, evinced a zealousness and personal animus inconsistent with proper prosecutorial function. (See *People v. Superior Court (Greer)*, *supra*, 19 Cal.3d at p. 257.)

Moreover, in light of evidence that Rackauckas had a personal, emotional investment in the handling of the case and had accused underlings of insubordination in the case (even reassigning and eventually terminating one of them), the trial court gave undue weight to Moore's assurance that the decision to retry the case was his own. (RT Vol. 21 4781.) It is likely that Moore was influenced, even if subconsciously, by the pressure which had been brought to bear by Rackauckas. (See *People v. Lepe*, *supra*, 164 Cal.App.3d at p. 689.)

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[51] As noted above, defense counsel advised the court that they had fully litigated the motion and were renewing it "just for the record." (RT Vol. 21 4777.) Accordingly, they fully preserved the matter for appeal. Surely, the law does not require futile rituals to preserve a claim for appeal. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 820.)

Contrary to the trial court's suggestion (RT Vol. 21 4781), the fact that Rackauckas was an elected official did not mean that any input he may have had was proper. The evidence presented by appellant showed that Rackauckas's decisions were motivated by his position as a *son*, not as an elected official. Given the highly personal dimension involved in this case, he was acting as "the representative of [an] ordinary party" and not "of a sovereignty whose obligation is to govern impartially." (*People v. Eubanks*, *supra*, 14 Cal.4th at p. 589.)

Because the trial court's denial of appellant's motion was not supported by substantial evidence, the ruling was an abuse of discretion. (See *People v. Gamache*, *supra*, 48 Cal.4th at pp. 362-263; *Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at pp. 711-712.) Even if its ruling constituted an application of the law to the facts, that ruling was arbitrary and capricious. (See *Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at pp. 711-712.)

D. The Trial Court's Abuse of Discretion Violated Appellant's State and Federal Constitutional Rights to Due Process, Equal Protection, and a Reliable Adjudication, and Violated the Constitutional Prohibition Against Cruel and Unusual Punishment

1. The Trial Court's Error Violated Appellant's Rights to Due Process and an Impartial Jury Under the State and Federal Constitutions

Under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 7 of the California Constitution, a person shall not be deprived of life or liberty without due process of law and a fair and impartial trial. Moreover, a defendant is constitutionally entitled to the trial rights set forth in the Sixth Amendment to the federal Constitution (as applied through the Fourteenth

Amendment's due process clause) and in article I, section 15, of the California Constitution. (*Faretta v. California* (1975) 422 U.S. 806, 818; *People v. Windham* (1977) 19 Cal.3d 121, 128.)

Appellant is aware that this Court has declared that the erroneous failure to recuse under Penal Code section 1424 does not necessarily lead to the denial of due process. (*People v. Vasquez*, *supra*, 39 Cal.4th at p. 59.) There, this Court addressed the due process implications of prosecutorial conflicts, observing that a number of courts have declined to find a due process violation where the prosecutor is alleged merely to have a personal interest that might add to his or her zeal. (*Id.* at pp. 60-65.) As this Court recognized,

> [t]he Supreme Court's postulate that pecuniary conflicts of interest on a judge's or prosecutor's part pose a constitutionally more significant threat to a fair trial than do personal conflicts of interest may be somewhat counterintuitive, for common experience tells us that personal influences are often the strongest. But according "matters of kinship [and] personal bias" [citation] dispositive constitutional importance in this context would import into constitutional law a set of difficult line-drawing problems. As neither judges nor prosecutors can completely avoid personal influences on their decisions, to constitutionalize the myriad distinctions and judgments involved in identifying those personal connections that require a judge's or prosecutor's recusal might be unwise, if not impossible. The high court's approach to judicial conflicts generally leaves that line-drawing process to state disqualification and disciplinary law, with "only the most extreme of cases" being recognized as constitutional violations. [Citation.]

(*Id.* at p. 64.)

In light of its analysis, this Court held that the close family relationship between one of the two defendants and two employees of the

district attorney's office created a conflict of interest and a consequential likelihood of unfair treatment, warranting recusal. The existence of the conflict as well as its severity were evidenced by the prosecutor's admission that concerns about appearance of favoritism had in part influenced her to reject a defense proposal for a bench trial, rather than a jury trial. (*Id.* at p. 55.) Nevertheless, this Court further held that the erroneous denial of the defendants' motion to recuse the district attorney's office did not deprive them of due process for the following reasons: (1) "[n]either [the prosecutor] nor her supervisors had a direct, substantial interest in the outcome or conduct of the case separate from their proper interest in seeing justice done" (*id.* at pp. 64-65); (2) "[g]iven that 'matters of kinship' do not necessarily create a constitutional bar even to a judge's participation [citation], we are unable to conclude the family relationship between a defendant and two employees out of hundreds in a public prosecutor's office [] constitutionally bars that entire office from participating in the prosecution" (*id.* at p. 65); and, (3), the defendants could not point to any "specific prosecutorial actions taken as a result of the conflict that deprived them of a fundamentally fair proceeding" (*ibid.*).

By contrast, Rackauckas's personal bias and interest in this case led to his total *failure* to exercise his prosecutorial discretion, creating an actual likelihood that appellant would not (and did not) receive a fair trial. Even assuming, arguendo, that Rackauckas did not dictate Moore's handling of the trial, it cannot be assumed that the District Attorney's Office would have sought the death penalty had it conducted a special circumstances review hearing. (See Section C, *ante*.)

In addition, the decision to charge this case as a capital case produced a jury that was conviction-prone at the guilt phase, violating

appellant's Sixth Amendment right to a fair and impartial jury. (See *Lockhart v. McCree* (1986) 476 U.S. 162, 173 [assuming for the sake of argument that "'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries"]; *People v. Mills* (2010) 48 Cal.4th 158, 172 [assuming for the sake of argument "that social science evidence now shows conclusively that death-qualified juries are more prone to convict than those not thus qualified"].) Similarly, the prosecutor's decision to charge this case as a death case produced a jury that was prone to reach a death verdict at the penalty phase, in violation of appellant's rights under the Sixth Amendment. As Justice Moreno has pointed out,

> the problem of how to deal with prospective jurors in capital cases who oppose the death penalty may well be a large and growing one. Polls show that about one-third of those surveyed in this state oppose the death penalty, up from only 14 percent in 1989. (See Field Research Corp., The Field Poll, Release # 2183 (Mar. 3, 2006) 1-2, 6 (The Field Poll) [poll conducted February 12-26, 2006, showed 63 percent favored and 32 percent opposed the death penalty in California].) The exclusion of one out of three potential jurors because the attitudes toward the death penalty might predispose them to vote for life imprisonment without parole would indeed result in a jury panel "uncommonly willing to condemn a man to die" in violation of the defendant's Sixth Amendment rights. [Citation.]

(*People v. Martinez* (2009) 47 Cal.4th 399, 459, fn. 1 (conc. and dis. opn. of Moreno, J.).)

Under these circumstances, the trial court's denial of the recusal motion violated appellant's right to due process under the state and federal Constitutions. In addition, both the District Attorney's Office (by failing to conduct a special circumstances review hearing) and the trial court (by

denying appellant's motion to recuse) contravened well-established state law intended to avoid conflicts that might lead to due process violations (*People v. Vasquez*, *supra*, 39 Cal.4th at p. 59; *People v. Superior Court (Greer)*, *supra*, 19 Cal.3d at pp. 264-265), arbitrarily depriving appellant of a state-created liberty interest. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

2. Appellant Was Deliberately Singled Out On the Basis of Invidious Criteria in Violation of the Equal Protection Clauses of the Federal and State Constitutions

The Fourteenth Amendment to the federal Constitution, and article I, section 7, subdivision (a) of the California Constitution prohibit all state action which denies to any person the "equal protection of the laws." (See also *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 294.) The United States Supreme Court has explained that "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (*Sunday Lake Iron Co. v. Wakefield Tp.* (1918) 247 U.S. 350, 352.)

This Court has held that when a defendant establishes the elements of discriminatory prosecution, the action must be dismissed even if a serious crime is charged, unless the People establish a compelling reason for selective enforcement. (*Murgia v. Municipal Court*, *supra*, 15 Cal.3d at p. 304.) To establish a claim of selective enforcement, a defendant must prove (1) that he has been deliberately singled out for prosecution on the basis of some invidious criterion and (2) that "the prosecution would not have been pursued except for the discriminatory design of the prosecuting

authorities." (*Id.* at p. 298.) An invidious criterion is "one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests." (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 833.) "[A]n accused may show by direct or circumstantial evidence that prosecutorial discretion was exercised with *intentional and invidious discrimination in his case*. [Citations.]" (*People v. Keenan* (1988) 46 Cal.3d 478, 506; emphasis in original.)

Although "prosecutorial discretion to select those eligible cases in which the death penalty will actually be sought does not in and of itself evidence an arbitrary and capricious capital punishment system or offend principles of equal protection" (*People v. Keenan, supra*, 46 Cal.3d at p. 505), there can be no doubt that appellant was singled out for prosecution, and certainly for the death penalty, based on an invidious criterion: Rackauckas's personal bias in the case and his personal animus against appellant in particular. First, at least as of October, 2000, more than a year after Rackauckas announced his new policy regarding a "public rampage of indiscriminate killings," the District Attorney's procedures manual regarding the handling of special circumstances cases did not reflect the new policy. (CT Vol. 1 129, 137-157, 175.) Second, in at least one case subject to the new policy regarding a "public rampage of indiscriminate killings" the defense was invited to participate in a special circumstances review hearing/meeting.[52] Third, although the Attorney General asserted

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[52] See People v. Abrams (Orange County Superior Court case no. 99HF0436). Abrams was charged with killing two children and attempting to kill seven others during an incident in which he ran his vehicle into a public preschool. (CT Vol. 1 125.) Appellant is presently unaware of any other Orange County public "rampage" cases in which the District Attorney (continued...)

that the basis for the decision to seek the death penalty in this case was "to punish and deter this type of arbitrary, 'rampage' murders" (CT Vol. 1 239, fn. 6), neither the Attorney General nor the District Attorney explained how the policy served that interest or why such murders deserved special concern. (See CT Vol. 1 221-242 [Attorney General's Opinion Regarding Motion to Recuse the Orange County District Attorney's Office], 243-252 [District Attorney's opposition to recusal motion].)[53]

Finally, as appellant noted below, "[t]he defense is not in a position to say whether the death penalty would not have been sought but for the discriminatory actions of the District Attorney because they were never given a chance to produce what evidence there was to convince the panel of district attorneys not to seek the death penalty." (CT Vol. 1 130.)

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[52](...continued)
could have sought the death penalty. (Cf. Emery, *Readers: Samurai Sword Murder is Irvine's Strangest Crime*, Orange County Register (Aug. 5, 2009) [sword-wielding man killed two workers and slashed four other people at a grocery store before being shot and killed by police].)

[53] As appellant observed in his recusal motion,

> Mr. Rackauckas has unilaterally singled out only those persons who commit murder in public places for special treatment. Other than a person's home, every place would qualify as a "public place." How can it be said that the mandatory seeking of the death penalty in all killings that arise in public places is rationally related to the legitimate law enforcement interest of discouraging persons from committing murder? Is Mr. Rackauckas saying that any killing in a public place is more offensive than, for example, a person who invades another's home and kills an entire family?

(CT Vol. 1 130.)

However, appellant presented strong circumstantial evidence that the District Attorney's Office would not have sought the death penalty but for the fact that appellant committed the shootings at a medical facility where, by happenstance, Rackauckas's father had just been hospitalized and which he himself had just visited. (Sections A-C.1, *supra*.)

This Court has explained that "the requisite 'standards' [for deciding when to seek the death penalty] are those minimum standards set forth in a constitutional death penalty statute." (*People v. Keenan*, *supra*, 46 Cal.3d at p. 506; accord, *People v. Lucas* (1995) 12 Cal.4th 415, 478.) However, Rackauckas decided to seek the death penalty by fiat, not the exercise of his discretion. That is, the "process" by which he decided to seek the death penalty in this case fell far short of "the minimum standards" set forth in California's death penalty scheme.[54] Accordingly, appellant has established a claim of discriminatory enforcement. (*Murgia v. Municipal Court*, *supra*, 15 Cal.3d at p. 298.)

3. The Trial Court's Error Violated the Constitutional Prohibition Against Cruel and Unusual Punishment and Deprived Appellant of His Right To a Reliable Adjudication At All Stages of a Death Penalty Case

The Eighth Amendment to the federal Constitution bars the infliction of cruel and unusual punishment. Similarly, article I, section 17, of the California Constitution prohibits the infliction of cruel or unusual punishment.

Thus, in *Furman v. Georgia* (1972) 408 U.S. 238, the United States

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[54] For this reason, it is immaterial that the Orange County District Attorney's office theoretically might have decided to seek the death penalty had the case been submitted to a special circumstances review hearing.

Supreme Court held that, to minimize the risk that the death penalty would be imposed on a capriciously-selected group, the decision to impose it had to be guided by standards which focus on the particularized circumstances of the crime and the defendant. As such, the high court reversed the death sentences received by three defendants, one of whom had been convicted of murder and two of whom had been convicted of rape. (*Ibid.*) In his concurring opinion, Justice Stewart commented that their death sentences were

> cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

(*Id.* at pp. 309-310 (conc. opn. of Stewart, J.).) The high court later elaborated that, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S. 153, 189.) Significantly, the high court has made clear that the application of death penalty statutes to particular cases may be probed. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 304-305.)

Under the Eighth Amendment, a capital defendant also enjoys the right to a reliable adjudication at all stages of a death penalty case. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 328, abrogated on other grounds in *Atkins v. Virginia* (2002) 536 U.S. 304; *Lockett v. Ohio* (1978) 438 U.S.

586, 603-605; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) As the United States Supreme Court has explained, "[t]o insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

As a consequence of the trial court's denial of appellant's recusal motion, his death sentence was pursued and imposed in an arbitrary and capricious manner, in violation of the state and federal Constitutions. Moreover, in light of Rackauckas's conduct in the case, including his arbitrary and capricious denial of a SCRH in this case, appellant was denied his Eighth Amendment right to a reliable adjudication at all stages of his case.

E. The Entire Judgment Must Be Reversed

In *Young v. U.S. ex rel. Vuitton et Fils S.A.* (1987) 481 U.S. 787, 789-790, the District Court appointed the attorneys for the respondent ("Vuitton") to prosecute a criminal contempt action brought against the petitioners. A plurality of the United States Supreme Court held that the appointment of counsel for Vuitton to conduct the contempt prosecution in these cases was reversible per se. (*Id.* at pp. 809-810.) In so holding, the *Vuitton* plurality emphasized three critical factors.

First, the plurality noted that the appointment of an interested prosecutor raises doubts about the integrity of the proceedings. (*Young v. U.S. ex rel. Vuitton et Fils S.A.*, *supra*, 481 U.S. at pp. 810-811.) Among other things, the involvement of an interested prosecutor is inconsistent with the "fundamental premise . . . that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for

liberty itself may be at stake in such matters." (*Id.* at p. 810.)

Second, the appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general. (*Young v. U.S. ex rel. Vuitton et Fils S.A.*, *supra*, 481 U.S. at p. 811.) Elaborating on the harm caused by the appearance of impropriety, the plurality commented that "[s]ociety's interest in disinterested prosecution . . . would not be adequately protected by harmless-error analysis, for such analysis would not be sensitive to the fundamental nature of the error committed." (*Id.* at p. 812.)

Third, the plurality recognized that the appointment of an interested prosecutor is an error whose effects are pervasive, for it "calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision." (*Young v. U.S. ex rel. Vuitton et Fils S.A.*, *supra*, 481 U.S. at p. 812.) Moreover, determining the effect of such an appointment would be extremely difficult because "[a] prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are part of the record." (*Id.* at pp. 812-813.)

Each of these concerns was present in the instant case, requiring automatic reversal of the entire judgment. The record makes clear that Rackauckas did not treat appellant "in a rigorously disinterested fashion." (*Young v. U.S. ex rel. Vuitton et Fils S.A.*, *supra*, 481 U.S. at p. 810.) As noted above, appellant presented a wide array of circumstantial evidence showing that Rackauckas decided by fiat to seek the death penalty against appellant due to his personal bias and anger about the shootings, abandoning long-established procedures governing special circumstances cases. (CT Vol. 1 134-136, 138, 159-163, 167, 173, 175, 196, 201, 211-

212.) Moreover, Rackauckas's conduct could only have undermined public confidence in the fairness of the system, particularly in light of evidence that he accused underlings of insubordination when they disagreed with his new policy, that he may have retaliated against at least one of them, and that this was part of a larger pattern in which a greater premium was placed on personal loyalty than the goals of the office. (CT Vol. 1 163-165; CT Vol. 4 841-1114.)

Finally, the effect of the trial court's failure to recuse the District Attorney's Office is not susceptible to harmless-error analysis. It simply cannot be determined from the record the extent to which Rackauckas's conflict of interest affected his decisions, particularly those decisions which were confidential or not memorialized, perhaps even hidden from the defense. (See, e.g., CT Vol. 1 163 [Rackauckas expressed his concern about what the media would do if they discovered that his father had been a patient at West Anaheim Medical Center].) Moreover, critical information was either not disclosed to the defense (see, e.g., RT Vol. 1 32-45, CT Vol. 1 104 [denial of appellant's motion for discovery relevant to the recusal motion]), or was disclosed only belatedly (see, e.g., CT Vol. 1 164 [more than a year after Rackauckas announced his new policy, Jacobs wrote and submitted a memorandum expressing his opinion that the fact Rackauckas's father had been a patient at West Anaheim Medical Center must be disclosed to the defense]). Similarly, the record cannot fully disclose the extent to which the decisions of line deputies were affected, whether consciously or subconsciously, by the knowledge that Rackauckas wanted to pursue the death penalty and that he viewed disagreement as insubordination. (CT Vol. 1 163-165; CT Vol. 4 841-1114.) Under these circumstances, the trial court's failure to recuse the entire Orange County

District Attorney's Office constituted structural error, and the entire judgment must be reversed. (*Young v. U.S. ex rel. Vuitton et Fils S.A.*, *supra*, 481 U.S. at pp. 809-810; see also *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.)

Appellant is aware that this Court has stated that it does not find the *Vuitton* plurality's arguments for structural error compelling as applied to California procedures. (*People v. Vasquez*, *supra*, 39 Cal.4th at p. 69.) While that may be true in most California cases involving a conflicted prosecutor, this Court's distinctions of *Vuitton* do not hold true in this case. First, although "the basic guardians of the defendant's rights at trial are his attorneys and the court, not the prosecutor" (*ibid.*), neither the trial court nor defense counsel could have adequately protected appellant's interests where, among other things, critical information was either not disclosed to the defense, or was disclosed only belatedly. (See, e.g., RT Vol. 1 32-45, CT Vol. 1 104; CT Vol. 1 164.)

Moreover, notwithstanding the actual impropriety which occurred in this case (e.g., the decision to seek the death penalty without first conducting a special circumstances review hearing), this Court should not turn a blind eye to the corrosive effect such arbitrary and capricious decisions by the District Attorney must have on the public confidence in the fairness of the judicial system. (Cf. *People v. Vasquez*, *supra*, 39 Cal.4th at p. 69 [stating that "[t]o hold that an erroneous failure to recuse under section 1424 is reversible per se because of the appearance of impropriety it creates would be contrary to the statutory policy"].)

Finally, for the reasons set forth above, appellant is unable to show the full extent of the actual prejudice in this case, as many of the District Attorney's decisions were disclosed belatedly, if at all. However, at a

minimum appellant has shown at least one critical instance of actual prejudice: Rackauckas's decision to pursue the death penalty without affording appellant a special circumstances review hearing. (Cf. *People v. Vasquez*, *supra*, 39 Cal.4th at pp. 69-70 [concluding that Vasquez had failed to show prejudice].)

For the same reasons, the entire judgment must be reversed even if this Court were to apply harmless error analysis. (*Chapman v. California* (1967) 386 U.S. 18, 24; see also *People v. Vasquez*, *supra*, 39 Cal.4th at pp. 66-71 [holding that a violation of Penal Code section 1424 which does not violate due process principles must be evaluated for harmless error under the standard of *People v. Watson* (1956) 46 Cal.2d 818].)

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II

THE PROSECUTION'S DISCRIMINATORY USE OF A PEREMPTORY CHALLENGE TO STRIKE A MINORITY PROSPECTIVE JUROR FROM THE PETIT JURY VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION AND TO A JURY DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY

A. Introduction

Appellant is Vietnamese. (RT Vol. 9 2149.) During jury selection for the third penalty trial, and over defense objection, the prosecutor used a race-based peremptory challenge to exclude a Vietnamese prospective juror from appellant's jury. (RT Vol. 21 5017; Quest./Exh. CT Vol. 40 10960-10978.) Appellant challenged the prosecutor's use of a peremptory challenge against this prospective juror under *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258, overruled in part by *Johnson v. California* (2005) 545 U.S. 162, 170. (RT Vol. 21 5017.) After finding a prima facie case and hearing the prosecutor's various reasons for excluding the prospective juror (RT Vol. 21 5018-5020), the trial court denied appellant's "*Wheeler/Batson*" motion (RT Vol. 21 5020).

Because the prosecutor's reasons for exercising his peremptory challenge against the prospective juror are not supported by the record, and because the trial court failed to make a serious attempt to evaluate the prosecutor's explanations for excusing him, appellant's rights to trial by a representative jury and to equal protection were violated and reversal is required. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7 and 16.)

B. Applicable Legal Principles

In *Batson v. Kentucky*, *supra*, 476 U.S. at pages 86-89, the United States Supreme Court held that the Equal Protection clause of the federal Constitution guarantees a defendant that the state will not exclude members of his race from the jury venire on account of race.[55] *Batson* recognized that denying a person participation in jury service on account of his or her race not only harms the accused but also undermines public confidence in the fairness of our system of justice by unconstitutionally discriminating against the excluded juror. (*Id.* at p. 87.)

Batson set forth a three-step process to determine whether a peremptory challenge is race-based in violation of the federal Constitution. The defendant must first make a prima facie showing that the prosecution has exercised a peremptory challenge on the basis of race. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-97.) That is, the defendant must demonstrate that the facts and circumstances of the case "raise an inference" that the prosecution has excluded venire members from the petit jury on account of their race. (*Id.* at p. 96.) If a defendant makes this showing, the burden shifts to the prosecution to provide a race-neutral explanation for its challenge. (*Id.* at p. 97.) The trial court then has the duty to determine whether the defendant has established purposeful racial discrimination by the prosecution. (*Id.* at p. 98.)[56]

In *People v. Wheeler*, *supra*, 22 Cal.3d at pages 276-277, decided

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[55] In *Powers v. Ohio* (1991) 499 U.S. 400, 402, the United States Supreme Court eliminated the requirement that the defendant and the stricken juror be of the same race.

[56] The trial court's obligations in conducting the third step of the *Batson* procedure is set forth in greater detail in Section D, *post*.

eight years before *Batson,* this Court presaged *Batson* by holding that a defendant's right to a jury drawn from a representative cross-section of the community under Article I, section 16 of the California Constitution was violated by the use of peremptory challenges to remove prospective jurors on the sole ground of group bias. Group bias was defined as a presumption "that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds." (*Id.* at p. 276; see also *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1191, citing *People v. Johnson* (1989) 47 Cal.3d 1194, 1215.)

Wheeler set forth procedures similar to those later adopted in *Batson.* Thus, one who believes his opponent is using peremptory challenges for improper discrimination must object in a timely fashion and make a prima facie showing that prospective jurors are being excluded because of race or group association. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280; see also *People v. Davenport* (1995) 11 Cal.4th 1171, 1199-1200, abrogated on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; *People v. Crittenden* (1994) 9 Cal.4th 83, 115.)[57] If the trial court finds a

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[57] In *People v. Wheeler*, *supra*, 22 Cal.3d at page 280, this Court held that, to make a prima facie case, a party "must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." Later, in *People v. Johnson* (2003) 30 Cal.4th 1302, 1317-1318, this Court, discussing the term "strong likelihood" (as well as the term "reasonable inference") as used in *Wheeler*, held that "to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." However, the United States Supreme Court rejected this conclusion in *Johnson v. California*, *supra*, 545 U.S. 162. In so doing, the high court clarified the

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prima facie case, the burden shifts, and the party whose peremptory exclusions are under attack must then provide a race- or group-neutral explanation, related to the particular case, for each suspect excusal. (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 281-282; see also *People v. Turner* (1994) 8 Cal.4th 137, 164-165; *People v. Fuentes* (II) (1991) 54 Cal.3d 707, 714.) Once the burden has shifted and the prosecution has stated its reasons for the excusal, the trial court has an obligation to make "'a sincere and reasoned attempt to evaluate the prosecutor's explanation' [citation] and to clearly express its findings [citation]" in light of all the circumstances. (*People v. Silva* (2001) 25 Cal.4th 345, 385-386; accord *Batson v. Kentucky*, *supra*, 476 U.S. at p. 98; see also *People v. Wheeler*, *supra*, 22 Cal.3d at p. 282.)

If the trial court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted and the trial court must dismiss the venire and begin jury selection anew unless the complaining party waives its right to such remedy or consents to an alternative remedy. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 282; *People v. Willis* (2002) 27 Cal.4th 811, 823-824.) Moreover, the exclusion by peremptory challenge of a single juror on the basis of race or ethnicity violates both the state and federal Constitutions and requires reversal. (*People v. Silva*, *supra*, 25 Cal.4th at p. 386, citing *People v. Montiel* (1993) 5 Cal.4th 877, 909; *People v. Fuentes*, *supra*, 54 Cal.3d at

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[57](...continued)
first prong of the *Batson* test, explaining that "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Id.* at p. 170.)

pp. 715 and 716, fn. 4; see also *People v. Howard* (1992) 1 Cal.4th 1132, 1158; *United States v. Vasquez- Lopez* (9th Cir. 1994) 22 F.3d 900, 902 ["the Constitution forbids striking even a single prospective juror for a discriminatory purpose"].)

The unlawful exclusion of members of a particular race from jury selection constitutes structural error resulting in automatic reversal because the error infects the entire trial process. (See *Vasquez v. Hillery* (1986) 474 U.S. 254, 263-264 [unlawful exclusion of members of the defendant's race from a grand jury constitutes structural error]; *Williams v. Woodford* (9th Cir. 2005) 396 F.3d 1059, 1069 ["A *Batson* violation is structural error for which prejudice is generally presumed"].)

C. The Prosecutor's Stated Reasons for Exercising The Peremptory Challenge, Defense Counsel's Responses, and the Trial Court's Ruling

1. Prospective Juror N.V.'s Questionnaire and Voir Dire Responses

At the time of appellant's trial, Prospective Juror No. 277 (hereafter, "N.V.") was a 45-year-old customer service supervisor employed by the United States Postal Service. (Quest./Exh. CT Vol. 40 10960-10961.) He was a high school graduate. (Quest./Exh. CT Vol. 40 10962.) In his questionnaire, he affirmed that he was objective and emotionally stable, and that he did not form judgments based on personal feelings (Quest./Exh. CT Vol. 40 10963); he would keep an open mind with respect to expert testimony (Quest./Exh. CT Vol. 40 10963); although he had read a newspaper article about the incident, he had not paid much attention to the case nor had he discussed it with anyone (Quest./Exh. CT Vol. 40 10964-10965); nothing he had heard about the case led him to believe he could not be a fair and impartial juror (Quest./Exh. CT Vol. 40 10965, 10968-10969);

neither he nor anyone close to him had worked in the medical field, and neither he nor anyone close to him had ever been a patient in a hospital or home care setting (Quest./Exh. CT Vol. 40 10966); he had no opinion as to whether the death penalty was used too often or too seldom, and he stated that "I don't really pay attention to the death penalty" (Quest./Exh. CT Vol. 40 10972); he could follow the law as the court explained it (Quest./Exh. CT Vol. 40 10972); he was willing to consider all of the aggravating and mitigating factors listed in the questionnaire, and would be willing to vote for either death or life imprisonment without possibility of parole (Quest./Exh. CT Vol. 40 10972-10975); and, he promised to freely discuss the law and evidence with fellow jurors during deliberations (Quest./Exh. CT Vol. 40 10976).

On voir dire, N.V. confirmed that he believed he could be fair, objective and completely open to either penalty. (RT Vol. 21 4964, 4977, 4981, 4983-4984.) He further confirmed that he believed expert testimony could be of assistance and that he would treat it as he did other testimony, i.e., weighing it to determine its value. (RT Vol. 21 4977.) He stated that he had not thought about the death penalty since filling out the questionnaire. (RT Vol. 21 4981.) He commented, "[] I mean I don't have any strong opinion to give the death penalty or life in prison without parole, neither is more severe than the other." (RT Vol. 21 4981-4982.) He stated that the fact he was Vietnamese would not affect his decision, and he would not act as an interpreter or as "an expert witness" on Vietnamese culture. (RT Vol. 21 4983, 4985.) Finally, he stated that he wanted to be a juror in the case. (RT Vol. 21 4984.)

Nevertheless, the prosecutor exercised a peremptory challenge as to N.V. (RT Vol. 21 5017.) The trial court subsequently found that "[N.V.]

voir dired very well, his questions and answers were similar to those offered by other jurors, he is Vietnamese, so there is a prima facie showing." (RT Vol. 21 5018.)

In this case, the trial court found that N.V., as a "Vietnamese" (RT Vol. 21 5018), belonged to a cognizable group. Indeed, trial courts in a number of cases have similarly concluded or assumed that specific Asian ethnic groups constitute cognizable groups. (See *People v. Burney* (2009) 47 Cal.4th 203, 226 [trial court rejected notion that "Asians" generally constitute a cognizable group, but concluded that the term "Asians" includes separate ethnic groups, such as Chinese and Filipinos, that do constitute cognizable groups]; *People v. Bell* (2007) 40 Cal.4th 582, 595 [trial court assumed, for purposes of the defendant's *Batson/Wheeler* motion, that Filipino-Americans are a cognizable group]; *People v. Neuman* (2009) 176 Cal.App.4th 571, 574 [trial court found that Southeast Asians constitute a cognizable group]; *People v. Brown* (1999) 75 Cal.App.4th 916, 919, fn. 1, and 924 [trial court found that Chinese-Americans are a cognizable group]; *People v. Lopez* (1991) 3 Cal.App.4th Supp. 11, 17 [appellate department of the San Francisco Superior Court concluded that the trial court did not err in finding that defense counsel exercised his peremptory challenges to prevent Chinese people from being on the jury].) Significantly, the prosecutor in this case did not challenge the assumption that N.V. belonged to a cognizable group. (See RT Vol. 21 5017-5020.)

In any event, the principles underlying *Wheeler* and *Batson* are no less appropriate in this case than in any case involving members of established cognizable groups. (See, e.g., *Castaneda v. Partida* (1977) 430 U.S. 482, 494 [defining a cognizable group as "one that is a recognizable, distinct class, singled out for different treatment under the laws, as written

or as applied"]; *Rubio v. Superior Court* (1979) 24 Cal.3d 93, 97-98 [two requirements must be met in order to qualify an asserted group as "cognizable": (1) its members must share a common perspective arising from their life experience in the group; and, (2) the party seeking to prove a violation of the representative cross-section rule must also show that no other members of the community are capable of adequately representing the perspective of the group assertedly excluded]; *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1281 [holding that, under the two-pronged *Rubio* test, gays and lesbians meet the criteria for a cognizable group].) Among other things, the culture, language and history shared by Vietnamese citizens (including the Vietnam War and the experience of life as a refugee) arguably could not be represented by members of other Asian groups.

Of course, the trial court did not require appellant to make a further showing that Vietnamese (or Asians generally) constitute a cognizable group, or that N.V. belonged to a cognizable group.[58] Instead, the trial court found that Vietnamese were a cognizable group and that appellant had made a prima facie showing of purposeful discrimination, and proceeded to the second step of *Batson/Wheeler* analysis. (See Section C.2, *post.*) Appellant should not be penalized for not providing further evidence or authority to show that N.V. belonged to a cognizable group.

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[58] Because both the court and counsel treated N.V. as "Vietnamese" for the purposes of *Batson/Wheeler* analysis, the issue of "[w]hether 'Asians' [as a whole] can or do constitute a cognizable group" (*People v. Burney*, *supra*, 47 Cal.4th at p. 227; see also *People v. Johnson* (1989) 47 Cal.3d 1194, 1217, fn. 3) is moot.

2. The Prosecutor's Stated Reasons, Defense Counsel's Responses and the Trial Court's Ruling

Because the trial court expressly found that appellant made a prima facie case that N.V. had been excluded on account of race, the prosecutor was obligated to justify the challenges in accordance with *Batson v. Kentucky*, *supra*, 476 U.S. at page 97, and *People v. Wheeler*, *supra*, 22 Cal.3d at page 282. (RT Vol. 21 5018.) Thus, the prosecutor stated as follows:

> [Prosecutor]: Okay. He is 45 years old. Never been married. Single. Has no kids. That is not the type of juror I would keep.
>
> He is a postal worker, also not the type of juror I would keep.
>
> His answers to the death penalty in his questionnaire, he has no opinion. I couldn't get any opinion about that topic out of him. He was nonresponsive to some of my questions, I would ask him about it and he would just say, yeah, I am ready. He was too easy [*sic*] to please.
>
> And those were the reasons I excused him.

(RT Vol. 21 5018.)

After defense counsel responded that the prosecutor's stated reasons were insufficient, the trial court stated,

> Like another juror that Mr. Moore excused, he seemed to be very anxious to sit on this case. One thing Mr. Moore didn't mention that I thought was very odd was he read about the case in the paper, and didn't give it any thought. Which is very striking to me, he is Vietnamese, a little younger than Mr. Trinh, but single like Mr. Trinh. I am not so sure, in fact there is no evidence that he is taking care of his mother or

> anything like that. I am concerned about postal workers, that just once you start picking on occupations, I think we are all over the place.

(RT Vol. 21 5018-5019.) The trial court subsequently stated, "When you said, 'nonresponsive,' he was really just quick to give a yes or no answer to satisfy the question," and the prosecutor agreed with this assessment. (RT Vol. 21 5019.) The trial court went on to state,

> And you questioned him quite a bit, he had no opinions about the death penalty. He did say no strong feelings for either penalty.
>
> Anything else, because right now I think Mr. Moore has shown that the reasons for his challenge were other than ethnicity?

(RT Vol. 21 5019.)

After defense counsel submitted the matter, the trial court ruled as follows:

> I agree, I even went beyond not only that he was overly eager to serve, I just find that strange he didn't take an interest in this case, very, very unusual. In the Lisa Peng case, that entire community was talking, reading the paper, and on and on and on about the case. Maybe he is just unique. But if I were the prosecutor, I would be suspicious of a person who says [he has] no interest in the case after reading about it.

(RT Vol. 21 5020.) Following the court's ruling, the prosecutor indicated that the juror's responses with respect to publicity regarding the case were not a factor in his decision. Finally, the court denied appellant's "*Wheeler/Batson*" motion. (RT Vol. 21 5020.)

D. The Prosecutor's Reasons for Exercising the Peremptory Challenge Do Not Withstand Scrutiny, Requiring Reversal of Appellant's Convictions and Judgment of Death

1. Legal Principles

In determining whether the defendant has established purposeful racial discrimination within the meaning of *Batson*, the trial court "must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' [Citation.]" (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 93; see also *Purkett v. Elem* (1995) 514 U.S. 765, 767.) Although the courts have not prescribed a specific procedure to be followed in conducting such an inquiry, "[a]t a minimum, this procedure must include a clear record that the trial court made a deliberate decision on the ultimate question of purposeful discrimination." (*United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 968, fn. 2.) Similarly, this Court has held that in the third step of a *Wheeler/Batson* challenge, the trial court is obligated to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation" (*People v. Hall* (1983) 35 Cal.3d 161, 167-168) and to clearly express its findings (*People v. Fuentes, supra*, 54 Cal.3d at pp. 716-720; *People v. Silva*, *supra*, 25 Cal.4th at p. 386).

The United States Supreme Court has also noted that "under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.' [Citation.]" (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 93.) Indeed, the United States Supreme Court recently found a prosecutor's proffered reasons for striking a prospective juror to be pretextual and vacated the judgment. As that Court explained:

> The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent. See [*Miller-El v. Dretke* (2005) 545 U.S. 231, 252] (noting the "pretextual significance" of a "stated reason [that] does not hold up"); *Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (*per curiam*) ("At [the third] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination"); *Hernandez* [*v. New York* (1991) 500 U.S. 352], 365, 111 S.Ct. 1859 (plurality opinion) ("In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed"). Cf. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) ("[R]ejection of the defendant's proffered [nondiscriminatory] reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination").

(*Snyder v. Louisiana* (2008) 552 U.S. 472, 485; emphasis in original.)

Justifications for a particular peremptory challenge remain a question of law and thus are properly subject to appellate review. (*People v. Turner* (1986) 42 Cal.3d 711, 720, fn. 6; *People v. Granillo* (1987) 197 Cal.App.3d 110, 120.) "[A]n appellate court independently reviews a trial court's conclusion on whether the prosecutor stated adequate neutral reasons for the peremptory challenges in question: It amounts to the resolution of a pure question of law [citation]. . . ." (*People v. Alvarez, supra,* 14 Cal.4th at p. 198, fn. 9.) "At the same time, [the appellate court] review[s] for substantial evidence a finding that the prosecutor's stated reasons were genuine: 'It is plainly the resolution of a pure question of fact.'" (*Id.* at p. 198; see also *People v. Lewis* (2006) 39 Cal.4th 970, 1009.) If the trial court makes a sincere and reasoned effort to evaluate the justifications offered, its conclusions are entitled to deference on appeal. (*People v. Ervin* (2000) 22 Cal.4th 48, 75; *People v. Arias* (1996) 13 Cal.4th 92, 136.)

A trial court's failure to engage in such a careful assessment of the prosecution's stated reasons is itself reversible error. (*People v. Silva, supra*, 25 Cal.4th at p. 386; *People v. Fuentes, supra*, 54 Cal.3d at p. 721; see also *Purkett v. Elem, supra*, 514 U.S. at p. 768 [third step in *Batson* process requires trial court to determine whether facially non-discriminatory reasons are implausible or pretextual]; *United States v. Alcantar* (9th Cir. 1996) 897 F.2d 436, 438.)

As the United States Supreme Court has pointed out, the credibility of a prosecutor's stated reasons "can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.) In *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830-831, the Court of Appeals explained:

> As with any credibility finding, the court's own observations are of paramount importance. [Citation.] Other factors come into play in a court's evaluation of a prosecutor's reasons . . . For example, if a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination. Similarly, a comparative analysis of the struck juror with empaneled jurors "is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." [Citation.] . . . A court may enlist the help of counsel in order to evaluate "the totality of the relevant facts" thoroughly. [Citation.]

The Ninth Circuit also suggested that "[a]fter analyzing each of the prosecutor's proffered reasons, . . . the court should then step back and evaluate all of the reasons together." (*Lewis v. Lewis, supra*, 321 F.3d at pp. 830-835.)

2. A Review of the Record Demonstrates That the Prosecutor's Reasons for Striking N.V. Were Pretextual

In *Miller-El v. Cockrell*, *supra*, 537 U.S. 322, the United States Supreme Court established that comparative juror analysis is a constitutionally-required technique to be employed by courts in evaluating whether the prosecution's stated reasons for use of the peremptory violated *Batson*'s proscription against race-based peremptory challenges. The issue before the Supreme Court was whether Miller-El had made "a substantial showing of the denial of a constitutional right," thus warranting the issuance of a certificate of appealability ("COA") relating to the third prong of his *Batson* claim: that is, whether he had carried his burden of proving purposeful racial discrimination. (*Id.* at pp. 326-327.) The Supreme Court explained that while a COA ruling was not the occasion for ruling on the merits of Miller-El's claim, the COA determination required an overview of the claims and a general assessment of their merits. (*Id.* at p. 331.) Miller-El argued that the prosecution's stated race-neutral reasons for use of peremptories were pretextual.[59]

The Supreme Court in *Miller-El* reaffirmed its holding in *Purkett v. Elem*, *supra*, 514 U.S. at page 768, that the critical question in determining whether a defendant has proven purposeful discrimination at step three is the persuasiveness of the prosecution's justification for the peremptory strike. (*Miller-El v. Cockrell*, *supra*, 537 U.S. at pp. 338-339.) The Supreme Court held that, while such a finding is an issue of fact normally

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[59] The state conceded the existence of a prima facie case, and Miller-El conceded that the prosecution had offered facially race-neutral reasons for the three strikes subject to defense objection. (*Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 338.)

accorded deference, such deference does not amount to abandonment of judicial review. (*Id.* at pp. 339-340.)

In analyzing Miller-El's claim that peremptory strikes were race-based, the United States Supreme Court considered the facts and circumstances that were adduced in support of a prima facie case, including statistical evidence supporting the claim that the strikes were more than happenstance. It also conducted a tentative comparative analysis of whether the state's proffered race-neutral rationales for striking Black jurors pertained just as well to some White jurors who were not challenged and who did serve on the jury. (*Miller-El v. Cockrell*, *supra*, 537 U.S. at pp. 342-343.)[60] Even the lone dissenter endorsed a comparative analysis, although he disagreed with the majority's conclusion. (*Id.* at pp. 361-363 (dis. opn. of Thomas, J.).) The Supreme Court thus left no doubt that comparative analysis was a factor to be considered on review of a claim of purposeful discrimination under *Batson*.

Recently, this Court held that evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons. (*People v. Lenix* (2008) 44 Cal.4th 602, 622; accord, *People v. Mills* (2010) 48 Cal.4th 158, 177; *People v. Hamilton* (2009) 45 Cal.4th 863, 902, fn. 12.)[61] According to this Court, "*Miller-El* [*v. Dretke*] and

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[60] After remanding Miller-El's case and later granting certiorari, the United States Supreme Court conducted a comparative juror analysis in *Miller-El v. Dretke*, *supra*, 545 U.S. 231.

[61] Prior to its decision in *Lenix*, this Court had for some time engaged in comparative analysis, but in so doing it had assumed without explicitly deciding that it was obligated to do so. (See *People v. Lenix*,

(continued...)

Snyder [*v. Louisiana*] demonstrate that comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622.)[62] This Court went on to state that "[t]he law has long recognized that particular care must be taken when relying on circumstantial evidence." (*Ibid.*)[63]

Ideally, a court evaluating a *Batson* motion would use most, if not all, of the tools identified in *Lewis v. Lewis*, *supra*, 321 F.3d at pages 830-

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[61](...continued)
supra, 44 Cal.4th at p. 612; *People v. Lewis* (2008) 44 Cal.4th 415, 472; *People v. Watson* (2008) 43 Cal.4th 652, 674, fn. 5; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1109-1118; *People v. Stevens* (2007) 41 Cal.4th 182, 196-198; *People v. Lewis*, *supra*, 39 Cal.4th at pp. 1016-1024.)

[62] Appellant submits that this Court has interpreted *Miller-El v. Cockrell* and its progeny too narrowly. For instance, those cases do not accord comparative juror analysis so little weight, or, put another way, require so much evidence beyond comparative juror analysis. Although the defense in *Miller-El* presented evidence of the prosecutor's discriminatory intent other than comparative analysis – e.g., evidence that the prosecutor used peremptory challenges to strike 91 percent of eligible Black jurors but only 13 percent of eligible non-Black jurors; the prosecutor used a "jury shuffling" procedure to increase the likelihood that preferable venire members would be empaneled; and, the District Attorney's office had a systematic policy to exclude minority jurors (*Miller-El v. Cockrell*, *supra*, 537 U.S. at pp. 531-535) – the high court has not suggested that such a showing is necessary to establish a *Batson* violation. Indeed, in *Snyder v. Louisiana*, *supra*, the high court found a *Batson* violation based on (1) a comparison of the prosecutor's stated reasons with what the challenged juror actually said, and (2) comparative juror analysis. (128 S.Ct. at pp. 1208-1212.)

[63] It is also true that circumstantial evidence may suffice to prove a fact. (See *People v. Anderson* (2007) 152 Cal.App.4th 919, 930; CALCRIM Nos. 223 and 224; CALJIC Nos. 2.00, 2.01 and 2.02.)

831: consideration of its own observations; a review of the record; and, comparative analysis. As appellant demonstrates below, however, the trial court in this case failed to do so. In particular, the trial court failed to adequately test the prosecutor's reasons by referring to the actual record, and failed to engage in an adequate comparative analysis of the prosecutor's respective treatment of N.V. and similarly-situated White prospective jurors.

First, the record does not support the prosecutor's assertion that N.V. was "nonresponsive to some of [his] questions." (RT Vol. 21 5018.) N.V.'s responses were not "nonresponsive" in the sense of failing to answer the questions asked of him. (See Evid. Code, § 766 [regarding responsive answers]; *People v. Bell*, *supra*, 40 Cal.4th at p. 611, fn. 11.) On the contrary, a plain reading of the record shows that N.V. responded directly to each of the prosecutor's questions. (RT Vol. 21 4981-4984.)

Nor does the record support the prosecutor's claim that N.V. was somehow too eager to please. (RT Vol. 21 5018-5019.) Virtually every question asked by the prosecutor was closed-ended and did not call for or require detailed or narrative responses. Accordingly, N.V. responded with appropriate, responsive "yes" or "no" answers. (RT Vol. 21 4981-4984.) For the same reason, the prosecutor was inaccurate in claiming that "I don't know anything about him, he hasn't given me an answer about anything." (RT Vol. 21 5019.) The fact that N.V. was concise does not mean he was providing no information regarding his views.

It should also be noted that the prosecutor exaggerated N.V.'s eagerness to serve when he claimed, "I would ask [N.V.] about [the death penalty] and he would just say, yeah, I am ready." (RT Vol. 21 5018.) In fact, N.V. never said he was "ready" to serve. Rather, he merely stated that

he felt he could impose either penalty; what he had read in the newspaper would not affect his decision; the fact he was Vietnamese would not bias him; he could think of no reason he could not be a fair and impartial juror; and, that he wanted to be a juror in the case. (RT Vol. 21 4981-4984.)[64]

Second, a comparative analysis of the answers given by prospective jurors who were later seated as jurors or alternate jurors in this case reveals that the prosecutor's reasons for striking N.V. were clearly pretextual. (See *People v. Hamilton*, *supra*, 45 Cal.4th at p. 902, fn. 12, citing *People v. Lenix*, *supra*, 44 Cal.4th at p. 624 [the reviewing court need only consider responses by stricken panelists or seated jurors identified by the defendant in the claim of disparate treatment].)

a. N.V.'s Age

Although the prosecutor cited N.V.'s age (i.e., 45 years old) in support of his peremptory challenge (RT Vol. 21 5018), five of the seated jurors and three of the alternate jurors were of or near the same age. (Quest./Exh. CT Vol. 35 9628 [Juror #2 (48 years old)]; Quest./Exh. CT Vol. 36 9704 [Alt. Juror #3 (47 years old)]; Quest./Exh. CT Vol. 37 10161 [Juror #12 (45 years old)]; Quest./Exh. CT Vol. 38 10237 [Juror #1 (46 years old)]; Quest./Exh. CT Vol. 38 10313 [Alt. Juror #4 (45 years old)]; Quest./Exh. CT Vol. 46 12635 [Juror #8 (45 years old)]; Quest./Exh. CT Vol. 47 12845 [Juror #5 (49 years old)]; Quest./Exh. CT Vol. 47 12864 [Alt. Juror #1 (42 years old)].)

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[64] The trial court did not suggest that N.V. was in any way overly eager to respond or to serve on the jury until *after* the prosecutor asserted that "[N.V.] would just say, yeah, I am ready." (RT Vol. 21 5018.) Indeed, the trial court had observed that "N.V. voir dired very well" and that "his questions and answers were similar to those offered by other jurors." (RT Vol. 21 5018.)

Moreover, the prosecutor failed to explain why N.V.'s age made him unacceptable as a juror. (Cf. *People v. Hamilton*, *supra*, 45 Cal.4th at pp. 905, 907, fn. 13 [prosecutor explained why he did not want any jurors under the age of 30, and why he considered a 24-year-old prospective juror to be too immature, emotionally unconnected and bereft of sufficient life experience to be a juror].) This Court should not supply possible race-neutral reasons, particularly where the prosecutor stated an exclusive list of reasons for exercising a peremptory challenge. (See, e.g., *Williams v. Runnels* (C.D. Cal. 2009) 640 F.Supp.2d 1203, 1218 [observing that at step two of *Wheeler/Batson* analysis, "the State has the burden to offer the actual reasons for the challenges, not to suggest speculative reasons why the prosecutor might have exercised his peremptory challenges"].)[65]

b. N.V.'s Marital Status

Although the prosecutor cited the fact that N.V. was single in support of the peremptory challenge (RT Vol. 21 5018), Juror #3 was also single. (Quest./Exh. CT Vol. 37 10009.) In any event, the prosecutor failed to explain why the fact N.V. had never been married made him unacceptable as a juror, and this Court must not supply possible but unstated race-neutral reasons. (See Section D.2.a, *ante*.)

c. N.V.'s Lack of Children

The prosecutor also cited the fact that N.V. had no children (RT Vol. 21 5018), but three of the jurors also did not have children. (Quest./Exh. CT Vol. 37 10009-10027 [Juror #3], 10161 [Juror #12]; Quest./Exh. CT Vol. 44 12102 [Juror #6].) The prosecutor failed to explain why the fact

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[65] After stating his supposed reasons for exercising the peremptory challenge, the prosecutor in this case commented, "And those were the reasons I excused him." (RT Vol. 21 5018.)

N.V. had no children made him unacceptable as a juror, and this Court must not supply possible but unstated race-neutral reasons. (See Section D.2.a, *ante*.)

d. N.V.'s Employment

In explaining his peremptory challenge, the prosecutor stated, "[N.V.] is a postal worker, also not the type of juror I would keep." (RT Vol. 21 5018.) However, the prosecutor did not exercise a peremptory challenge as to Alternate Juror #4, a consumer affairs associate/clerk for the Postal Service. (Quest./Exh. CT Vol. 38 10314; RT Vol. 21 5320.) Moreover, although the prosecutor claimed that he exercised peremptory challenges to postal workers "quite a bit" (RT Vol. 21 5019), he did not explain why he did so or why N.V.'s occupation made him unacceptable as a juror; as such, the prosecutor's stated reason should be deemed implausible and pretextual. (See *Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 339.)

e. N.V.'s Lack of Opinion Regarding the Death Penalty

Finally, the prosecutor claimed that he exercised a peremptory challenge as to N.V. because N.V. had no opinion regarding the death penalty and was too eager to please. (RT Vol. 21 5018-5019.) Yet the prosecutor did not exercise peremptory challenges to other prospective jurors who gave similar responses. In particular, Juror #3 indicated in his or her questionnaire that "I can only form my opinion in specific cases because I cannot decide one way or another, which is best." (Quest./Exh. CT Vol. 37 10021.) Juror #1, in addressing his or her opinion as to whether the death penalty is imposed too often or too seldomly, responded as follows:

> I'm not sure. Because I don't follow murder cases often or at all. I actually don't know how often (what

percentage) the death penalty is imposed.

(Quest./Exh. CT Vol. 38 10249.) Responding to the same question, Alternate Juror #1 wrote, "I don't know if it is too often or too seldom. I have not followed all cases that go for the death penalty and the end results." (Quest./Exh. CT Vol. 47 12876.)

Similarly, other prospective jurors, including several who became seated or alternate jurors, gave similarly brief responses during voir dire by the prosecutor. (See RT Vol. 21 4885-4887 [Juror No. #12]; RT Vol. 22 5047-5049 [Juror #8], 5103 [Juror #2], 5107-5108 [Juror #1]; RT Vol. 23 5337-5338 [Alt. Juror #1].) Appellant observes too that Alternate Juror #1 said he or she wanted to be a juror (RT Vol. 23 5337-5338), yet, unlike N.V., was acceptable to the prosecutor.

E. The Prosecutor's Improper Peremptory Challenge In This Case Requires That the Judgment of Death Be Reversed

The prosecutor's exclusion of N.V. on the basis of his race or ethnicity was prejudicial per se and requires reversal of appellant's convictions and death judgment. (*Batson v. Kentucky, supra*, 476 U.S. at p. 100; *People v. Silva, supra*, 25 Cal.4th at p. 386.)

The fact that the prosecutor failed to excuse a number of White prospective jurors who provided responses similar to those provided by N.V. fatally undermines his credibility. (*Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1427, citing *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695; accord, e.g., *Davidson v. Harris* (8th Cir. 1994) 30 F.3d 963, 965; *Bennett v. Collins* (E.D. Tex 1994) 852 F.Supp. 570, 577.)

"[T]he inadequacy of the prosecutor's reasons was compounded by the court's apparent acceptance of those reasons at face value." (*People v.*

Turner, supra, 42 Cal.3d at p. 727; see also *Garrett v. Morris* (8th Cir. 1987) 815 F.2d 509, 514 ["The trial court's immediate acceptance of [the prosecutor's] explanation at face value compounds our concern about the adequacy and genuineness of the proffered explanation."].) As in *Turner*, not only did the prosecution fail "to sustain its burden of showing that the challenged prospective juror[] [was] not excluded because of group bias," but also "the court failed to discharge its duty to inquire into and carefully evaluate the explanations offered by the prosecutor." (*People v. Turner, supra*, 42 Cal.3d at p. 728; see also *People v. Silva, supra*, 25 Cal.4th at pp. 385-386.) Moreover, the trial court's failure to engage in comparative juror analysis and other critical measures virtually guaranteed that it would accept the prosecutor's reasons as proper and race-neutral. (See *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 358 ["We hold that the California courts, by failing to consider comparative evidence in the record before it that undeniably contradicted the prosecutor's purported motivations, unreasonably accepted his nonracial motives as genuine."].)

Thus, reversal of the judgment of death is required because the record clearly reveals that the prosecution's purported race-neutral explanations were pretexts for purposeful discrimination. (See *Ali v. Hickman* (9th Cir. 2009) 571 F.3d 902, 910 [concluding that where "'an evaluation of the voir dire transcript and juror questionnaires clearly and convincingly refutes each of the prosecutor's non-racial grounds,' we are 'compell[ed] [to conclude] that his actual and only reason for striking [the relevant juror] was her race'"].)

III

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO GIVE SPECIAL I, A DEFENSE-REQUESTED INSTRUCTION EXPLAINING THE CONCEPT OF "PROVOCATION"

A. Introduction

During the guilt phase, appellant requested that the trial court give proposed instruction Special I, which read as follows:

> By saying that a defendant is not permitted to set up his own standard of conduct, the court is not instructing you that the question to answer is whether or not a reasonable person would commit the act of killing another because of the provocation that the defendant believed he was under. Rather the question is whether the provocation was such that a reasonable person would commit any act rashly and from passion rather than judgment because of it.

(CT Vol. 2 550.) Appellant cited *People v. Valentine* (1946) 28 Cal.2d 121 in support of his request that the instruction be given. (CT Vol. 2 541.)

During the guilt phase jury instruction conference, defense counsel expressed her concern that the prosecutor would argue that other people would not kill "because of this passion," and that appellant was "setting up his own standard." (RT Vol. 10 2365-2367.) The prosecutor confirmed that he intended to so argue, asserting that such argument correctly stated the law. (RT Vol. 10 2367; see also RT Vol. 10 2373.) The prosecutor further contended that the proposed instruction made no sense (because it was phrased as a double-negative) and that he could find no support for it in the case law. (RT Vol. 10 2367.)

Defense counsel countered as follows:

> [I]f you look at the actual instruction itself, [CALJIC No.] 8.42, it says the question to be answered is whether or not . . . whether or not at the time of the killing the reason of

the accused was so obscured and so disturbed by passion to an extent that would cause an ordinarily [*sic*] person of average disposition to act rashly and without deliberation or reflection. It does not say, if you wouldn't kill, if the objective person wouldn't kill because of this provocation, then the defendant is setting up his own standard. It is saying, the act is just simply [committed] rashly. Rashly could be a variety of things. It doesn't have to be just kill. Is the provocation enough?

(RT Vol. 10 2368.)[66]

Ultimately, the trial court ruled as follows:

There are lots of mental states involved in this case. This instruction is attempting to redefine a portion of heat of passion.

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[66] CALJIC No. 8.42, the standard instruction explaining the concept of sudden quarrel or heat of passion and provocation, stated in pertinent part that:

A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. . . .

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The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than judgment.

(CT Vol. 3 621.)

* * *

> And it is adequately covered in [CALJIC No.] 8.42 specially as modified. Tends to be argumentative. Not taken from any particular case. Never given as an instruction or offered as an instruction and refused and reversed by an appellate court. So you are reading something into it that [the prosecutor] certainly hasn't.

(RT Vol. 10 2376; CT Vol. 2 590.)

As appellant demonstrates below, the trial court abused its discretion by refusing to give Special I, which was a proper pinpoint instruction relating defense evidence regarding the factors affecting appellant's mental state (including grief and caregiver stress) to the defense theory that appellant was acting in the heat of passion when he shot the victims. (*People v. Wright* (1988) 45 Cal.3d 1126, 1137; *People v. Sears* (1970) 2 Cal.3d 180, 190.)

B. The Trial Court Abused Its Discretion in Refusing to Instruct the Jury Pursuant to Appellant's Proposed Special I

1. Legal Principles Relating to Heat of Passion and Provocation

In order to assess the effect of the trial court's refusal to give the defense-requested instruction, it is necessary to "ascertain at the threshold what the relevant law provides." (*People v. Warren* (1988) 45 Cal.3d 471, 487.)

Penal Code section 188 provides in pertinent part that malice "is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Both first degree murder and second

degree murder require malice aforethought. (§ 187.) The difference between the two crimes is that the former requires the additional element of premeditation and deliberation (or murder by some specified means). (§ 189.)

Voluntary manslaughter, on the other hand, is the unlawful killing of a human being, upon a sudden quarrel or heat of passion. (§ 192, subd. (a).) As this Court has explained, "[w]hen a mortal blow is struck upon a sudden quarrel or in the heat of passion, upon adequate provocation, the actual intent is disregarded. In such case, although the intent to kill may exist, it is not that malicious intent which is an essential element in the crime of murder." (*People v. Ross* (1939) 34 Cal.App.2d 574, 579; see also *People v. Williams* (1969) 71 Cal.2d 614, 624.)

This Court has made clear that heat of passion has both an objective and a subjective component. (*People v. Wickersham* (1982) 32 Cal.3d 307, 326-327, disapproved of on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201.) First, the circumstances giving rise to the heat of passion are viewed objectively. That is, "'[the] heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253; see also *People v. Breverman* (1998) 19 Cal.4th 142, 163.) Moreover, "'[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to

have been engaged in by the victim. [Citations.]" (*People v. Moye* (2009) 47 Cal.4th 537, 549-550.)

However, a defendant is entitled to have the jury "take into consideration all the elements in the case which might be expected to operate on his mind." (*People v. Smith* (1907) 151 Cal. 619, 628; accord, *People v. Minifie* (1996) 13 Cal.4th 1055, 1065.) In addition, as appellant explains in Section B.2, *post*, the law requires only that the provocation lead an ordinary man of average disposition "to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." (*People v. Valentine*, *supra*, 28 Cal.2d at p. 139; see also *People v. Najera* (2006) 138 Cal.App.4th 212, 223-224.) It does not require that the response be a killing.

Second, the subjective component of heat of passion requires that the defendant be under the actual influence of a strong passion at the time of the homicide. (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 327.) The subjective component is satisfied where the defendant actually killed in the heat of "passion," a shorthand reference to any "'violent, intense, high-wrought, or enthusiastic emotion'" other than revenge. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163 [citations omitted]; see also *People v. Steger* (1976) 16 Cal.3d 539, 547; *People v. Taylor* (1961) 197 Cal.App.2d 372, 380.)

The malice element of murder is negated when both the subjective and objective components of heat of passion are satisfied. (See, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1143-1144.) The specific intent element of attempted murder (see *People v. Koontz* (1984) 162 Cal.App.3d 491, 495) is similarly negated when both components of heat of passion are satisfied, reducing the offense to attempted voluntary

manslaughter. (See *People v. Lee* (1994) 28 Cal.App.4th 1724, 1732-1733.)

Where only the subjective prong is satisfied, the crime is murder, but only second degree murder. This is so because the subjective mental state of heat of passion is inconsistent with, or prevents, premeditation and deliberation. (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 329; *People v. Valentine* (1946) 28 Cal.2d 121, 132; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 251.) Therefore, while the existence of someone else's conduct, or "provocation," is highly relevant to this question, it is not necessary to demonstrating a subjective heat of passion inconsistent with premeditation. (See, e.g., *People v. Wickersham*, *supra*, 32 Cal.3d at pp. 327, 329 [evidence would have supported second degree murder under unreasonable heat of passion theory where there was substantial evidence killing committed in hot blood, yet "virtually no" evidence of provocation]; *People v. Valentine*, *supra*, 28 Cal.2d at pp. 131-135 [killing in heat of passion inconsistent with premeditation, to which evidence of even slight provocation is relevant; instruction to contrary erroneous]; *People v. Padilla* (2002) 103 Cal.App.4th 675, 678-679 [if defendant was provoked to passion based on his own hallucinations, it would not satisfy objective component for voluntary manslaughter, but would satisfy subjective component to show heat of passion and negate premeditation]; *In re Thomas C.* (1986) 183 Cal.App.3d 786, 794 [while defendant's depressed mental state and distress over family problems supported finding of subjective heat of passion, it did not amount to adequate provocation under objective reasonable-person standard; trial court correctly concluded that defendant's mental state was inconsistent with premeditation but did not negate malice, and he was therefore guilty of second degree murder];

People v. Webb (1956) 143 Cal.App.2d 402, 423 [in resolving whether evidence was sufficient to prove premeditation rather than impassioned killing, "the question of provocation is relevant but not decisive. It is a factor, but not a conclusive factor, that should be considered on the issue of premeditation"]; see also *People v. Anderson* (1968) 70 Cal.2d 15, 28 [killing in heat of passion or "explosion of violence" is inconsistent with premeditation without regard to existence or non-existence of provocation]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [same]; cf. *People v. Golsh* (1923) 63 Cal.App. 609, 612-614 [Court of Appeal rejected defendant's argument that the trial court should have permitted the jury to consider evidence of sunstroke and its consequent effect upon his mental and emotional nature in connection with his claim that the charged killing was committed in the heat of passion, explaining that the requisite provocation "must be such as would have a like effect upon the mind and emotions of the average man – the man of ordinary self-control"].)

State law and the federal Constitution impose on the prosecution the burden of proving beyond a reasonable doubt the elements of malice, premeditation and deliberation. (§ 189; see, e.g., *United States v. Gaudin* (1995) 515 U.S. 506, 510; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *People v. Anderson*, *supra*, 70 Cal.2d at p. 25.)

So understood, the critical questions in this case were: (1) whether appellant faced legally adequate provocation and (2) whether he committed the killings in an actual state of impulsive "passion." To answer those questions, it was critical that the jury understand that legally adequate provocation is not provocation that would necessarily lead a reasonable person to kill; rather, the provocation simply must be such as would cause a reasonable person to act rashly.

As appellant demonstrates below, the trial court's failure to give the requested instruction precluded the jury from properly assessing these critical questions.

2. Special I Was a Proper Pinpoint Instruction Relating to Appellant's Defense Theory

A criminal defendant is entitled upon request to instructions which either relate the facts of his or her case to any legal issue, or pinpoint the crux of his defense. (*People v. Sears*, *supra*, 2 Cal.3d at p. 190; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885.) Thus, a defendant is entitled to jury instructions on any theory of the case which is supported by substantial evidence. (*People v. Bolden* (2002) 29 Cal.4th 515, 558; *People v. Breverman*, *supra*, 19 Cal.4th at p. 157.) In fact, "[t]he court must give any correct instructions on defendant's theory of the case which the evidence justifies, no matter how weak or unconvincing that evidence may be." (*People v. Bynum* (1971) 4 Cal.3d 589, 604, overruled on another ground in *People v. Williams* (1976) 16 Cal.3d 663, 669; see also *People v. Kane* (1946) 27 Cal.2d 693, 700.)

The trial court may reject a proffered instruction if it is argumentative or focuses on disputed evidence rather than the defense theory (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137); if it is duplicative or legally incorrect (*People v. Mickey* (1991) 54 Cal.3d 612, 697); or if it is lengthy or confusing (*People v. Falsetta* (1999) 21 Cal.4th 903, 923). This applies to defense requests to supplement standard jury instructions with additional factors relevant to the particular case before the jury. (*People v. Wright*, *supra*, 45 Cal.3d at p. 1143.) If a proffered instruction meets the guidelines discussed above, however, the trial court has no discretion to refuse to so charge the jury. (*People v. Saille* (1991) 54 Cal.3d 1103,

1119.)

Here, the defense theory at the guilt phase was that appellant shot Marlene Mustaffa in the heat of passion, provoked by the circumstances surrounding his mother's physical and mental decline, collapse and death. (RT Vol. 11 2526-2585, 2590-2591.)[67] It was critical that the trial court fully instruct the jury regarding heat of passion and provocation, so that it could properly assess the evidence relating to the existence or non-existence of malice aforethought, premeditation and deliberation. Therefore, the trial court should have instructed the jury pursuant to appellant's proposed Special I.

First, Special I correctly stated the law. As appellant observed above, the "'heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' [Citation.]" (*People v. Steele*, *supra*, 27 Cal.4th at pp. 1252-1252.)

In *Steele*, this Court agreed that the defendant's evidence that he was intoxicated, that he suffered various mental deficiencies, that he had a psychological dysfunction due to traumatic experiences in the Vietnam War, and that he just "snapped" when he heard a helicopter prior to the killing with which he was charged, may have satisfied the subjective

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[67] Defense counsel further argued that, in shooting Rosetti and Robertson, appellant discharged his gun unlawfully but with no intent to kill them; therefore, he was guilty of involuntary manslaughter. (RT Vol. 11 2586-2589.)

element of heat of passion. (*People v. Steele*, *supra*, 27 Cal.4th at p. 1253.) Nevertheless, this Court reasoned that such evidence did not satisfy the objective, reasonable person requirement, which requires provocation by the victim. (*Ibid.*) That is, "'evidence of defendant's extraordinary character and environmental deficiencies was manifestly irrelevant to the inquiry.' [Citation.]" (*Ibid.*)[68]

However, in *People v. Valentine*, this Court explained that

> "[i]n the present condition of our law it is left to the jurors to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether or not he did, commit his offense under a heat of passion. The jury is further to be admonished and advised by the court that this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances, and that, consequently, no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man. Thus, no man of extremely violent passion could so justify or excuse himself if the exciting cause be not adequate, nor could an excessively cowardly man justify himself unless the circumstances were such as to arouse the fears of the ordinarily courageous man. Still further, while the conduct of the defendant is to be measured by that of the ordinarily reasonable man placed in identical circumstances, the jury is properly to be told that the exciting cause must be such as would naturally tend to arouse the passion of the

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[68] For that reason, this Court held that the trial court did not err in refusing the defendant's request that it give an instruction stating that "[t]he passion necessary to constitute heat of passion need not mean rage or anger but may be any violent, intense, overwrought or enthusiastic emotion which causes a person to act rashly and without deliberation and reflection." (*Id.* at pp. 1251-1252.)

> ordinarily reasonable man. *But as to the nature of the passion itself, our law leaves that to the jury, under these proper admonitions from the court.* For the fundamental of the inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion – not necessarily fear and never, of course, the passion for revenge – to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment."

(*People v. Valentine*, *supra*, 28 Cal.2d at p. 139, quoting *People v. Logan* (1917) 175 Cal. 45, 48-49; emphasis added.) Significantly, this Court's explanation requires only that the provocation lead an ordinary man of average disposition "to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." (*Ibid.*) It does not require that the response be a killing.

In arguing that the jury should be instructed pursuant to Special I, defense counsel explicitly distinguished *People v. Steele*, explaining that she was not arguing that appellant was entitled to instructions on heat of passion and provocation because of circumstances unique to him. (RT Vol. 10 2368-2370.) Instead, she explained, she was arguing that the law (as reflected by CALJIC No. 8.42 and the *Valentine* opinion) provides (1) that the provocation be such as would cause an ordinarily reasonable person to act rashly, and (2) the rash act thus provoked need not be a killing (i.e., a homicide). Defense counsel further argued that the caregiver stress experienced by appellant constituted such a provocation. (RT Vol. 10 2367-2376.)

Defense counsel's interpretation of the law was correct. (See *People v. Najera*, *supra*, 138 Cal.App.4th at pp. 223-224.) There, the Court of

Appeal explained that

> [a]n unlawful homicide is upon "a sudden quarrel or heat of passion" if the killer's reason was obscured by a "'provocation'" sufficient to cause an ordinary person of average disposition to act rashly and without deliberation. [Citation.] The focus is on the provocation – the surrounding circumstances – and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion.

(See also *Mendoza v. Clark* (E.D.Cal. 2009) 2009 WL 2590209, slip opn. p. 7 [observing that, in *Najera*, "The Court of Appeal explained, 'How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion.'"].) Appellant acknowledges that *Najera* post-dated his trial, but its holding was implicit in the holdings of *People v. Valentine*, *supra*, 28 Cal.2d at p. 139 and *People v. Logan*, *supra*, 175 Cal. at pp. 48-49. In any event, appellant is not aware of any opinion holding that legally adequate provocation must be such that it would lead an ordinary person of average disposition to kill.

Therefore, appellant's reading of the law regarding "provocation," embodied in his proposed Special I, was the correct one. Contrary to the court's position (RT Vol. 10 2376), appellant was not attempting to redefine the concept of heat of passion. Moreover, the trial court failed to recognize that the prosecutor's reading of the law was far too broad. (RT Vol. 10 2376.)

Second, appellant's proposed instruction was supported by substantial evidence. Appellant presented evidence regarding the objective circumstances facing him prior to the shootings. Among other things, there was evidence that: (1) appellant's mother, who had suffered from serious

health problems as early as 1996 or 1997, was in severe pain and exhibited deteriorating cognitive and physical functioning during the time she was a patient at West Anaheim Medical Center and La Palma Intercommunity Hospital (RT Vol. 7 1600-1601, 1605-1611, 1620-1627, 1646-1648, 1661-1666, 1678, 1704-1708, 1710, 1712-1713, 1718-1719; RT Vol. 8 1933-1942; RT Vol. 9 1951, 1955-1956, 2020-2024, 2116-2118, 2120-2123, 2125, 2130, 2136-2139, 2151-2152, 2159, 2184-2185, 2189-2202, 2208-2209; RT Vol. 10 2246; RT Vol. 11 2404-2411, 2416, 2420-2421, 2423); (2) West Anaheim Medical Center, La Palma Intercommunity Hospital and other medical providers failed to provide culturally competent care, e.g., often calling upon appellant to act as interpreter and translator (RT Vol. 7 1601-1604, 1677-1678, 1703, 1708-1712, 1714-1717, 1719; RT Vol. 8 1740-1801, 1813-1829, 1890-1928; RT Vol. 9 1952-1954, 1958, 1980-2014, 2025-2053, 2061, 2064-2065, 2073, 2140-2142, 2150, 2154, 2182-2183, 2189, 2211-2212; RT Vol. 10 2239-2241, 2318; RT Vol. 11 2423, 2427-2473); and, (3) appellant was upset when he saw, without having been warned beforehand, that his mother had been tied to her bed (RT Vol. 9 2152-2153, 2155-2157, 2159, 2192-2201; RT Vol. 10 2250).

Moreover, there was evidence that appellant was under the actual influence of heat of passion at the time of the shootings. For instance, there was evidence that: (1) he appeared to be dazed and panicky at the time of the shootings (RT Vol. 5 1236-1239, 1247-1252, 1254; RT Vol. 7 1630-1637); (2) he suffered from caregiver stress, i.e., the escalating physical and emotional toll taken on appellant by the intense demands of almost single-handedly caring for his mother while having to work full-time (RT Vol. 7 1580-1582, 1584, 1591, 1601, 1616-1620, 1698-1702, 1705, 1708-1712, 1714-1718; RT Vol. 8 1831-1883, 1930-1933; RT Vol. 9 1954, 1962-1963,

2065-2074, 2148-2149, 2160; RT Vol. 10 2228-2237, 2244-2246, 2137; RT Vol. 11 2404-2412, 2427-2473); and, (3) he suffered intense grief over the loss of his mother, who was virtually his only companion (RT Vol. 6 1317, 1319, 1335-1336, 1338, 1379-1380, 1385; RT Vol. 7 1674, 1690-1693, 1695-1696; RT Vol. 9 2144-2145, 2147, 2149; RT Vol. 10 2262-2316).

Third, the proposed instruction did not duplicate any instructions given to the jury. In particular, CALJIC No. 8.42 did not instruct the jury that legally adequate provocation need not be a provocation that would lead an ordinarily reasonable person to kill. (*People v. Najera*, *supra*, 138 Cal.App.4th at pp. 223-224; *People v. Valentine*, *supra*, 28 Cal.2d at p. 139.) Certainly, if the standard instruction did not lead the prosecutor to a correct understanding of provocation, it surely failed to adequately instruct the jurors on that concept. Thus, the proposed instruction clarified the meaning of CALJIC No. 8.42, which stated in pertinent part that "[a] defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation." (CT Vol. 3 621.)

Fourth, the proposed instruction was not argumentative. That is, it did not "invite the jury to draw inferences favorable to the parties from specified items of evidence." (*People v. Wright*, *supra*, 45 Cal.3d at p. 1135.) Rather, it was a neutral, legally accurate statement of law.

Even if the proposed instruction was somehow flawed, the trial court had a duty to correct it. That is, even where there are defects in a proposed instruction, the trial court should tailor the instruction to focus the jury's

attention on facts relevant to its determination, rather than denying the instruction outright. (See, e.g., *People v. Falsetta* (1999) 21 Cal.4th 903, 924; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110; *People v. Grant* (2006) 113 Cal.App.4th 579, 592.)

C. The Trial Court's Refusal to Give the Requested Instruction Violated Appellant's Constitutional Right to Instruction on the Defense Theory of the Case

The United States Constitution guarantees criminal defendants the right to present a defense, and therefore the right to requested instructions on the defense theory of the case. (*Mathews v. United States* (1988) 485 U.S. 58, 63 ["As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor"]; *United States v. Hicks* (4th Cir. 1984) 748 F.2d 854, 857-858 [rights to trial by jury and due process abridged by failure to give requested instruction on defense theory of the case]; *Richmond v. Embry* (10th Cir. 1997) 122 F.3d 866, 871 [right to present defense evidence arises under the Sixth Amendment right to compulsory process and the Fourteenth Amendment right to due process].) Consequently, the trial court's failure to adequately instruct the jury on the defense theory of the case violated appellant's Sixth Amendment right to present a defense, compulsory process, and trial by jury, his Fourteenth Amendment right to due process, and his Eighth Amendment right to reliable guilt and penalty determinations.

D. The Trial Court's Error Was Prejudicial

In arguing that the evidence did not establish legally adequate provocation (RT Vol. 11 2478-2523, 2591-2601), the prosecutor stated:

> Caregiving, yes, it is stressful. Hell, yeah, it is hard. Oh, yeah. But we all have to go through things like that in

> life. . . There is no discount, if you are having a difficult time in your life, there is no discount [for] murder. You don't get bonus points if you take care of your mother. You don't get bonus points if you are having a bad day or your mom dies. That ain't the way it works.
>
> The only way out is heat of passion. That is what they are going to go after. All these things were coming down on him. He was having financial difficulties. They raised his rent 20 bucks. He got a parking ticket. He had to quit his job to take care of mom. If you are having a bad day, you don't get to kill, only if there is legally adequate provocation.

(RT Vol. 11 2517-2518.) The prosecutor went on to assert that "[y]ou don't get a discount for misperception. You don't get a discount on your murder for misperception or misperceive, you don't understand or paranoia." (RT Vol. 11 2520.)

In the absence of the proposed instruction, it is reasonably likely that the jury accepted the prosecutor's argument that, by presenting evidence of "misperception," misunderstanding and paranoia, appellant was essentially setting up his own standard of conduct. In other words, it is reasonably likely that, in the absence of proposed Special I, the jury believed the threshold for finding legally adequate provocation to be higher than it actually is.

On the other hand, had the instruction been given, the jury likely would have accepted the defense theory that appellant committed the shootings in response to legally adequate provocation and that he was in fact acting in the heat of passion. Accordingly, the jury would have found appellant guilty of nothing more than voluntary manslaughter as to Counts 1 through 3, and of nothing more than attempted voluntary manslaughter with respect to Count 4. (See *People v. Lee*, *supra*, 28 Cal.App.4th at pp. 1732-

1733.)

At a minimum, the jury reasonably could have determined that, while there did not exist legally adequate provocation, the evidence established the subjective mental state of heat of passion. (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 329; *People v. Valentine*, *supra*, 28 Cal.2d at p. 132; (1992) 2 Cal.App.4th 1285, 1295-1296; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 251.) Consequently, the jury would have had to find appellant guilty of nothing more than second degree murder as to Counts 1 through 3. Further, the jury would have had to find not true the allegation that appellant acted willfully, deliberately and with premeditation in the commission of the attempted murder charged in Count 4 (CT Vol. 1 3; CT Vol. 3 705). (See *People v. Thompkins*, *supra*, 195 Cal.App.3d at p. 251 ["heat of passion" and "premeditation" are mutually exclusive].)[69]

In either event, the jury also would have had to find the multiple-murder special circumstance – the only special circumstance alleged in this case – not true.

The trial court's refusal to give appellant's requested instruction violated his due process right to present a defense (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, §§ 7 and 15; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294), his right to a fair and reliable capital trial (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638), and his right to the presumption of innocence,

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[69] For purposes of sentencing, the distinction between unpremeditated attempted murder and willful, deliberate, and premeditated attempted murder is enormous. The former offense is punishable by imprisonment for five, seven, and or nine years. The latter offense is punishable by imprisonment for life with the possibility of parole. (§ 664, subd. (a).)

requirement of proof beyond a reasonable doubt, and fair trial secured by due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15; *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In addition, the error violated appellant's right to trial by a properly instructed jury (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Carter v. Kentucky* (1981) 450 U.S. 288, 302), and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested pinpoint instructions supported by the evidence (U.S. Const., 14th Amend.; *Mathews v. United States*, *supra*, 485 U.S. at p. 63; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347; *Fetterly v. Paskett* (1993) 997 F.2d 1295, 1300.)

Accordingly, appellant's convictions of first degree murder as to Counts 1 through 3, his conviction of attempted murder as to Count 4, and the jury's finding as to the multiple-murder special circumstance, must be set aside. In addition, the jury's verdict of death must be reversed.

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IV

THE TRIAL COURT COMMITTED "*CARTER* ERROR" WHEN IT INADVERTENTLY FAILED TO SUPPLY THE JURY WITH WRITTEN COPIES OF CALJIC NOS. 2.60 AND 2.61

A. Introduction

Appellant did not testify during the guilt phase of his trial. Accordingly, he specifically requested that the trial court instruct the jury pursuant to CALJIC Nos. 2.60 and 2.61, which relate to a defendant's constitutional right not to testify. (CT Vol. 2 541.) Although the trial court orally read CALJIC Nos. 2.60 and 2.61, a comparison of the court's set of written jury instructions and the set of written instructions given to the jury indicates that those two instructions were omitted from the latter set. (RT Vol. 11 2613; CT Vol. 3 607-609, 663.)[70]

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[70] CALJIC No. 2.60, as read by the court in this case, provided:

> A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify.
>
> Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.

(RT Vol. 11 2613.) CALJIC No. 2.61, as read by the court, provided:

> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him.
>
> No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding

(continued...)

The trial court's failure to supply the jury with written copies of CALJIC Nos. 2.60 and 2.61 violated appellant's privilege against compulsory self-incrimination and his rights to due process, a fair trial, and a reliable guilt determination under the federal and state Constitutions. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 16 and 24.)

B. The Trial Court Erred in Omitting CALJIC Nos. 2.60 and 2.61 From the Written Instructions Provided to the Jury

A defendant in a criminal matter has an absolute right not to be called as a witness and not to testify. (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, § 15; Evid. Code, § 930.) A defendant also enjoys constitutional guarantees that no adverse inferences are to be drawn from the exercise of that privilege. (*Griffin v. California* (1965) 380 U.S. 609, 614-615; *People v. Bostick* (1965) 62 Cal.2d 820, 823 [holding that a clause of the California Constitution permitting comment on a defendant's decision not to testify "must bow to the superior mandates of the Fifth and Fourteenth Amendments to the United States Constitution"].)

When a criminal defendant exercises his right not to testify, the trial court, if requested by the defendant to do so, must instruct the jury not to draw an adverse inference from his decision not to take the stand. (*Carter v. Kentucky* (1981) 450 U.S. 288, 300; *People v. Evans* (1998) 62 Cal.App.4th 186, 190-191.) As the United States Supreme Court has explained, "[a] trial judge has a powerful tool at his disposal to protect the

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[70](...continued)
against him on any such essential element.

(*Ibid.*)

constitutional privilege – the jury instruction – and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum." (*Carter v. Kentucky*, *supra*, 450 U.S. at p. 303.)[71] In accordance with that principle, CALJIC Nos. 2.60 and 2.61 must be given if requested by the defendant. (*People v. Evans*, *supra*, 62 Cal.App.4th at pp. 190-191.)

In addition, Penal Code section 1093, subdivision (f), provides in pertinent part that:

> [Following presentation of the evidence and of argument by counsel, *the] judge may then charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party*; and the judge may state the testimony, and he or she may make such comment on the evidence and the testimony and credibility of any witness as in his or her opinion is necessary for the proper determination of the case and he or she may declare the law. . . Upon the jury retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy.

(Emphasis added.)

Therefore, because appellant specifically requested that the trial court give CALJIC Nos. 2.60 and 2.61 (CT Vol. 2 541), the trial court was

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[71] A trial court's failure to give such an instruction despite the defendant's request that it be given is sometimes referred to as "*Carter* error." (See *People v. Evans*, *supra*, 62 Cal.App.4th at pp. 190-191.)

obligated to give them. (*Carter v. Kentucky*, *supra*, 450 U.S. at p. 300; *People v. Evans*, *supra*, 62 Cal.App.4th at pp. 190-191; § 1093, subd. (f).) Although the court read the instructions to the jury (RT Vol. 11 2613; CT Vol. 3 663), its failure to provide written copies of CALJIC Nos. 2.60 and 2.61 was tantamount to not giving them at all, and effectively permitted the jury to consider, and draw adverse inferences from, the fact that appellant did not testify.[72]

First, the trial court instructed the jury pursuant to CALJIC No. 17.45, which stated in pertinent part that "the instructions which I am now giving to you will be made available in written form for your deliberations." (RT Vol. 11 2639; CT Vol. 3 643.) This instruction would have led the jurors to believe that the set of written instructions provided to them was complete, and that it was identical to the set of instructions the court had read to them. Moreover, the trial court's reading of the guilt phase instructions took up almost 39 pages of the reporter's transcript (RT Vol. 11 2603-2641), but its reading of the two instructions took up only 16 *lines* of the reporter's transcript (RT Vol. 11 2613). Therefore, it is unlikely that any of the jurors would have recalled the fleeting oral reading of CALJIC Nos. 2.60 and 2.61, let alone realize that they had been omitted from the set of instructions provided to them.

Second, even if the jurors somehow recalled CALJIC Nos. 2.60 and 2.61 as read by the court, those instructions were effectively nullified by CALJIC No. 17.45, which also stated that "[y]ou are to be governed only by

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[72] Although the giving of CALJIC No. 2.60 may be waived for tactical reasons (*People v. Holt* (1997) 15 Cal.4th 619, 687), there is nothing in the record to suggest that appellant withdrew his request for the instructions.

the instruction in its final wording." (RT Vol. 11 2639; CT Vol. 3 643.) This instruction would have led the jurors to believe that they were to follow the instructions in their final wording, i.e., that they were to follow the instructions as written, not as they were read by the judge.[73]

Third, it must be presumed that the jurors followed the written instructions. (See *People v. Osband* (1996) 13 Cal.4th 622, 687, citing *People v. Crittenden* (1994) 9 Cal.4th 83, 138 [trial court's error in misreading jury instruction held to be harmless, in part because the jury received the correct instruction in written form]; *People v. McLain* (1988) 46 Cal.3d 97, 111, fn. 2 [presuming that jurors were guided by written form of jury instructions].)

The "primacy" of written instructions is illustrated by *People v. Osband, supra*, 13 Cal.4th 622. There, the defendant argued that the trial court's error in misreading various jury instructions violated his rights under the federal Constitution. (*Id.* at pp. 686-688.) This Court rejected his argument as follows:

> Regarding the instructions orally misstated but whose written form defendant does not contend to be erroneous: The jurors had before them six copies of the written version when they began to deliberate, and we presume that they were guided by those copies. [Citation.] Although defendant insists that it is mere speculation to conclude that the jury even read the printed instructions, much less was guided by them, their primacy was reinforced by the court's admonition that "[y]ou are to be governed only by [each] instruction in its final wording whether printed, typed or handwritten." This direction reminded the jurors that it is difficult to recite

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[73] For example, the jurors reasonably could have assumed that, because they were not provided with written instructions relating to appellant's decision not to testify, those instructions had been withdrawn.

> complicated and lengthy written material verbatim and that the carefully prepared and reworked written text should guide them. The error committed in misstating the instructions was harmless. [Citation.] However, we emphasize the importance of trial judges reading jury instructions with care.

(*Id.* at pp. 687-688.) Here, by contrast, CALJIC Nos. 2.60 and 2.61 as read by the trial court correctly stated the law, but the written instructions were flawed because those instructions were omitted.

Thus, as appellant stated above, the trial court's failure to provide written copies of CALJIC Nos. 2.60 and 2.61 was tantamount to the failure to give those instructions at all, and thereby constituted "*Carter* error." As the high court has explained, "[j]ust as adverse comment on a defendant's silence 'cuts down on the privilege [against self-incrimination] by making its assertion costly,' [citation], the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege." (*Carter v. Kentucky*, *supra*, 450 U.S. at p. 305.)

Appellant is aware that this Court has rejected an argument that the trial court erred when it inadvertently omitted CALJIC Nos. 2.02 (regarding the sufficiency of circumstantial evidence to prove specific intent or mental state) and 2.03 (regarding a defendant's willfully false or deliberately misleading statement with respect to consciousness of guilt), which it had given to the jury orally, from the written set of instructions with which the jury was provided. (*People v. Ochoa* (2001) 26 Cal.4th 398, 446-447, disapproved of on other grounds in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.) In so holding, this Court observed that a "defendant has no federal or state constitutional right to instructions in writing [citation], and

the statutory right depends on an express request. (§ 1093, subd. (f).)" (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 447.)[74]

Ochoa, however, is distinguishable from the instant case. While CALJIC Nos. 2.02 and 2.03 undoubtedly are important jury instructions, CALJIC Nos. 2.60 and 2.61 directly implicate a critical constitutional principle. (See, e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 886-887 [this Court stated that "[i]nsofar as the federal Constitution itself does not require courts to instruct on the evaluation of circumstantial evidence where, as here, the jury properly was instructed on reasonable doubt [citations], defendant's claim necessarily rests on the asserted arbitrary denial of a state-created liberty interest. [Citation.] We doubt the common law right to a circumstantial evidence instruction rises to the level of a liberty interest protected by the due process clause. [Citation.]"].)[75] Moreover, while the legal principles set forth in CALJIC Nos. 2.02 and 2.03 are adequately covered by other standard jury instructions (see, e.g., *People v. Rodrigues*

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[74] In *People v. Samayoa* (1997) 15 Cal.4th 795, 845, this Court noted that neither the state nor the federal Constitution require that written instructions be provided to the jury, but also commented the provision of written instructions is "generally beneficial and to be encouraged."

[75] Appellant acknowledges that this Court declined to decide whether Ochoa's failure to object at trial waived the issue. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 447.) Nevertheless, appellant observes that instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (Pen. Code, §§ 1259, 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) Certainly, an error which runs afoul of a defendant's constitutional privilege against self-incrimination, the presumption of innocence, and his rights to due process and to trial by a properly instructed jury is one which affects his substantial rights.

(1994) 8 Cal.4th 1060, 1142 [trial court's error, if any, in failing to give CALJIC No. 2.02 was harmless where it gave the more inclusive CALJIC No. 2.01]; CALJIC No. 2.01 [regarding the sufficiency of circumstantial evidence generally]; CALJIC No. 2.20 [regarding the believability of a witness]),[76] only CALJIC Nos. 2.60 and 2.61 address a defendant's decision not to testify.

Indeed, decisions both of this Court and the United States Supreme Court make clear that "*Carter* error" violates a defendant's right against self-incrimination under the Fifth and Fourteenth Amendments. (*Carter v. Kentucky*, *supra*, 450 U.S. at p. 305; *People v. Evans*, *supra*, 62 Cal.App.4th at pp. 190-191.) The trial court's failure to give written copies of CALJIC Nos. 2.60 and 2.61 also violated appellant's due process right to present a defense (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, §§ 7 & 15; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294), his right to a fair and reliable capital trial (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638), his right to the presumption of innocence, requirement of proof beyond a reasonable doubt, and fair trial secured by due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15; *Estelle v. Williams* (1976) 425 U.S. 501, 503; see also *People v. Towey* (2001) 92 Cal.App.4th 880, 884 [noting that CALJIC Nos. 2.60 and 2.61 "relate to the fundamental right concerning self-incrimination and to the presumption of innocence]), and his right to trial by a properly instructed jury (U.S. Const., 6th and 14th Amends.; Cal.

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[76] The trial court in *Ochoa* instructed the jury pursuant to CALJIC No. 2.20. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 446.) However, the opinion is silent as to whether the trial court actually gave CALJIC No. 2.01.

Const., art. I, § 16; *Carter v. Kentucky*, *supra*, 450 U.S. at p. 302). Finally, the trial court's failure to comply with Penal Code section 1093, subdivision (f), denied a state-created right in violation of appellant's right to due process under the federal Constitution. (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, § 1, 7, and 15; *Hicks v. Oklahoma* (1980) 447 U.S. 343.) Accordingly, it is immaterial that a defendant ordinarily "has no federal or state constitutional right to instructions in writing." (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 447.)

C. The Trial Court's Error Was Prejudicial

Appellant acknowledges that whether "*Carter* error" is reversible per se remains an open question. (See *Carter v. Kentucky*, *supra*, 450 U.S. at p. 304 [the United States Supreme Court expressly declined to reach the question of whether not giving requested instructions on the defendant's failure to testify could be treated as harmless error].) However, even assuming the error is subject to harmless-error analysis (see *People v. Evans*, *supra*, 62 Cal.App.4th 186, 196-198 [holding that "*Carter* error" is subject to the harmless-error standard of *Chapman v. California* (1967) 386 U.S. 18, 24]), the entire judgment in this case must be reversed. During his closing argument, the prosecutor argued as follows:

> You heard from a lot of expert witnesses talk about generalities, about Vietnamese culture. *You have no evidence about this defendant*. And that is what you are here to decide about is this particular defendant and this particular crime.
>
> Defense counsel had an interesting argument about these experts. They would be biased if they knew something. That is kind of a ridiculous concept.

(RT Vol. 11 2597-2598; emphasis added.) It is likely that the jury believed that the prosecutor was referring (if only indirectly) to appellant's decision

not to testify, and that he was suggesting that appellant could have provided the supposedly missing evidence. As such, the prosecutor was asking the jury to draw an adverse inference from his decision not to testify, in violation of *Carter v. Kentucky*, *supra*, 450 U.S. 288. Under these circumstances, the state cannot show that the trial court's error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

For the foregoing reasons, the entire judgment must be reversed.

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V

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION THAT IT IMPOSE A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE PURSUANT TO PENAL CODE SECTION 190.4, SUBDIVISION (b)

A. Introduction

At the time the trial court declared a mistrial during appellant's first penalty trial, the jurors were split 10-2 in favor of life without possibility of parole (hereafter, "LWOP"). (RT Vol. 14 3156-3157; RT Vol. 20 4715, 4719-4720; CT Vol. 4 1120-1121; CT Vol. 6 1564.) At the time the trial court declared a mistrial during the second penalty trial, the jury was split 11-1 in favor of death. (RT Vol. 20 4715, 4718-4791; CT Vol. 6 1564.) Following the second mistrial, defense counsel filed a motion requesting that the trial court impose a sentence of LWOP. (CT Vol. 6 1563-1594.)

In their motion, defense counsel argued that: (1) appellant's motive and his lifetime of laudable character traits made LWOP the appropriate sentence (CT Vol. 6 1566-1572); (2) any death verdict reached during the third penalty trial would be based largely upon additional fabrications by appellant (referring to his transparent attempts to induce the prosecutor to seek, and the jury to return, a death verdict), not on a fair evaluation of the evidence in mitigation and aggravation (CT Vol. 6 1572-1576); (3) despite appellant's efforts to induce or provoke the previous two juries to vote to impose the death sentence, neither jury reached a unanimous verdict of death (CT Vol. 6 1576-1578); and, (4) confinement in state prison without the possibility of parole would be the appropriate sentence for appellant

(CT Vol. 6 1578).[77] Defense counsel specifically recited some of the evidence and other information supporting their arguments, but explained that their motion would not itemize all of the evidence supporting an LWOP sentence, "as the [trial] court is well aware of the details of the case by its having twice presided over the trial." (CT Vol. 6 1566, fn. 3; see also RT Vol. 20 4714-4716 [defense argument in support of motion].)

Defense counsel explained that the "precipitous swing from life [i.e., the 10-2 split in favor of LWOP at the first penalty trial] to death [i.e., the 11-1 split in favor of a death verdict at the second penalty trial] appears directly proportional to Mr. Trinh's improved performance at making jurors believe that he is a remorseless killer, so as to guarantee that which Trinh so desperately seeks: death." (CT Vol. 6 1564.) Defense counsel also presented evidence that this "precipitous swing" may have resulted from serious juror misconduct during the second penalty trial.[78]

The trial court denied appellant's motion, focusing solely on the numerical divisions among the jurors and the impact on the victims' families if there were to be a third penalty trial. (RT Vol. 20 4716-4720.)

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[77] Appellant discusses each of these points in greater detail in Section C, *post*.

[78] Defense counsel attached the following exhibits in support of the motion: (1) a newspaper article regarding appellant's demand that he be sentenced to death, and a letter to the newspaper's editor advocating verdicts based upon a majority of votes, which was sent by juror Ken Lindberg. (CT Vol. 6 1582-1583 [Appendix A]); and, (2) reports and declarations regarding interviews with jurors Vera Bloom, Ken Lindberg, and Roy Kenney, each of whom described instances in which they and/or fellow jurors introduced extraneous information during the deliberations, after which additional jurors changed their votes from LWOP to death (CT Vol. 6 1585-1586 [Exhibit B], 1588-1589 [Exhibit C], 1591-1594 [Exhibit D]).

Because the trial court failed to consider critical factors bearing on the motion – particularly, the mitigating evidence, the effect of appellant's efforts to obtain a death verdict, and the fact that LWOP would be an appropriate, sufficiently harsh sentence for appellant – the trial court's ruling constituted an abuse of discretion. The trial court's error violated appellant's rights to due process, a reliable penalty verdict, and the constitutional prohibitions against cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 1, 7, 13, 15, 16 and 17.)

B. Applicable Law

Penal Code section 190.4, subdivision (b), provides in pertinent part as follows:

> If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(See also *People v. Thompson* (1990) 50 Cal.3d 134, 177 [noting that the statute "specifically gives the court discretion to enter a sentence of life imprisonment without possibility of parole after a second deadlock"].)

Appellant is unaware of any published opinions reviewing a trial court's denial of a motion to prohibit a third penalty trial pursuant to section 190.4, subdivision (b). (Cf. *People v. Batts* (2003) 30 Cal.4th 660, 696-697 [challenging constitutionality of second retrial on double jeopardy grounds]; *People v. Sons* (2008) 164 Cal.App.4th 90, 93 and fn. 3 [same].) Logically, however, a trial court's exercise of discretion under section 190.4,

subdivision (b), must be reviewed under the abuse of discretion standard.

In *People v. Stewart* (1985) 171 Cal.App.3d 59, 65, the Court of Appeal set forth the "settled principles generally applicable when a trial court has discretion to act" as follows:

> It has been said that the term judicial discretion implies the absence of arbitrary determination, capricious disposition, or whimsical thinking. (*People v. Giminez* (1975) 14 Cal.3d 68, 72, 120 Cal.Rptr. 577, 534 P.2d 65.) The term means the exercise of discriminating judgment within the bounds of reason. To exercise judicial discretion, a court must know and consider all material facts and all legal principles essential to an informed, intelligent, and just decision. (*In re Cortez* (1971) 6 Cal.3d 78, 85-86, 98 Cal.Rptr. 307, 490 P.2d 819.)
>
> When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. (*Brown v. Newby* (1940) 39 Cal.App.2d 615, 618, 103 P.2d 1018.) A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 650-651, fn. 7, 190 Cal.Rptr. 355, 660 P.2d 813.) In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. (See *People v. Gimenez*, *supra*, 14 Cal.3d at p. 72, 120 Cal.Rptr. 577, 534 P.2d 65.)

This Court has explained that "[t]he abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, [footnote] its conclusions of law are reviewed de novo, [footnote] and its application of the law to the facts is

reversible only if arbitrary and capricious [footnote.]" (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712.)

As appellant demonstrates below, applying these principles to the trial court's denial of his section 190.4, subdivision (b), motion makes clear that its ruling was an abuse of discretion.

C. The Trial Court's Failure to Properly Exercise Its Discretion Under Penal Code Section 190.4, Subdivision (b), Constituted Prejudicial Error

Here, as noted above, defense counsel set forth several factors weighing in favor of LWOP and against a third penalty trial. First, defense counsel argued that appellant's motive and his lifetime of laudable character traits made LWOP the appropriate sentence. To that end, defense counsel identified or otherwise referred to evidence demonstrating that: (1) appellant killed out of pain and grief stemming from the loss of his mother, not for a baser motive such as financial gain or sexual gratification; (2) prior to his decision to seek revenge for what he believed to be the killing of his mother, he had exhibited some of the most valued character traits, such as love for his mother, kindness, trustworthiness, and an exceptional work ethic; (3) contrary to his testimony, he did not fully understand the hospital procedures; (4) he committed the killings under extremely emotional circumstances, i.e., immediately after learning that his beloved mother had died; and, (5) his plan was neither as sophisticated nor as calculated as portrayed by either appellant or the prosecution. (CT Vol. 6 1566-1572; RT Vol. 20 4715-4716.)

Second, defense counsel argued that any death verdict reached during the third penalty trial would be based largely upon additional fabrications by appellant, not on a fair evaluation of the evidence in mitigation and aggravation. In support of this argument, defense counsel

observed that: (1) appellant expressed remorse a number of times following the crime and up through his first penalty trial, belying his claimed lack of remorse; (2) appellant's earlier statements and testimony suggested that Rosetti and Robertson had surprised him and that he did not know where he was firing when he shot them, belying his testimony at the second penalty trial that he executed them; and, (3) defense counsel noted that, following his second penalty trial, appellant stated to the press that one of the factors leading him to kill was his lingering resentment towards the American government regarding the Vietnam War, completely contradicting his prior statements and testimony, in which he had explained that his sole motivation was to avenge the mistreatment of his mother. (CT Vol. 6 1572-1576.) As defense counsel observed, appellant "desperately" wanted the death penalty and was willing to say anything necessary to get it. (CT Vol. 6 1573-1574.)

Third, defense counsel reminded the trial court that, despite appellant's efforts to induce or provoke the first two juries to vote to impose the death sentence, neither one reached a unanimous verdict of death. (CT Vol. 6 1576-1578.) Moreover, defense counsel suggested, there was no additional information that the prosecution could use to sway a third jury to vote for death. The first jury was 10-2 in favor of LWOP. The second jury was 11-1 for death, but until jurors committed numerous acts of misconduct, the division had been only 8-4 in favor of death. (CT Vol. 6 1576-1577; RT Vol. 20 4715.)[79]

Finally, defense counsel pointed out that, in light of appellant's wish to obtain a death verdict, confinement in state prison without the possibility

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[79] The juror misconduct is described in greater detail below.

of parole would be an appropriate, and harsh, sentence. As defense counsel argued,

> Mr. Trinh devoted his entire life to caring for his mother, and all that Mr. Trinh lived for died the day his mother died. Prior to her death, he had no friends, no relatives and no support system. Nothing has changed during his three years of incarceration in the Orange County Jail, and nothing ever will. Mr. Trinh's isolation and loneliness will only increase in the harsh and unforgiving environment of state prison. Unlike most in his position, Mr. Trinh covets the death penalty – and lives in fear of a life sentence. For that reason, life without possibility of parole is an exceptionally harsh sentence for Mr. Trinh.

(CT Vol. 6 1578).

During a hearing on the motion, the trial court stated that the issue before it was "whether or not 12 reasonable citizens will reach a unanimous verdict." (RT Vol. 20 4716; see also RT Vol. 20 4717 [trial court stated that evidence of juror misconduct might be relevant to whether any 12 jurors would agree to a verdict in this case].) The court went on to state,

> If it was eight to four, I think my response would be different. There is no way the court would know that the misconduct, and there were at least two or three instances of misconduct, changed the votes.
>
> Eleven to one is awfully close; just like 10 to two was the other way around.
>
> I am also concerned about the families of the victims. I mean, it is so hurtful for them to go through another trial. The second trial was much worse than the first trial. You can see the pain.
>
> Last night that is all I could think about is what will a third trial do to the families? It is not just three families. We

have a fourth family,[80] you understand that, all suffering. And so no matter what we do, it won't be fair to them.

(RT Vol. 20 4719-4720.) Shortly thereafter, the trial court ruled, "Because of the close verdict of 11 to one, your motion is denied. Very hard decision." (RT Vol. 20 4720.)

The heart of defense counsel's motion was the notion that, because appellant's life history was so uniquely sympathetic and his crimes so out of character, the trial court should exercise its discretion by imposing the appropriate sentence, LWOP. However, the trial court framed the issue in an overly narrow fashion, that is, whether any jury could reach a verdict in this case. (RT Vol. 20 4713-4720.) Consequently, the court failed to address the central issue raised by appellant, namely, that LWOP was the appropriate sentence, and that the court should exercise its discretion under section 190.4, subdivision (b), to impose it. Moreover, nothing in the trial court's comments suggest that it did in fact consider either the mitigating evidence, appellant's efforts to induce a death verdict, or the unique severity of an LWOP sentence in this case, to determine whether LWOP was the appropriate sentence.

Instead, the court's ruling was based solely upon the numerical divisions among the jurors and the potential impact of a third penalty trial on the victims' families. The trial court's comments about the respective jury splits do not show that it independently reviewed and reweighed the mitigating evidence. Rather, the court appeared to consider the mitigating evidence, if at all, only to the extent that it bore on whether any potential

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[80] The trial court apparently was referring to Mila Salvador and her family.

jury could reach a unanimous verdict in this case. (RT Vol. 20 4716-4717.) In other words, the court did not consider the mitigating evidence for the purpose of determining whether it believed LWOP was the appropriate sentence, and, whether it would exercise its discretion to impose it. Similarly, the trial court's remark that its ruling represented a "[v]ery hard decision" does not demonstrate that it took the evidence cited by defense counsel into account, but simply reflected its concern that a third penalty trial would prove to be too difficult for the victims' families. (RT Vol. 20 4720.)

Under these circumstances, there is no indication that the trial court at least *considered* all of the evidence, and therefore its ruling was an abuse of discretion. (See *In re Cortez*, *supra*, 6 Cal.3d 78, 85-86 [to exercise judicial discretion, a court must know and consider all material facts and all legal principles essential to an informed, intelligent, and just decision].) Although section 190.4, subdivision (b), does not expressly require that the judge state the reasons for his or her ruling, the trial court in this case chose to do so. (Cf. § 190.4, subd. (e) [requiring that court expressly state the reasons for its ruling on an automatic motion for modification of the verdict].) That is, the trial court's statement of reasons made clear what it had and had not considered in making its ruling, and therefore this Court has a sufficient basis upon which to find an abuse of discretion. (See *People v. Stewart*, *supra*, 171 Cal.App.3d at p. 65.)

Even assuming the trial court properly confined its inquiry to "whether or not 12 reasonable citizens will reach a unanimous verdict" (RT Vol. 20 4716), its ruling was an abuse of discretion. According to the court, there was no way to know whether the jury misconduct changed the votes. (RT Vol. 20 4719.) However, the supporting exhibits submitted by defense

counsel strongly suggested that the misconduct did just that.

All three jurors discussed in the defense exhibits (i.e., Vada Bloom, Ken Lindberg and Roy Kenney) recalled that the jury split was 8-4 for death prior to a long Thanksgiving break. (CT Vol. 6 1585-1586, 1588, 1591.) Bloom, moreover, stated that the majority of the jurors had struggled throughout their deliberations. (CT Vol. 6 1585.)

On the Monday the jury returned from the break, juror Lindberg read a speech to his fellow jurors in which he focused on the suffering of the victims' families and suggested that the jury owed it to them to vote for death. Lindberg also relayed information regarding California's death penalty (e.g., that 62 cases had been overturned and that 1.5% of death row inmates had had their sentences carried out), data he had obtained by conducting internet research. (CT Vol. 6 1585, 1585, 1591-1592.) Juror Kenney reported to his fellow jurors that he had spoken to a co-worker to elicit his or her opinion about how African-Americans dealt with the death penalty, explaining that he did so to better understand the jury foreman, an African-American. (CT Vol. 6 1586, 1589.)

The defense exhibits also referred to several other instances of misconduct. One of the jurors consulted with an Asian-American co-worker, trying to determine whether appellant used the term "Americans" to refer to all non-Asians or to White people exclusively. (CT Vol. 6 1586, 1592.) According to Kenney, a few jurors, including himself, had contacted outside sources. For instance, he had asked his sister-in-law, a nurse, about La Palma Intercommunity Hospital and Fountain Valley Hospital, and one of the female jurors had consulted with a member of the clergy. (CT Vol. 6 1592.) Finally, one of the jurors recited Bible passages regarding punishment and remorse. (CT Vol. 6 1586.)

Bloom recalled that most of the outside information was revealed and discussed on the Monday the jury returned from the break. (CT Vol. 6 1586.) On that day, the vote changed from 8-4 to 9-3 or 10-2. (CT Vol. 6 1586, 1589.) Ultimately, three of the jurors changed their votes from LWOP to death during the week following the Thanksgiving break. (CT Vol. 6 1591.)

Evidence Code section 1150, subdivision (a), provides that

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

This Court has explained that "'[t]he only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration.' [Citations.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.)

In light of this authority, the trial court in this case could consider the defense exhibits in that they provided evidence of statements and conduct subject to corroboration within the meaning of *Steele*. For the same reason, the trial court could consider the exhibits insofar as they provided evidence regarding changes in the jury splits, which simply reflected observable events, not statements by the jurors regarding the effect of the misconduct on their deliberations. (See, e.g., *People v. Danks* (2004) 32 Cal.4th 269, 304-313 [concluding that unsolicited comments from one juror's pastor,

another juror's conversation with her pastor, and the introduction of the Bible passages to the jury room were misconduct, though harmless]; *In re Carpenter* (1995) 9 Cal.4th 634, 646-658 [considering whether a juror's misconduct (i.e., juror learned forbidden information but did not report it, then told nonjurors that the jurors were not supposed to know, but Carpenter had already been convicted and sentenced to death for the Santa Cruz crimes, and then lied about it when confronted after trial) was prejudicial]; *People v. Perez* (1992) 4 Cal.App.4th 906, 918-919 [if jurors discussed defendant's failure to testify, that discussion was admissible to impeach the verdict].)

The trial court recognized that whether juror misconduct had occurred was relevant to "whether or not any 12 will ever agree to a verdict in this case." (RT Vol. 20 4717.) However, the trial court's comment that there was no way to know whether the misconduct changed the votes suggests that it accepted the prosecutor's argument that the defense exhibits demonstrating juror misconduct constituted improper impeachment of the jury verdict. (RT Vol. 20 4719.)

Contrary to the court's position, it did not need to "know" whether the misconduct actually affected the jury deliberations. This Court has pointed out that a defendant need not affirmatively prove that the jury's deliberations were improperly affected by juror misconduct, which cannot be done under Evidence Code section 1150 and other authority. (*In re Carpenter*, *supra*, 9 Cal.4th at p. 652.) *At most*, the court should have applied the test governing a trial court's duty with respect to a motion for a new trial based upon jury misconduct, which requires that it undertake a three-step inquiry: (1) the court must determine whether the evidence presented for its consideration is admissible; (2) once the court finds that

the evidence is admissible, it must then consider whether the facts establish misconduct; and, (3) if misconduct is found to have occurred, the court must determine whether the misconduct was prejudicial. (*People v. Duran* (1996) 50 Cal.App.4th 103, 112-113.) Accordingly, the trial court could have, and should have, considered the evidence of misconduct for the purpose the court itself had identified, that is, to determine whether any potential jury could reach a unanimous verdict in this case. Its failure to do so was an abuse of discretion.

The trial court's abuse of discretion violated appellant's right to federal due process by arbitrarily depriving him of a statutory mechanism pursuant to which it could have sentenced him to the lesser sentence of LWOP. (U.S. Const., 5th, 6th and 14th Amends.; Cal. Const., art. I, § 1, 7, and 15; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347 [defendant constitutionally entitled to procedural protections afforded by state law]; see also *People v. Memro* (1995) 11 Cal.4th 786, 880 [presuming that the Legislature, in enacting section 190.4, subdivision (b), considered LWOP to be a less severe penalty than death].) It also violated the Eighth Amendment's requirement for reliability in capital sentencing by permitting a third penalty trial which, as defense counsel warned, was tainted by irrelevant and inflammatory information, including improper victim impact evidence. (See Arguments VII and VIII, *post*, incorporated by reference as if fully set forth herein.) Finally, the court's abuse of discretion violated the constitutional prohibitions against cruel and unusual punishment. (See Arguments VI, IX, and X, *post*, incorporated by reference as if fully set forth herein.)

Under these circumstances, the state cannot show that the trial court's error was harmless beyond a reasonable doubt. (*Chapman v.*

California (1967) 386 U.S. 18, 24.) Even if the error is viewed as one involving purely statutory law, the death judgment must be reversed because it is reasonably possible that it affected the penalty decision. (*People v. Brown* (1988) 46 Cal.3d 432, 447.)

Accordingly, this Court must reverse the death judgment and remand the case for a new penalty trial.

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VI

THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTIONS TO BAR A PENALTY RETRIAL VIOLATED HIS RIGHTS TO DUE PROCESS, A FAIR TRIAL, A RELIABLE PENALTY VERDICT, EQUAL PROTECTION, AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

A. Introduction

Prior to his second penalty trial, appellant filed a motion to prohibit retrial of the penalty phase. (CT Vol. 4 1115-1121.) In his motion, appellant argued that retrial of the penalty phase would violate the due process clauses of the state and federal Constitutions and the Eighth Amendment's prohibition against cruel and unusual punishment. (CT Vol. 4 1116-1119.) In further support of the motion, appellant attached the declaration of defense investigator Alan Clow, who stated that after the first penalty trial ended in a mistrial, two of the jurors informed him that the jury had split 10-2 in favor of life without possibility of parole. (CT Vol. 4 1120-1121 [Exhibit A].) The trial court denied appellant's motion, stating, "No violation of the due process laws. The statute is constitutional." (RT Vol. 14 3130.)[81]

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[81] The trial court apparently was referring to Penal Code section 190.4, subdivision (b), which provides in pertinent part as follows:

> If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a

(continued...)

Prior to the third penalty trial, appellant orally renewed his challenge to the constitutionality of a retrial, relying on the motion he had raised at the second retrial. (RT Vol. 21 4777.) The prosecutor opposed the motion, arguing that retrial of the penalty phase was constitutional. He explained that he was relying on "[t]he fact there is no contrary authority." The court then ruled as follows:

> That is what I thought. And I did evaluate it. And because of the numbers involved and the way they changed, I thought a third trial was appropriate if the prosecutor chose to do it. That is certainly not unconstitutional. Okay. So that is denied.

(RT Vol. 21 4780.)[82]

Allowing the penalty retrial under these circumstances constituted federal constitutional error. An overwhelming majority of the jurisdictions that allow the death penalty to be imposed do not permit the penalty phase to be retried after a jury has been unable to reach a unanimous verdict as to penalty. As one of the few remaining jurisdictions that permits a penalty retrial following a hung jury, California's death penalty scheme is an anomaly and is contrary to the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) Here, the trial court permitted a penalty retrial following not one but *two*

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[81](...continued)
term of life without the possibility of parole.

[82] As appellant discusses in Argument V, *ante*, which addresses the trial court's error in denying his motion requesting that it impose a sentence of life without the possibility of parole (hereafter, "LWOP") pursuant to section 190.4, subdivision (b), the jury at the first penalty trial was split 10-2 in favor of LWOP, while the jury at the second penalty trial was split 11-1 in favor of death. (See CT Vol. 6 1564.)

hung juries, thereby violating appellant's federal constitutional rights to a fair jury trial, reliable penalty determinations, freedom from cruel and unusual punishment, equal protection, and due process as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as analogous protections in article I, sections 1, 7, 15, 16, and 17 of the California Constitution.

B. The Trial Court's Denial of Appellant's Motions to Bar a Penalty Retrial Violated the Prohibition Against Cruel and Unusual Punishment

1. Standard of Review

Analysis of a claim that a death penalty scheme violates the cruel and unusual punishment prohibition of the Eighth Amendment involves two inquiries: (1) an examination of the "objective indicia that reflect the public attitude toward a given sanction" (*Gregg v. Georgia* (1976) 428 U.S. 153, 173), including the "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made" (*Enmund v. Florida* (1982) 458 U.S. 782, 788); and, (2) "informed by [these] objective factors to the maximum possible extent" (*Coker v. Georgia* (1977) 433 U.S. 584, 592), the Court "bring[s] its own judgment to bear on the matter" (*Enmund v. Florida*, *supra*, 458 U.S. at pp. 788-789) to determine whether the sanction "comports with the basic concept of human dignity at the core of the Amendment" (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 182).

2. Analysis

The death penalty is currently barred in 15 states and in the District of Columbia.[83] The death penalty is currently authorized under federal law and in 35 state jurisdictions. However, in the vast majority of these jurisdictions – that is, in 23 of the 35 states, and under the federal death penalty law[84] – if the jury is unable to agree unanimously on a penalty phase verdict, there is no penalty retrial and the defendant is instead sentenced to

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[83] The death penalty is prohibited in the following jurisdictions: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin. The death penalty is also prohibited in the District of Columbia. (See Death Penalty Information Center website at www.deathpenaltyinfo.org/documents/FactSheet.pdf.)

[84] 18 USCA § 3593(d); Ark. Stat. Ann. § 5-4-603(c); Col. Rev. Stat. Ann. § 18-1.3-1201(2)(b)(II)(d); Ga. Code Ann. § 17-10-31(c); Id. Code § 19-2515(7)(c); Ill. Ann. Stat. ch. 720, § 5/9-1(g); Kan. Stat. Ann. § 21-4624(e); La. Stat. Ann. – Code Crim. Proc. art. 905.8; MD Code, Crim. Law § 2-303(j)(2); Miss. Code Ann. § 99-19-103; Mo. Ann. State. § 565.030(4); N.H. Rev. Stat. Ann. § 630:5(IX); N.C. Gen. Stat. Ann. § 15A-2000(b); Ohio Rev. Code Ann. § 2929.03(D)(2); Okla. Stat. Ann. tit. 21, § 701.11; Pa. Con. Stat. Ann. tit. 42, § 9711(c)(1)(v); SC Code 1976 Ann. 16-3-20(C); SD Codified Laws Ann. §23A-27A-4; Tenn. Code Ann. § 39-13-204(h); Tex. Crim. Proc. Code Ann. art. 37.071(2)(g); Utah Code Ann. § 76-3-207(5)(c); Va. Code Ann. § 19.2-264.4(E); Wash. Rev. Code Ann. § 10.95.080(2); Wyo. Stat. § 6-2-102(d)(ii); see also *State v. Springer* (Ohio 1992) 586 N.E.2d 96, 100 [holding that when a jury becomes irreconcilably deadlocked during the penalty phase, the trial court is required to sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment]. To date, appellant has found no Nebraska court opinions or death penalty statutes discussing the consequences of a hung jury at the penalty phase.

life imprisonment or LWOP.[85]

Formerly, California followed, under the 1977 death penalty statute, the more enlightened trend and prohibited a penalty retrial following a hung jury. (See *People v. Kimble* (1988) 44 Cal.3d 480, 511.)[86] However, under the harsher 1978 death penalty statute, California reverted to the minority group of states which permit such penalty retrials. (§ 190.4, subd. (b).) This position is followed in only a few other jurisdictions.[87] Statutes in Connecticut and Kentucky are silent about the consequences of a hung jury in the penalty phase of a capital case, but case law suggests that penalty retrials are permissible. (*State v. Daniels* (Conn. 1988) 542 A.2d 306, 317; *State v. Ross* (Conn. 2004) 849 A.2d 648, 726, fn. 68; *Skaggs v. Commonwealth* (Ky. 1985) 694 S.W.2d 672, 682; *Dillard v. Commonwealth* (Ky. 1999) 995 S.W.2d 366, 374.)

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[85] Delaware has enacted a procedure which requires a unanimous jury finding of at least one aggravating circumstance, although the judge makes the ultimate penalty determination; if the jury is unable to unanimously find at least one aggravating circumstance, a life sentence is imposed. (11 Del. Code § 4209(d)(1) and (2).) Similarly, Montana employs a procedure where the judge determines the penalty upon a jury finding of at least one aggravating factor. (Mont. Code Ann. § 46-18-305.) Florida requires that the jury make a recommendation on sentencing, but the judge actually decides between life and death. (Fla. Stat. Ann. § 921.141(2) and (3).)

[86] See former Cal. Pen. Code, § 190.4, subd. (b).

[87] Ala.Code 1975 § 13A-5-46(g); Ariz. Crim. Code § 13-752(J); Ind. Code § 35-50-2-9(f) [mandating retrial by court if the jury is unable to agree upon a penalty verdict]; Nev. Rev. Stat. 175.556(1); Or. Rev. Stat. Ann. § 163.150(5). Significantly, Arizona Revised Statute section 13-752(J) provides in pertinent part that "[i]f the [second penalty] jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant."

Thus, California is one of only seven jurisdictions out of 52 (the 50 states, the federal government, and the District of Columbia) which permit a penalty retrial following a hung jury in a capital case. That means that even if one considers only the 50 states, 43 of them do not allow a penalty retrial after a hung jury. This shows that California is out of step with an emerging national consensus prohibiting penalty retrials following a hung jury. But, even more remarkable, California is one of only *two* states (along with Alabama) which expressly permit more than one penalty retrial. (See Pen. Code, § 190.4, subd. (b); Ala.Code 1975 § 13A-5-46(g).)

The overwhelming consensus prohibiting a penalty phase retrial following a hung jury, let alone more than one hung jury, reflects a widespread recognition that concern for fundamental fairness and human dignity requires that a capital defendant should only be "forced to run the gantlet once." (*Green v. United States* (1957) 355 U.S. 184, 190.) Ordinarily, "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause" (*Richardson v. United States* (1984) 468 U.S. 317, 324), and this general rule has been held applicable to capital case penalty proceedings. (*Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 108–110.)

Even if double jeopardy does not apply, however, it is still indisputable that death is a penalty different from all others. (*Gregg v. Georgia, supra*, 428 U.S. at p. 188 (joint opinion of Stewart, Powell and Stephens, JJ.).) No capital defendant should be subject to repeated attempts by the State to sentence him to death, "thereby subjecting him to embarrassment, expenses and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . .' [Citation.]" (*United States v. Scott* (1978) 437 U.S. 82, 95.) Such penalty retrials also take a tremendous toll on the other trial participants – defense counsel, the

prosecutors, the trial judge and court personnel, and the families and friends of the victims and defendants. Indeed, most states which allow the death penalty have recognized that one penalty trial is enough.

A review of recent opinions in which the United States Supreme Court struck down certain death penalty provisions based on a "national consensus" is illustrative. In *Atkins v. Virginia* (2002) 536 U.S. 304, 313-315, the United States Supreme Court held that execution of the mentally retarded is unconstitutional based on the fact that 30 states prohibit such executions, including the 12 states that prohibit the death penalty in any circumstance. Using those same statistics, that Court later held that the execution of juveniles is unconstitutional. (*Roper v. Simmons* (2005) 543 U.S. 551, 564.)[88] More recently, the United States Supreme Court held that the Eighth Amendment prohibits the death penalty for the rape of a child, relying on the fact that, of the 37 jurisdictions which have the death penalty, only six authorized the death penalty for that offense. (*Kennedy v. Louisiana* (2008) 128 S.Ct. 2641, 2649-2653.) In so holding, the Supreme Court explained,

> Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins* and *Roper* and the 42 States in *Enmund* [*v. Florida, supra*, 458 U.S. 782] that prohibited the death penalty under the circumstances those cases considered.

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[88] The high court's analysis in *Atkins* and *Roper* demonstrates that, in determining whether there is a national consensus with respect to some aspect of the death penalty, it is appropriate to include non-capital jurisdictions.

(*Id.* at p. 2653.)

Significantly, appellant would not have faced a third penalty trial in *50* of the 52 jurisdictions, or in *34* of the 36 capital jurisdictions! These figures far surpass even the 45 jurisdictions in *Kennedy*, let alone the cases cited therein, and must be held to demonstrate that California is well outside of the national consensus prohibiting more than one retrial of a penalty phase.

The profound importance of "evolving standards of decency" in considering the Eighth Amendment's prohibition against cruel and unusual punishment was recently highlighted by *Graham v. Florida* (2010) ___ U.S. ___, 130 S.Ct. 2011. There, the high court prohibited a particular type of sentence *other than the death penalty*. Specifically, the Court held that the Eighth Amendment's Cruel and Unusual Punishments Clause does not permit a juvenile offender to be sentenced to LWOP for a nonhomicide crime. (*Id.* at p. 2034.)[89] The Supreme Court made clear that its opinions interpreting the clause "underscore the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes." (*Id.* at p. 2021.)

Appellant acknowledges that this Court has repeatedly held that a

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[89] In reaching its holding, the high court considered indicia of a national consensus against the imposition of LWOP for juvenile offenders convicted of nonhomicide offenses. (*Id.* at pp. 7119-7121.) Among other things, the Court noted that "only 12 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders – and most of those impose the sentence quite rarely – while 26 States as well as the District of Columbia do not impose them despite apparent statutory authorization." (*Id.* at p. 7120.) Significantly, far fewer jurisdictions permit a penalty retrial after one hung jury, let alone two, than permitted a sentence of LWOP for juvenile nonhomicide offenders.

penalty-only retrial is permitted after a mistrial is declared. (See, e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 633-634; *People v. Halvorsen* (2007) 42 Cal.4th 379, 423-426; *People v. Gurule* (2002) 28 Cal.4th 557, 645-646; *People v. Davenport* (1995) 11 Cal.4th 1172, 1192-1194; *People v. Hawkins* (1995) 10 Cal.4th 920, 966-968.) However, none of these opinions addressed the argument made here. In *Halvorsen*, *supra*, 42 Cal.4th at pp. 425-426, and *Gurule*, *supra*, 28 Cal.4th at p. 646, the defendants challenged their penalty retrials on double jeopardy grounds. *Davenport* and *Hawkins* both dealt with the issue of whether a penalty retrial would deprive the defendant of the right to have the jury treat "lingering doubt" from the guilt phase as a reason not to vote for death. (*People v. Davenport*, *supra*, 11 Cal.4th at p. 1193; *People v. Hawkins*, *supra*, 10 Cal.4th at pp. 966-968.) Appellant has not raised either of these claims. To that extent, this Court's prior decisions are not applicable because "[i]t is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.)

3. Penal Code Section 190.4, Subdivision (b), Unconstitutionally Mandated That the Trial Court Deny Appellant's Motion to Bar a Second Penalty Trial

Appellant acknowledges that, under Penal Code section 190.4, subdivision (b), the trial court lacked discretion to bar a second penalty retrial and impose a sentence of LWOP instead. (See *People v. Thompson*, *supra*, 50 Cal.3d at p. 177 ["The fact that the statute specifically gives the court discretion to enter a sentence of life imprisonment without possibility of parole after a second deadlock makes it clear that the emphasized language mandates a retrial after a first deadlock].) However, for the reasons set forth above, section 190.4, subdivision (b), is unconstitutional

on its face, as it is inconsistent with the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, *supra*, 356 U.S. at p. 101.)

Moreover, the provision is unconstitutional as applied in this case. Because the trial court was required to order that a new jury be impaneled, it was precluded from considering the arguments and evidence presented in, and ruling on the merits of, appellant's motion to bar a second penalty trial. (CT Vol. 4 1116-1121.) Instead, the court summarily denied the motion. (RT Vol. 14 3130.)

Appellant is aware that this Court recently held that the fact that "California is among the 'handful' of states that allows a penalty retrial following jury deadlock on penalty does not, in and of itself, establish a violation of the Eighth Amendment or 'evolving standards of decency that mark the progress of a maturing society.'" (*People v. Taylor*, *supra*, 48 Cal.4th at p. 634.) Appellant submits that the *Taylor* opinion asserts that the California statute allowing a penalty retrial following jury deadlock does not violate the Eighth Amendment, but fails to explain why that is so. Therefore, appellant respectfully requests that this Court reconsider its holding in that case.

4. Penal Code Section 190.4, Subdivision (b), Unconstitutionally Permitted a Third Penalty Trial

Although this Court has held that section 190.4, subdivision (b), does not violate the Eighth Amendment by allowing a penalty retrial following a jury deadlock (*People v. Taylor*, *supra*, 48 Cal.4th at p. 634), appellant is unaware of any cases addressing the constitutionality of a *third* penalty trial following two penalty-phase hung juries. It should also be noted that

although section 190.4, subdivision (b), codifies a procedural matter, it nevertheless comes within the purview of the cruel and unusual provision of the Eighth Amendment. When the State seeks death, courts must ensure that every safeguard designed to guarantee "fairness and accuracy" in the "process requisite to the taking of a human life" is painstakingly observed. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414; see also *Gardner v. Florida* (1977) 430 U.S. 349, 357-358.) As a result, the Eighth Amendment requires a "greater degree of accuracy" and reliability. (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342; see also *Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 ["[T]he severity of the death sentence mandates heightened scrutiny in the review of any colorable claim or error."].)

The trial court denied appellant's motion to prohibit a third penalty trial "because of the numbers involved and the way they changed" (RT Vol. 21 4780), referring to the jury splits of 10-2 (for LWOP) and 11-1 (for death). However, the trial court failed to consider the likelihood that the serious jury misconduct which occurred during the second penalty trial changed the jury split from 8-4 to 11-1, a matter which had already been brought to its attention. (CT Vol. 6 1563-1594; RT Vol. 20 4713-4720; see also Argument V, *ante*, incorporated by reference as if fully set forth herein.)

Moreover, permitting a third penalty trial was likely to, and indeed did, result in unfair proceedings and an unreliable death verdict. The trial court in this case was aware not only that the proceedings had been painful for the victims' families (RT Vol. 20 4719-4720), but that their increasing anger and frustration had led some family members to engage in improper conduct from the stand and from the gallery (RT Vol. 21 4790-4796, 4804-4807). (See Argument VII, *post*, incorporated by reference as if fully set

forth herein.) Thus, even if section 190.4, subdivision (b), ordinarily passes constitutional muster – e.g., because a retrial represents a "clean slate," a new opportunity for a fair trial – the court knew or reasonably should have known that there was virtually no chance that a retrial in this case would be free of serious error.

Thus, Penal Code section 190.4, subdivision (b), is unconstitutional both on its face and as applied in this case, in that compelling appellant to endure the ordeal of a third full-blown trial concerning whether he would live or die was constitutionally inconsistent with the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, *supra*, 356 U.S. at p. 101.)

5. Denial of Appellant's Motion to Prohibit a Third Penalty Retrial Permitted the Arbitrary and Capricious Imposition of the Death Penalty in Violation of the Eighth Amendment

"[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. (*Furman v. Georgia* (1972) 408 U.S. 238, 309-310 (conc. opn. of Stewart, J.); see also *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plurality opn.).)

As appellant argued below, "[i]mplicit in [footnote omitted] the well-established constitutional requirement of individualized sentencing is that the possibility of 'randomness' or 'bias in favor of the death penalty' should not be injected into the sentencing determination." (CT Vol. 4 1119 & fn 2 [citing *Stringer v. Black* (1992) 503 U.S. 222, 235-236].) However, the injection of "randomness" and "bias in favor the death penalty" is

precisely what occurred at both the second and third penalty retrials. As appellant demonstrates, the second penalty trial was tainted by serious juror misconduct, and both the second and third penalty trials were marred by, among other things, irrelevant and inflammatory victim impact evidence. (See Arguments V, *ante*, and VII and VIII, *post*, incorporated by reference as if fully set forth herein.)

C. Penal Code Section 190.4, Subdivision (b), Violated Appellant's Right to Equal Protection

Penal Code section 190.4, subdivision (b), also violated appellant's right to equal protection of the law under both the state and federal Constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7) because, in a case like this one, where both the first and second penalty trial end with a hung jury, it contains no standards to guide a trial court's discretion as to whether to grant LWOP or order that a new jury be impaneled. As a result, the provision allows identically situated defendants to receive starkly different sentences – one with a court-imposed sentence of LWOP and another with a jury-imposed sentence of death.

Appellant is aware that this Court has upheld the constitutionality of various provisions of the California Penal Code which vest a trial court with discretionary power to sentence defendants convicted of certain crimes to state prison or to jail but do not mention standards for the exercise of that discretion. (See *In re Anderson* (1968) 69 Cal.2d 613, 626, citing Penal Code sections 17, 476a, 489, 496, and 524.) However, there is a profound difference between a death sentence and the punishment for the relatively minor offenses to which those sections pertain. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 188 (lead opn. of Stewart, J.) ["the penalty of death is different in kind from any other punishment imposed under our system of

criminal justice"].)

Similarly, appellant is aware that this Court has repeatedly rejected challenges to the discretion vested in juries to choose between death and life imprisonment without possibility of parole under California's death penalty scheme. However, a penalty jury is given at least *some* guidance as to how it should exercise its discretion. (See, e.g. CALJIC Nos. 8.85 and 8.88.)[90] Section 190.4, subdivision (b), provides absolutely no guidance as to how a trial court should exercise its discretion in deciding whether to impose LWOP or impanel a new jury. The absence of standards is exacerbated by a dearth of case law concerning the exercise of discretion under that provision.

Moreover, section 190.4, subdivision (b), is unconstitutional as applied in this case, for the trial court's ruling permitted the Orange County District Attorney's Office to continue its single-minded, selective pursuit of a death sentence against appellant. While "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination'" (*McCleskey v. Kemp* (1987) 481 U.S. 279, 292), appellant has amply demonstrated that the prosecution sought the death penalty in an arbitrary and capricious manner. (See Argument I, *ante*, incorporated by reference as if fully set forth herein; see also CT Vol. 4 1116-1119.)

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[90] Nevertheless, as appellant discusses in Argument XI, *post*, California's death penalty scheme fails to provide sufficient guidance to penalty juries, and thereby runs afoul of both the federal Constitution and international law.

D. Penal Code Section 190.4, Subdivision (b), Violated Appellant's Right to Due Process

For the reasons set forth in Sections B and C, *ante*, the statute, on its face and as applied in this case, also violated appellant's right to due process. (U.S. Const., 5th, 6th and 14th Amends.; Cal. Const., art. I, §§ 7 and 15; see also *Gardner v. Florida*, *supra*, 430 U.S. at p. 358 [noting that the sentencing process must satisfy the requirements of the Due Process Clause].)

E. The Death Judgment Must Be Reversed

Because the state cannot show that these violations of the federal Constitution were harmless beyond a reasonable doubt, appellant's death judgment must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if the error is viewed as one of state law, error that affects the penalty determination similarly requires reversal if there was a "reasonable possibility" that it affected the penalty decision. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) These standards are the same in substance and effect. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965, disapproved on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

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VII

THE TRIAL COURT ERRED BY ADMITTING HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE

Prior to his third penalty trial, appellant renewed his motion to limit victim impact testimony and the number of victim impact witnesses. (CT Vol. 6 1625-1678.)[91] Appellant pointed out that

> [t]he prosecution introduced 11 victim impact witnesses in Trinh I and 11 victim impact witnesses in Trinh II . . . as [an] aggravating circumstance under Penal Code section 190.3(a). Based on the number and increasingly improper nature of the testimony, permitting the introduction of this testimony or evidence in Trinh III goes beyond the permissible bounds set by case law. It will distort the process of determining whether the defendant should receive life [or] death, causing any resulting death sentence to violate the Due Process and Cruel and Unusual Punishment Clauses of the California and United States Constitutions.

(CT Vol. 6 1625.) In support of his motion, appellant submitted reporter's transcripts of the testimony of five victim impact witnesses, highlighting several incidents in which the witnesses had "offered irrelevant and inflammatory rhetoric in thinly veiled attempts to divert the jury's attention from its proper role" (CT Vol. 6 1627-1628).[92] Appellant also submitted

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[91] Prior to each of the first two penalty trials, appellant had similarly moved to limit the scope of victim impact evidence and the number of victim impact witnesses. (CT Vol. 3 742-746; RT Vol. 12 2675-2682; RT Vol. 14 3153-3159, 3185-3186; RT Vol. 16 3807-3811; RT Vol. 19 4421-4432.)

[92] Specifically, appellant attached transcripts of the testimony of Joe Partise (CT Vol. 6 1633-1639 [Exhibit A]); Angela Rosetti-Smith (CT Vol. 6 1640-1645 [Exhibit B]); Derek Robertson (CT Vol. 6 1646-1651 [Exhibit C]); Suzanne Robertson (CT Vol. 6 1652-1659 [Exhibit D]); and, Kirk

(continued...)

the declaration of a juror who recalled, among other things, that "[many] of the Jurors couldn't put their emotions aside because they felt so much sorrow after hearing all of the victim's witnesses" (CT Vol. 6 1669-1670 [Exhibit F]); the declaration of a defense investigator regarding his interview of a second juror, who reported that the jury was deeply affected by the victim impact witnesses, and that the juror himself had read a statement urging his fellow jurors to give the victims' families "what they want" (CT Vol. 6 1671-1673 [Exhibit G]); a newspaper article which reported that "[a]nguished jurors wept and apologized to the [victims'] relatives" after a mistrial was declared at the second penalty trial (CT Vol. 6 1674-1675 [Exhibit H]); and, the declaration of a defense attorney who had represented Charles Ng (Orange County Superior Court case no. 94ZF0195), whose case involved 12 victims but only 10 victim impact witnesses (CT Vol. 6 1631, fn. 6, and 1676-1677 [Exhibit I]).

Although the trial court prohibited certain lines of inquiry, it largely denied appellant's motion to confine the scope of the victim impact testimony and denied altogether his motion to limit the number of victim impact witnesses. (RT Vol. 21 4789-4792.) The prosecutor subsequently called Dave Mustaffa (Marlene Mustaffa's husband), Debbie Marshall (Vince Rosetti's sister), Michael Rosetti (Rosetti's brother), Angela Rosetti-Smith and Becky Rosetti (Rosetti's daughters), Agnes Rosetti (Rosetti's mother), Suzanne Robertson (Ron Robertson's wife), Derek Robertson (Robertson's son), and surviving victim Mila Salvador.

As appellant demonstrates below, the trial court erred by admitting

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[92](...continued)
Premo (CT Vol. 6 1660-1668 [Exhibit E]). All but Partise and Premo went on to testify at the third penalty trial.

foreseeably inflammatory, irrelevant and unduly prejudicial victim impact evidence, thereby violating his rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and analogous provisions of the California Constitution. Therefore, reversal of the death judgment is required.

A. Procedural Background

Appellant's motion raised two basic arguments with respect to victim impact evidence. First, appellant argued that the narrow scope of permissible victim impact testimony had been exceeded by the victim impact testimony presented during the first two penalty trials, in violation of the state and federal constitutional prohibitions against cruel and unusual punishment (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17). (CT Vol. 6 1625-1630.)

In so arguing, appellant observed that *Payne v. Tennessee* (1991) 501 U.S. 808 "held that the Eighth Amendment permits capital sentencing juries to consider evidence that provides factual information of a victim's personal characteristics and demonstrates the loss to the victim's family." (CT Vol. 6 1628.) Appellant also cited *People v. Edwards* (1991) 54 Cal.3d 787, 835-836, in which this Court cautioned,

> . . . we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne* [*v. Tennessee* (1991) 501 U.S. 808]. [Footnote omitted.]
>
> Our holding also does not mean there are no limits on emotional evidence and argument. In *People v. Haskett* [(1982) 30 Cal.3d 841, 864], we cautioned, "Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court

> must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed."

(CT Vol. 6 1627.)

Accordingly, appellant requested that victim impact evidence be limited to "evidence that [is] factual in nature," and that the court not "allow 'emotion to reign over reason.'" (CT Vol. 6 1628-1629.) Appellant noted that a trial court must strike a careful balance between the probative and the prejudicial information requested of and elicited from each witness. (CT Vol. 6 1630, citing *People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) Appellant also suggested that the trial court (1) inform each of the witnesses, prior to their testimony, that it would not allow them to testify if they were unable to control their testimony, and (2) that it caution the victims' family members that characterizations and opinions concerning appellant, the crime, or the appropriate sentence would not be tolerated. (CT Vol. 6 1630, citing *United States v. Glover* (D. Kan. 1999) 43 F.Supp.2d 1217, 1236.)

Second, appellant argued that the number of victim impact witnesses in this case was excessive, rendering the penalty phase fundamentally unfair in violation of his right to due process (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, § 15) and the prohibition against cruel and unusual punishment (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17). In so arguing, appellant stated that an "exhaustive" search of case law since 1991 disclosed no other case involving as many victim impact witnesses as

had testified in his case. (CT Vol. 6 1631.) Appellant also observed that much of the testimony from members of the Rosetti and Robertson families was cumulative. (CT Vol. 6 1631-1632.) Accordingly, he requested that the court limit the number of victim impact witnesses to no more than two witnesses per victim. (CT Vol. 6 1630-1632.)[93]

During a hearing on appellant's motion, the trial court acknowledged that "there are parameters on what is admissible under victim impact. I mean, it should be a factual statement of the victim. I suppose the victim's life, what was lost and what that loss meant to close family members." The court then explained that it meant that victim impact witnesses "should be people relatively close to the victim, and, you know, just [testify to] how the loss of a life impacted them in their lives. And that is pretty broad." (RT Vol. 21 4788.)

The trial court acknowledged that some of the prior victim impact evidence was improper. First, the trial court remarked, "And I believe it was the brother-in-law's testimony, mostly irrelevant and somewhat inflammatory." (RT Vol. 21 4788.)[94] Second, the trial court acknowledged that two of the victim impact witnesses (referring to Rosetti-Smith and Derek Robertson) improperly had commented about appellant and the manner in which he had committed the crimes. (RT Vol. 21 4789, 4791.)[95]

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[93] During the hearing on the motion, the defense specifically objected to the number of victim impact witnesses testifying about victim Rosetti. (RT Vol. 21 4787.)

[94] The trial court was referring to the testimony of Joe Partise. (See CT Vol. 6 1627-1628, 1633-1639.)

[95] Rosetti-Smith concluded her testimony at the second penalty trial (continued...)

Lastly, the trial court observed that certain questions posed by the prosecutor – specifically, (1) questions about what occurred at the victim's funeral, and (2) questions to the effect of "What was the hardest thing to do after you found out he was murdered?" and "Anything else you need to tell us?" – tended to elicit improper responses. (RT Vol. 21 4792.)

Significantly, after the prosecutor stated that he intended to caution the family members again, the trial court replied as follows:

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[95](...continued)
by stating, "All this pain because one person had complete[,] utter disregard for human life." (RT Vol. 16 3806.) During his testimony at the second penalty trial, Derek Robertson stated, ". . . your just whole feeling just sinks down just because of a choice of some idiot pissed off about his mom dying and has to take other –" Although the court tried to interrupt him, Robertson continued, saying," – that is a coward." (RT Vol. 16 3819.) Shortly thereafter, he testified, "I mean I just wish I was there, you know, and I would have made for sure he would have died instead of my dad." (RT Vol. 16 3819.) His testimony concluded in the following manner:

> [Prosecutor]: Is there anything else you want to tell us about yourself or your family?
>
> [Robertson]: No. I love my family and I love everyone I got to know through all this. It kind of sucks how we got to meet new people through these type of stages, people's stupid decisions, cowardly decisions.
>
> I don't call him a man. I call him a feces. That is –
>
> [Prosecutor]: That is enough, Derek.
>
> [Robertson]: Pussy.

(RT Vol. 16 3820-3821.)

It doesn't work, Mr. Moore. I know you cautioned them last time. My suggestion, and that is all it is, with Mr. Derek Robertson, maybe you ought to talk about taking the admissible matters out of his prior testimony and having someone read it. His demeanor on the stand is very, very, very upsetting, very, very, very upsetting, his demeanor in the courtroom, and his demeanor and some of the other family members in this last trial, especially near the end is very, very troublesome. And I know it is rare that we have mistrials caused by spectator conduct, but it wouldn't take any more than what happened at the end of the last trial for the court to entertain such a motion.

The case is getting to the family. I know you disagreed with me when we had the motion after the last trial. It is getting to them.

(RT Vol. 21 4789-4790.)[96]

After the prosecutor agreed that the victims' family members were frustrated, the trial court continued:

I know. And I am thinking about their welfare. But, you know, controlling them in the courtroom is very, very difficult. First trial was fine. Second trial passes constitutional muster until the end when the verdict (*sic*) was read. I mean the courtroom went berserk. It was very, very upsetting. I have had spectator misconduct alleged in other cases, but I have never seen anything as loud and boisterous and troublesome to the jurors. Of course, they are finished. But if that is any indication of what we can expect during this trial, there should be concerns.

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[96] During a hearing on appellant's motion to bar a third penalty trial, the trial court had suggested that the second penalty trial was more painful for the victims' families than the first one, and that the third penalty trial would be harder still. The prosecutor disagreed, saying that the second penalty trial had been easier for them because they better understood the process. (RT Vol. 20 4720.) A review of their testimony and conduct demonstrates that the prosecutor was wrong. (See Section C, *post*.)

(RT Vol. 21 4790.)[97] Defense counsel then advised the court that a juror, identified as V.B., witnessed Derek Robertson "chase down the foreman" following the mistrial. (RT Vol. 21 4790-4791.) The prosecutor stated that he had been unaware of the incident, but, he conceded, "I know he is a problem." (RT Vol. 21 4791.)

Obviously aware of these problems, the trial court set forth several ground rules with respect to the parameters of admissible victim evidence. Specifically, the trial court barred the prosecutor: (1) from asking witnesses how they learned of the murders, a matter the court deemed irrelevant (RT Vol. 21 4789); (2) from eliciting testimony regarding appellant and how the crime was committed, which it characterized as irrelevant and beyond the scope of proper victim impact evidence (RT Vol.21 4789); (3) from eliciting testimony regarding what happened at the victim's funeral, which it deemed irrelevant and highly emotional (RT Vol 21 4791-4792); and, (4) from asking questions to the effect of "What was the hardest thing to do after you found out he was murdered?" and "Anything else you need to tell us?," which had elicited improper responses during the second penalty trial (RT Vol. 21 4792). The trial court also stated that it would allow testimony from a witness regarding the impact on another family member, so long as the second family member did not repeat that testimony. (RT Vol. 21 2795.)

The trial court denied appellant's motion to limit the number of victim impact witnesses. (RT Vol. 21 4792.) In so ruling, the trial court

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[97] Although the trial court's comments at that point concerned *spectator* conduct rather than the testimony of victim impact witnesses, it is likely that some of the spectators who engaged in the outburst had also testified as victim impact witnesses.

dismissed appellant's reliance upon the Charles Ng case, apparently suggesting that the prosecutor in that case presented fewer victim impact witnesses than he or she might have done otherwise because some of the victims were never identified and three others were from the same family. (RT Vol. 21 4793.) The trial court also denied appellant's request that it admonish the witnesses that it would not allow them to testify if they were unable to control their testimony, and that characterizations and opinions concerning appellant, the crime or the appropriate sentence would not be tolerated. (RT Vol. 21 4792.) Finally, the trial court discouraged, but did not prohibit, the prosecutor from presenting cumulative victim impact testimony. (RT Vol. 21 4788.)

Defense counsel subsequently objected to the testimony of any witness who was not an immediate family member of a victim, particularly with respect to the Rosetti family. The trial court responded, "I indicated that I don't think the brother-in-law should testify, especially when he did testify he didn't offer anything relevant, was repeated by another witness, and most of his stuff was inflammatory rhetoric –" (RT Vol. 21 4795; see also RT Vol. 21 4788-4789.) In so ruling, the court again appeared to recognize that victim impact evidence was particularly fraught with the risk of prejudice in this case, saying,

> there is a limit as to how far you go with emotion. I guess the limit is called inflammatory. Because the jurors' decision has to be objective, and it is going to be very hard in this case. You have a defendant who wants to die, and you got victims' family and a prosecutor who want him to die. Now you tell them in your arguments that none of that matters. You have to follow the rules. And that requires an objective evaluation of a [*sic*] very emotional evidence.

(RT Vol. 21 4795-4796.) Nevertheless, during the penalty trial, the trial

court overruled several defense objections to irrelevant and/or emotionally-charged victim impact testimony (RT Vol. 24 5619, 5623, 5628-5629), as appellant explains in greater detail below.

B. The Victim Impact Evidence

Marlene Mustaffa's husband, Dave Mustaffa, testified that he fell in love with her when he was 15 years old and she was 12 years old. (RT Vol. 24 5611.) They reconnected and married years later, after he was divorced. (RT Vol. 24 5611.) Marlene was a loving, thoughtful wife, mother and grandmother, and their children and grandchildren were still affected by her death. (RT Vol. 24 5612-5613, 5616.) He and Marlene were very excited about the prospect of moving to Oregon after she retired. (RT Vol. 24 5613-5614.) He missed her and was still unable to cope with her death. (RT Vol. 24 5614-5616.)

Debbie Marshall testified that Vince Rosetti was her oldest sibling. They had always been close. She could always talk with him, and he always had advice. (RT Vol. 24 5617.) He was funny, generous, and he enjoyed life. (RT Vol. 24 5617-5618.) The prosecutor asked Debbie Marshall to explain how Rosetti's death had affected her family, and the trial court overruled defense counsel's objection that this was improper. (RT Vol. 24 5619.) Marshall then testified that her family had not been the same since his death: there was a sense of emptiness whenever the family gathered; her daughter had quit school; her youngest son was unable to talk about the situation; and, the loss of her brother had not gotten any easier for her. (RT Vol. 24 5618-5620.)

Michael Rosetti, Rosetti's brother, testified that Vince had served in the army's medical division during the Vietnam War. (RT Vol. 24 5621-5622.) Vince was a super individual, and he was a help not only to people

in his family, but to thousands of other people. (RT Vol. 24 5622.) Because of Vince's death, his family was now in a fog. Whenever they got together, it was no longer the same; they no longer laughed like they used to. (RT Vol. 24 5622-5623.)

The prosecutor asked Michael Rosetti to tell the jury about the fact that he had had to inform his parents of his brother's death. Defense counsel objected that this was improper, and the trial court overruled the objection. (RT Vol. 24 5623.) Michael testified that, after he was notified of his brother's death, he called his sister, who went into hysterics. He then rushed to his parents' house. When he arrived, his mother was excited to see him, but she could tell something was wrong. He told her that Vince had been shot, and she "just fell apart." Because his father was ill and had suffered heart attacks, Michael Rosetti was worried the news might kill him. When his father returned, he looked at them and knew something was wrong. After he was informed of his son's death, he too "just fell apart" and became "a mess." (RT Vol. 24 5623-5624.)

Angela Rosetti-Smith, Rosetti's oldest daughter, testified that Rosetti was a dedicated father. He participated in everything she and her sister did. He was the first person she called whenever something good happened or she needed advice. (RT Vol. 24 5626.) She stayed with her father the weekend before he was killed, and he hugged and kissed her when she left; three days later she had to pick out his coffin. (RT Vol. 24 5628.) She missed little things, such as being able to call him, and big things, such as his presence at her graduation from medical school, her sister's wedding, and other important family events. (RT Vol. 24 5627.)

After the prosecutor concluded his direct examination of Rosetti-Smith and defense counsel declined to cross-examine her, Rosetti-Smith

announced that she wanted to "say one more thing." After the trial court overruled defense counsel's objection that her request called for narrative, Rosetti-Smith testified that "[t]oday you are hearing from, you know, a few of our family members. But my dad's life affected so many more people than just us that you are hearing from. There were over 900 people at my father's funeral –" (RT Vol. 24 5628.) The trial court sustained defense counsel's objection as to the testimony regarding Rosetti's funeral, ordering that it be stricken. (RT Vol. 24 5628-5629.) Rosetti-Smith resumed her testimony without prompting, saying, "The bench you were talking about." Defense counsel objected that there was no question pending, which the trial court overruled. Rosetti-Smith then testified that "[e]veryone" on Rosetti's block contributed to the purchase of a park bench dedicated to him. (RT Vol. 24 5628-5629.)

Becky Rosetti, Vince Rosetti's youngest daughter, testified that she and her father were best friends. (RT Vol. 24 5630.) She was living with him before he died. They did things together, such as have dinner and take walks. She could tell him anything, and he loved to give his daughters advice. She last saw him the night before his death, when she told him she was going out to dinner. He was already in bed by the time she came home. (RT Vol. 24 5630-5631.) She was in shock after his death because her father had been so much a part of her life, and she felt robbed of the experiences they had expected to share, such as her wedding and the births of grandchildren. (RT Vol. 24 5632-5633.)

Agnes Rosetti, Vince Rosetti's mother, testified that her son was a wonderful man. (RT Vol. 24 5634-5635.) He tried to make his parents happy. Whenever he visited, he made them laugh, hugged them and said he loved them. (RT Vol. 12 5635-5636.) Before his death, she always had

plans and woke up with a happy feeling, but she had lost that happiness and was tired all the time. (RT Vol. 24 5636.) Her family had been saddened by his death. Her husband was now a wreck. She missed holidays, when her family gathered together. On Mother's Day, her son always brought her flowers, but now she took flowers to his gravesite. (RT Vol. 24 5636-5637.)

Suzanne Robertson, Ron Robertson's wife, testified that he had been her best friend. (RT Vol. 24 5638.) While serving as a pilot in Vietnam, he was shot down, wounded, and lost in the jungle for two days. Before she met him in 1975, he had suffered from PTSD. (RT Vol. 24 5639.) They had been married for 18 years. (RT Vol. 24 5639.) He was a devoted father of three, and always kept his children involved in sports. (RT Vol. 24 5639-5640.) His death had annihilated her family. Their children had begun using drugs and alcohol, and she had come to know more people in the police force and psychiatric hospitals than she had ever known in her work as a nurse. Her house was filled with damaged walls, broken doors and thrown objects. Her oldest son could not talk to anyone about his father's death, had not attended any of the court proceedings, and had never visited the cemetery where his father was buried. Her daughter refused to attend counseling and had lost interest in soccer, though she could have received a scholarship. Even the family dog had to be medicated with tranquilizers because he would howl, unable to find Ron. (RT Vol. 24 5640-5642.) Every time they returned to court, it was as hard as it was the first time. (RT Vol. 24 5642.)[98]

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[98] Despite the trial court's ruling that the prosecutor was not to ask questions to the effect of "What was the hardest thing to do after you found

(continued...)

Derek Robertson, Ron Robertson's son, testified that his father was like Superman. His father had been through Vietnam, and Derek thought he would survive everything. (RT Vol. 24 5659.)[99] His father's death had affected his life tremendously, and their household had been out of control. His mother held her feelings in, although raising her three children put her under great stress. His brother did not like to talk about his father's death and was unable to come to court. His sister was quiet too. (RT Vol. 24 5659-5660.) His father had loved to watch them play sports and always attended their games. He was supposed to attend Derek's first high school

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[98](...continued)
out he was murdered?" and "Anything else you need to tell us?" (RT Vol. 21 4792), the prosecutor engaged in misconduct by repeatedly asking variations of precisely those questions, forcing defense counsel to object each time (RT Vol. 24 5614, 5618, 5622, 5625, 5626-5627, 5631, 5641). (See Argument VIII, *post*.) Defense counsel objected after the prosecutor asked, "What is the hardest thing for you now?" Robertson interjected, "This is a never-ending story. I am real tired of your objections." (RT Vol. 24 5641.) Shortly thereafter, Robertson asked, "Can I say one more thing?" After the trial court overruled a defense objection, Robertson addressed appellant, apparently trying to speak in Vietnamese. (RT Vol. 24 5643.) At the bench, the interpreter surmised that she was trying to say, "It is your fault," among other things. The court and counsel agreed that she was speaking an unintelligible foreign language. However, defense counsel further requested that the court strike her comments and admonish the jury to disregard them, noting that anyone would infer that she was trying to convey her distaste, anger and grief to appellant. The trial court granted defense counsel's request. (RT Vol. 24 5645-5647.)

[99] Prior to Derek Robertson's testimony, the trial court expressed its belief that he was going to "act up" while on the stand, apparently in light of something he said or did while sitting in the audience. (RT Vol. 24 5647.) Moreover, the bailiff, concerned about courtroom security, spoke to Robertson for at least 15 minutes. Following that conversation, the bailiff advised the court that he believed Robertson might act out, at least verbally. (RT Vol. 24 5655-5656.)

football game the week he was killed. (RT Vol. 24 5660-5661.) Derek missed his father and would do anything to get him back. He had had a lot of problems with anger and hate since his father's death. (RT Vol. 24 5661.)

Mila Salvador testified that the incident had ruined her career, and she had been unable to return to work. She was on disability, in treatment, and taking medication for PTSD. For several months, she had been unable to leave her house. She still had nightmares about the incident. Her doctors had tried to have her return to the hospital, but she had been unable to do so. Every time she was supposed to return, she was unable to sleep the night before. She had made it only as far as the hospital's parking lot before turning back. (RT Vol. 23 5411-5412.)

C. The Applicable Law

In *Payne v. Tennessee*, *supra*, 501 U.S. 808, the United States Supreme Court upheld admission of evidence describing the impact of a state defendant's capital crimes on a three-year-old boy who was present and seriously wounded when his mother and sister were killed. The Supreme Court held the Eighth Amendment did not preclude admission of, and argument on, such evidence (*id.* at p. 827), thereby overruling the blanket ban on victim impact evidence and argument imposed by its earlier decisions in *Booth v. Maryland* (1987) 482 U.S. 496, and *South Carolina v. Gathers* (1989) 490 U.S. 805.

The Supreme Court did not hold that victim impact evidence must, or even should, be admitted in a capital case, but instead merely held that if a state decides to permit consideration of this evidence, "the Eighth Amendment erects no per se bar." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827; see also *id.* at p. 831 (conc. opn. of O'Connor, J.).) The Supreme

Court was careful to note that the Due Process Clause of the Fourteenth Amendment would be violated by the introduction of victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair . . . ." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; see also *id.* at pp. 836-837 (conc. opn. of Souter, J.).)

Relying on *Payne*, this Court in *People v. Edwards*, *supra*, 54 Cal.3d 787, 832-835, upheld the admission of photographs of the victim while she was alive, and the prosecutor's argument referring to the impact of the crime on her family. In so doing, this Court held that "factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim," but "only encompasses evidence that logically shows the harm caused by the defendant." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835.) This Court was careful to note that it was not holding that factor (a) encompasses all forms of victim impact evidence and argument. (*Ibid.*) Rather, there are "limits on emotional evidence and argument . . . [and] the trial court must strike a careful balance between the probative and the prejudicial. . . . [I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Id.* at p. 836.)

Thus, both *Payne* and *Edwards* recognize that while the federal Constitution does not impose a blanket ban on victim impact evidence, such evidence may violate the Fifth, Sixth, Eighth and Fourteenth Amendments where it is so inflammatory as to invite an irrational, arbitrary, or purely subjective response from the jury. (*Payne v. Tennessee*, *supra*, 501 U.S. at

pp. 824-825; *People v. Edwards*, *supra*, 54 Cal.3d at p. 836.)[100] The admissibility of victim impact evidence therefore must be determined on a case-by-case basis. As Justice Souter explained in his concurring opinion in *Payne*:

> Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. Cf. *Penry v. Lynaugh* [(1989)] 492 U.S. 302, 319-328 [] (capital sentence should be imposed as a "'reasoned moral response'") (quoting *California v. Brown* [(1987)] 479 U.S. 538, 545 [] (O'Connor, J., concurring)); *Gholson v. Estelle* [(5th Cir. 1982)] 675 F.2d 734, 738 ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence"). . . .With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case."

(*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 836-837 (conc. opn. of Souter, J.), citing *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

Although the high court "has left state and federal courts unguided in their efforts to police the hazy boundaries between permissible victim impact evidence and its impermissible, 'unduly prejudicial' forms" (*Kelly v. California* (2008) 129 S.Ct. 564, 566 (separate statement of Stevens, J., on denial of cert.)), the striking feature of the victim impact evidence that *Payne* and *Edwards* deemed appropriate as evidence of the circumstances

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[100] The highest courts of other states have articulated a similar recognition. (See, e.g., *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 891; *Berry v. State* (Miss. 1997) 703 So.2d 269, 275; *Conover v. State* (Okl.Cr. 1997) 933 P.2d 904, 921; *New Jersey v. Muhammad* (N.J. 1996) 145 N.J. 23, 55; *State v. Taylor* (La. 1996) 669 So.2d 364, 371-372.)

of the crime, and not so inflammatory as to risk a verdict based on passion, is how extremely limited that evidence was.

Thus, *Payne* involved a single victim impact witness who testified about the effects of the murder of a mother and her two-year-old daughter on the woman's three-year-old son, who was himself present at the scene of the crime and suffered serious injuries in the attack. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 811-812.) The boy's grandmother testified that he cried for his mother and sister, that he worried about his sister, and that he could not seem to understand why his mother did not come home. (*Id.* at pp. 814-815.)

Therefore, to be consistent with the facts and holding of *Payne*, the admission of victim impact evidence, if any is to be admitted, must be attended by appropriate safeguards to minimize the prejudicial effect of that evidence, and confine its influence to the provision of information that is legitimately relevant to the capital sentencing decision. There are three such safeguards which apply to the nature of the evidence itself, and none of them was employed in the instant case.

First, victim impact evidence should be limited to testimony from a single witness, like the testimony from the grandmother in *Payne*. This limitation has been imposed by judicial decision in New Jersey (*State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180), and by statute in Illinois (Illinois Rights of Victims and Witnesses Act, 725 ILCS 120/3(a)(3)); see *People v. Richardson* (Ill. 2001) 751 N.E.2d 1104, 1106-1107).

The Supreme Court of New Jersey explained the reason for this limitation as follows:

> The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for

> the victim impact evidence to unduly prejudice the jury against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness.

(*State v. Muhammad*, *supra*, 678 A.2d at p. 180.)

Second, victim impact evidence should be limited to testimony which describes the effect of the murder on a family member or other individual who was present at the crime scene either during or immediately after the crime. At a minimum, the evidence should be limited to testimony describing the impact of the victim's death murder on members of his or her immediate family. (See *ibid.*)

Third, victim impact evidence should be limited to those effects which were known or reasonably apparent to the defendant at the time he committed the crime or were properly introduced at the guilt phase of the trial to prove the charges. These limitations are consistent with *Payne v. Tennessee*, *supra*, where the victim impact evidence described the effect of the crime on the son and brother of the victims who was himself present at the scene of the crime, and whose existence and likely grief were therefore well-known to the defendant. These limitations also are necessary to make the admission of victim impact evidence consistent with the plain language of California's death penalty statutes, and to avoid expanding the aggravating circumstances to the point that they become unconstitutionally vague.[101]

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[101] In California, aggravating evidence is only admissible when it is (continued...)

Further, to be relevant to the circumstances of the offense, the evidence must show the circumstances that "materially, morally, or logically" surround the crime. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833.) The only type of victim impact evidence which meets this standard is evidence concerning the "the immediate injurious impact of the capital murder" (*People v. Montiel* (1993) 5 Cal.4th 877, 935), and evidence of the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes and the facts of the crime which were disclosed by the evidence properly received during the guilt phase (*People v. Fierro* (1991) 1 Cal.4th 173, 264-265 (conc. and dis. opn. of Kennard, J.)).[102]

Appellant recognizes that this Court has consistently upheld the admission of victim impact evidence in recent years. (See, e.g., *People v. Brady* (2010) 50 Cal.4th 547, 113 Cal.Rptr.3d 458 [trial court properly admitted evidence regarding, among other things, the impact of the victim's death on his professional community (i.e., fellow members of the Manhattan Beach Police Department), including "severe maladjustment and psychopathological states" "demonstrating varying degrees of mental

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[101](...continued)
relevant to one of the statutory factors (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776), and victim impact evidence is admitted on the theory that it is relevant to factor (a) of Penal Code section 190.3, which permits consideration of the "circumstances of the offense" (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835).

[102] See *Lewis v. Jeffers* (1990) 497 U.S. 764, 774-776 [the jury should be given clear and objective standards providing specific and detailed guidance]; *Tuilaepa v. California* (1994) 512 U.S. 967, 975 [sentencing factors must have a common-sense core of meaning that juries are capable of understanding].

illness"]; *People v. Cowan* (2010) 50 Cal.4th 401, 484-485 [victim's daughter and granddaughter permitted to testify about what they thought the victim must have gone through before her death]; *People v. Ervine* (2009) 47 Cal.4th 745, 792-794 [sheriff permitted to testify about impact of death of a deputy sheriff on members of his department and their families]; *People v. Zamudio* (2008) 43 Cal.4th 327, 364-368 [upholding trial court's admission of a 14-minute videotaped montage of still photographs narrated by the victims' children]; *People v. Kelly* (2007) 42 Cal.4th 763, 793-799 [testimony of the victim's mother and a videotape portraying the victim's life]; *People v. Huggins* (2006) 38 Cal.4th 175, 237 [trial court permitted the testimony of "seven [victim impact] witnesses, possibly eight" regarding a single victim]; *People v. Pollock* (2004) 32 Cal.4th 1153, 1180-1183 [testimony that the one of the victims taught Bible school, testimony about the brutality of the killings, and the testimony of the victims' friends].)

Nevertheless, appellant respectfully requests that this Court revisit its analysis of victim impact evidence to ensure that such evidence does not run afoul of the due process or cruel and unusual punishment clauses of the state and federal Constitutions. In particular, appellant submits that this Court has misinterpreted *Payne*, permitting a far broader array of victim impact evidence than that case allows. For instance, this Court recently observed that the high court stated that

> [t]he States remain free, in capital cases, as well as others to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.

(*People v. Hartsch* (2010) 49 Cal.4th 472, 509, quoting *Payne v. Tennessee*,

supra, 501 U.S. at pp. 824-825.) However, this statement was not intended to suggest that state courts are free to admit victim impact evidence in a manner which exceeds the scope of victim impact evidence suggested by *Payne*, which appellant discusses above. Rather, the Supreme Court was simply explaining that the Eighth Amendment does not impose a per se bar with respect to victim impact evidence, and therefore "a State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827.)

Appellant notes that other states have established more specific standards to govern the admission of victim impact evidence. For example, the Supreme Court of Tennessee has held that "[g]enerally, victim impact evidence [about the victim's character] should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed." (*State v. Nesbit*, *supra*, 978 S.W.2d at p. 891.) Similarly, the Supreme Court of New Jersey has held that victim character evidence "can provide a general factual profile of the victim, including information about the victim's family, employment, education, and interests," but "should be factual, not emotional, and should be free of inflammatory comments or references." (*State v. Muhammad*, *supra*, 678 A.2d at p. 180.)

The Louisiana Supreme Court has also emphasized the need for restraint in the admission of victim character evidence. Although that court held that the prosecution could "introduce a limited amount of general evidence providing identity to the victim," it also warned that special caution should be used in the "introduction of detailed descriptions of the

good qualities of the victim" because such descriptions create a danger "of the influence of arbitrary factors on the jury's sentencing decision." (*State v. Bernard* (La. 1992) 608 So.2d 966, 971.) The Supreme Court of New Mexico likewise held that "victim impact evidence, *brief and narrowly presented*, is admissible" in capital cases. (*State v. Clark* (N.M. 1999) 990 P.2d 793, 808; emphasis added.)

In any event, as appellant demonstrates below, the trial court's admission of victim impact evidence constituted prejudicial error under the circumstances present in this case.

D. The Victim Impact Evidence and the Number of Victim Impact Witnesses in this Case Were Unfairly Inflammatory

In the instant case, the trial court's admission of the victim impact evidence and its refusal to limit the number of victim impact witnesses permitted the prosecutor to elicit "irrelevant information or inflammatory rhetoric that divert[ed] the jury's attention from its proper role or invite[d] an irrational, purely subjective response." (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 835-836.)

First, because the trial court admitted the victim impact evidence, the jury witnessed Suzanne Robertson's enraged response when defense counsel objected to an improper question posed by the prosecutor. (RT Vol. 24 5641.)[103] Even more prejudicial, the jury witnessed Robertson's attempt to address appellant. Even if the jurors could not understand what she said, as she apparently tried to speak to him in Vietnamese, they would have recognized her anger and scorn. (RT Vol. 24 5643, 5645-5647.) Even

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[103] See Argument VIII, *post*, regarding the prosecutor's misconduct in this regard.

if they did not understand her words, they likely understood her actions as a "clarion call for vengeance." (Cf. *People v. Kelly*, *supra*, 42 Cal.4th at p. 797.)[104] In light of the uniquely upsetting nature of victim impact testimony, the jury likely ignored the trial court's admonition to disregard her comments. (See *Kelly v. California* (2008) 129 S.Ct. 567, 568 (statement of Breyer, J., dissenting from cert. denial).)[105]

Second, much of the victim impact testimony was cumulative. (Cf. *People v. Kelly*, *supra*, 42 Cal.4th at p. 797 [upholding the admission of victim impact evidence in that case because, among other things, "this is not a case of one witness after another giving repetitive victim impact testimony"].) Specifically, more than one witness testified regarding Rosetti's character (RT Vol. 24 5618 [Marshall], 5621 [M. Rosetti], 5631 [B. Rosetti], 5635 [A. Rosetti]), devotion to his family (RT Vol. 24 5617 [Marshall], 5626 [A. Rosetti-Smith], 5630-5631 [B. Rosetti], 5635-5636

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[104] The prejudice flowing from her conduct may have been compounded by the misconduct of her son, Derek. In a motion for a new trial, appellant presented evidence that, after Suzanne Robertson told defense counsel that she was tired of his objections, Derek Robertson told defense counsel to, "Shut up, bitch." (CT Vol. 8 2140; see also Argument IX, *post*.)

[105] The trial court in this case should have recognized that jurors would find it difficult, if not impossible, to disregard such an outburst. During the second penalty trial, Rosetti-Smith concluded her testimony by opining, "All this pain because one person had complete[,] utter disregard for human life." (RT Vol. 16 3806.) Shortly thereafter, during a discussion regarding defense counsel's concern that the victim impact evidence was becoming increasingly emotional, the court commented, ". . . and I understand why you did not [object to Rosetti-Smith's remark]. What are you going to do, strike it and say 'disregard it'? You know, we know that human nature is not quite that sophisticated." (RT Vol. 16 3810.) Suzanne Robertson's conduct was far more prejudicial than Rosetti-Smith's.

[A. Rosetti]), sense of humor (RT Vol. 24 5617-5618 [Marshall], 5635 [A. Rosetti]), kindness and generosity (RT Vol. 24 5617-5618 [Marshall], 5621 [M. Rosetti]), and willingness to offer advice (RT Vol. 5617 [Marshall], 5622 [M. Rosetti], 5626 [A. Rosetti-Smith], 5630 [B. Rosetti]). There was also cumulative testimony regarding his father's grief (RT Vol. 24 5622-5623 [M. Rosetti], 5637 [A. Rosetti]) and the fact that he would miss important family events, such as his daughter's wedding and the births of his grandchildren (RT Vol. 24 5627 [A. Rosetti-Smith], 5631-5633 [B. Rosetti]).

Similarly, both Suzanne and Derek Robertson testified about Robertson's devotion to his family (RT Vol. 24 5638-5640, 5642 [S. Robertson], 5660 [D. Robertson]), his strong character (RT Vol. 24 5639, 5642 [S. Robertson], 5659-5660 [D. Robertson]), his service in Vietnam (RT Vol. 24 5639 [S. Robertson], 5659 [D. Robertson]), and the devastating effect his death had on his family (RT Vol. 24 5640-5642 [S. Robertson], 5659-5660 [D. Robertson]).

Third, a significant portion of the evidence related to the impact of the victim's death on members of his or her extended family, friends, even community. (RT Vol. 24 5612-5613, 5616, 5619, 5622-5624, 5628-2629.) This evidence lay far outside the narrow parameters suggested by *Payne v. Tennessee*, *supra*, 501 U.S. 808. (See *State v. Muhammad*, *supra*, 678 A.2d at p. 180.)

Fourth, none of the victim impact evidence related to effects which were known or reasonably apparent to appellant at the time he committed the crimes, except, arguably, those endured by Salvador, the only victim impact witness actually present at the scene. (Cf. *People v. Zamudio*, *supra*, 43 Cal.4th at p. 364, fn. 20 [similar claim rejected by this Court because the

defendant and his family had been on "very friendly terms" with the victims and often did work for them].) For instance, as the trial court itself commented in denying appellant's original motion to limit victim impact evidence, appellant would not have known that Rosetti and Robertson had served in Vietnam. (RT Vol. 12 2678.) In addition, as defense counsel argued in connection with that motion, such evidence was particularly inflammatory in light of appellant's ethnicity. (RT Vol. 12 2675-2676.) Indeed, that evidence introduced an unacceptable risk that the jury imposed the death penalty for racial, political or other constitutionally impermissible reasons. (Cf. *People v. Kelly*, *supra*, 42 Cal.4th at p. 799.)

For the same reasons, none of the victim impact evidence (with the possible exception of Salvador's) concerned the "the immediate injurious impact of the capital murder" (*People v. Montiel*, *supra*, 5 Cal.4th at p. 935) or evidence of the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes and the facts of the crime which were disclosed by the evidence properly received during the guilt phase (*People v. Fierro*, *supra*, 1 Cal.4th at pp. 264-265 (conc. and dis. opn. of Kennard, J.).) In other words, only Salvador's testimony, if any at all, showed the circumstances "materially, morally, or logically" surrounding the crime (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833) and was therefore relevant to the circumstances of the offense.

There can be no question that the trial court was aware that victim impact witnesses might engage in improper conduct and/or testify to inflammatory and/or irrelevant matters. Not only did the court identify several examples of improper victim impact evidence in ruling on appellant's motion (RT Vol. 21 4788-4792; see also Section A, *ante*), it was

necessarily aware of still other incidents involving improper victim impact testimony and/or witness conduct, particularly during the second penalty trial. (See RT Vol. 12 2772 [during first penalty trial, Suzanne Robertson commented, "I think choices that people make suck for other people"]; RT Vol. 16 3807 [during second penalty trial, defense counsel expressed his concern that the victim impact evidence was becoming increasingly emotional, and he reported that jurors and relatives of the victims were crying],[106] 3811 [when the court advised the prosecutor to speak with Derek Robertson if he intended to call him as a witness, the prosecutor responded, "I have had a talk with him *twice a day* usually. I will do so again"], 3829 [when the prosecutor asked Suzanne Robertson whether there was anything she would like to say, she replied, "Not that I can be quoted on"].) Such conduct and comments were obviously intended to convey the witnesses' low opinion of appellant and of what they believed to be the appropriate punishment. (See *People v. Pollock*, *supra*, 32 Cal.4th at p. 1180 [noting that victim impact evidence may not "include characterizations or opinions about the crime, the defendant, or the appropriate punishment, by the victims' family members or friends. . . ."].)

Under these circumstances, the trial court's admission of victim impact evidence was prejudicial error. At a minimum, the trial court should have (1) cautioned the victim impact witnesses that it would not allow them to testify if they were unable to control their behavior in the courtroom, and

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[106] Appellant acknowledges that the trial court disagreed with defense counsel's characterization of the extent to which jurors and audience members were crying. (RT Vol. 16 3810.) Significantly, however, the trial court later came to believe that the proceedings had in fact become increasingly difficult for the victims' families. (RT Vol. 20 4720; RT Vol. 21 4789-4790.)

that characterizations and opinions concerning appellant, the crime or the appropriate sentence would not be tolerated (see *United States v. Glover*, *supra*, 43 F.Supp.2d at p. 1236); and, (2) limited the number of victim impact witnesses, particularly those related to Vince Rosetti. Because the trial court refused to do, the prosecutor was able to take advantage of the repetitive and inflammatory victim impact evidence, to which he referred extensively in his closing argument. (RT Vol. 27 6302-6303, 6318-6322, 6325-6326, 6330-6331.)

Moreover, the court's error in admitting the victim impact evidence was not cured by CALJIC No. 8.085m, which instructed the jury in pertinent part that they were not to "consider the victim's family member[']s characterizations and opinions about the defendant or the appropriate sentence" (CT Vol. 8 2042). (See, e.g., *Kelly v. California* (2008) 129 S.Ct. 567, 568 (statement of Breyer, J., dissenting from cert. denial) [discussing the uniquely upsetting nature of victim impact testimony]; *People v. Hill*, *supra*, 17 Cal.4th at p. 845 [quoting the axiom, "It has been truly said: 'You can't unring a bell.'"].)

E. Reversal of the Penalty Verdict is Required

When an error results in penalty phase jurors hearing aggravating evidence (or evidence in support of a death verdict) that they should not have otherwise heard, and that evidence is considered by them in assessing the appropriate penalty, the ensuing death judgment is constitutionally invalid and must be reversed. (*Brown v. Sanders* (2006) 546 U.S. 212, 220-221 [when an "improper element" has been "add[ed] to the aggravation scale in the weighing process," and results in the jurors hearing and considering facts or evidence it could not otherwise have heard or considered, the ensuing death judgment is unconstitutional]; accord,

Johnson v. Mississippi (1988) 486 U.S. 578, 585-586 [due process demands that death sentence based even in part upon improper or totally irrelevant aggravation must be set aside]; *Zant v. Stephens* (1983) 462 U.S. 862, 885 [if death sentence were based upon "totally irrelevant" aggravation, "due process of law would require that the jury's decision to impose death be set aside"]; see also *Tuggle v. Netherland* (1995) 516 U.S. 10, 13-14 [construing *Zant* for proposition that reliance on invalid aggravating factor does not necessarily demand reversal *if* the evidence in support of that factor were otherwise properly admitted].)

The victim impact testimony in this case was repetitive and emotionally charged. The emotional force of that testimony could only have been compounded by Suzanne Robertson's address to defense counsel and appellant, an occurrence which likely would not have occurred had the trial court limited the number of victim impact witnesses or, at a minimum, admonished the witnesses prior to their testimony. (CT Vol. 6 1630 [appellant's request that the court admonish the witnesses].)

The improperly admitted victim impact evidence in this case violated appellant's right to a fair and reliable capital sentencing hearing and his right to the effective assistance of counsel, and denied him due process by making the penalty trial fundamentally unfair. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15 and 17; *Tuilaepa v. California*, *supra*, 512 U.S. 967; *Payne v. Tennessee*, *supra*, 501 U.S. 808; *Booth v. Maryland*, *supra*, 482 U.S. 496; *Strickland v. Washington* (1984) 466 U.S. 668.)

Those violations of the federal Constitution require reversal unless the prosecution can show that they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if the error

is viewed as one of state law, error that affects the penalty determination similarly requires reversal if there was a "reasonable possibility" that it affected the penalty decision. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) These standards are the same in substance and effect. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965, disapproved on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

Accordingly, reversal of the penalty verdict is required.

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VIII

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT WHEN HE REPEATEDLY VIOLATED A TRIAL COURT RULING BY ASKING VICTIM IMPACT WITNESSES QUESTIONS INTENDED TO INFLAME THE WITNESSES AND JURORS, AND TO ELICIT IRRELEVANT, INFLAMMATORY TESTIMONY

During a hearing on appellant's motion to limit the scope of victim impact testimony and the number of victim impact witnesses, the trial court prohibited the prosecutor from asking the following questions: (1) "What was the hardest thing to do after you found out he was murdered?"; and, (2) "Anything else you need to tell us?"[107] The court also suggested that the question, "What was the hardest thing to do because of his loss?," *might* be appropriate, though it never ruled that such a question *would* be appropriate. (RT Vol. 21 4792.) Despite the court's ruling, the prosecutor asked all but two of the family member witnesses variations of precisely those impermissible questions, forcing defense counsel to object each time. (RT Vol. 24 5614, 5618, 5622, 5625, 5626-5627, 5631, 5641.)

The prosecutor's actions in this case went far beyond the limits of acceptable advocacy. A prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones." (*Berger* v. *United States* (1935) 295 U.S. 78, 88.) Prosecutorial misconduct violates state law if it involves the use of "deceptive or reprehensible methods" to attempt to persuade the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) It also violates federal due process standards if it infects a trial with fundamental unfairness. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974)

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[107] The trial court noted that the latter question had elicited improper responses during the second penalty trial. (RT Vol. 21 4792)

416 U.S. 637, 642-643; *People v. Hill, supra,* 17 Cal.4th at p. 819.) Moreover, the Eighth Amendment guarantees of reliability in capital sentences requires exacting scrutiny of a prosecutor's conduct and a trial court's errors. (*Beck v. Alabama* (1980) 447 U.S. 625, 638 [constitutional demands for reliability in capital case].) Accordingly, this Court should find that the misconduct violated federal and state due process guarantees and the requirements for a reliable death judgment. (U.S. Const., 8th & 14th Amends.; Cal. Const., art 1, §§ 7 & 15.)

A. The Prosecutor Engaged in Improper Conduct By Repeatedly Asking Victim Impact Witnesses Questions Which the Trial Court Had Previously Ruled to Be Improper

This Court has long held that prosecutors are held to a particularly high standard "because of the unique function he or she performs in representing the interests, and exercising the sovereign power, of the State." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) The prosecutor's ethical obligation reaches its apex at the penalty phase of a capital case, in which the accused's life hangs in the balance. (See *State v. Ramseur* (N.J. 1987) 524 A.2d 188, 290 [characterizing a prosecutor's ethical obligations in capital cases as "particularly stringent"].)

As this Court has explained,

> "It is, of course, misconduct for a prosecutor to 'intentionally elicit inadmissible testimony.' [Citations.]" (*People v. Bonin* (1988) 46 Cal.3d 659, 689 [250 Cal.Rptr. 687, 758 P.2d 1217] . . .Such misconduct is exacerbated if the prosecutor continues to attempt to elicit such evidence after defense counsel has objected. (*People v. Bell* (1989) 49 Cal.3d 502, 532 [262 Cal.Rptr. 1, 778 P.2d 129].)

(*People v. Smithey* (1999) 20 Cal.4th 936, 960.) Moreover, "[t]he repeated

asking of questions relative to objectionable and prejudicial matter which involve appeals to the passion and prejudices of the jury has been held to constitute reversible error." (*People v. Evans* (1952) 39 Cal.2d 242, 252, and cases cited therein.)

People v. Douglas (1947) 83 Cal.App.2d 80 is illustrative. There, the prosecutor asked the defendant, an African-American man, "Has there ever been any prostitution in this house?" (*Id.* at pp. 81-82.) An objection was made and sustained. However, the prosecutor subsequently emphasized the error, stating to the jury: "This is just the circumstances of the physical house itself, as to what may have been the reason for this particular person to go there." (*Id.* at p. 82.)

The Court of Appeal concluded that the prosecutor's questions constituted reversible error, pointing out that the prosecutor's question and remarks "were designed for these two purposes – to degrade the [defendant] before the jury by intimating that he was living in a house of prostitution, and, second, to impress the jury that the deceased, a white man and a member of the Navy, could not have been thought an 'intruder' in seeking to enter a 'negro' house of prostitution." (*People v. Douglas*, *supra*, 83 Cal.App.2d at p. 82.) The Court of Appeal also recognized that "[i]n view of the fact that jurors instantly perceive the probative value of such improper testimony and are also unfortunately inclined to attach weight to the insinuations or suggestions of counsel as to the proof in his possession, which is excluded by the rules of law enforced by the court, it is clear that however good the intentions of the jury, or however sincere they may be in endeavoring to follow the instructions of the court to disregard such suggestions, it is well-nigh inevitable that they should give weight to such suggestions. . . . " (*Ibid.*) Even if such errors ordinarily are cured by the

prompt sustaining of objections and by jury instructions to disregard the question, "where the offense has been repeated in various forms and where the evidence is so evenly balanced and the district attorney after being warned by the court continues in his course, we must hold that the misconduct was so prejudicial as to entitle the defendant to a new trial." (*Id.* at pp. 82-83.)

Significantly, it is well-established a showing of bad faith is not required to support a claim of prosecutorial misconduct. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 822-823.) As this Court has recognized, "'[injury] to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally.'" (*People v. Bolton* (1979) 23 Cal.3d 208, 214.)

Here, the prosecutor ignored the trial court's clear rulings, asking the first five victim impact witnesses variations of the very questions the trial court had prohibited. During his examination of Dave Mustaffa, he asked, "After you learned that your wife was killed, what was the hardest thing for you to do initially?" (RT Vol. 24 5614.) He asked Debbie Marshall, "After you learned of Vince's death, what was the hardest thing for you?" (RT Vol. 24 5618.) He asked Michael Rosetti, "After you learned of his death, what was the hardest thing for you." (RT Vol. 24 5622.) Shortly thereafter, he asked Rosetti, "Is there anything else that you need to tell us?" (RT Vol. 24 5625.) He asked Angela Rosetti-Smith, "Initially what was the hardest thing for you after your dad was killed?" (RT Vol. 24 5626.) The prosecutor asked Becky Rosetti, "Initially after your dad was killed, what was the hardest thing for you –" (RT Vol. 24 5631.) In each of these instances, defense counsel objected that the question was improper in form, and the trial court sustained each of the objections. (RT Vol. 24 5614, 5618, 5622, 5625-5627, 5631.)

Finally, the prosecutor asked Suzanne Robertson, "What is the hardest thing for you now?" After defense counsel objected, Robertson interjected, "This is a never-ending story. I am real tired of your objections." (RT Vol. 24 5641.)

Each of these instances constituted prosecutorial misconduct. Arguably, the prosecutor initially posed the question in good faith, believing that he was complying with the trial court's earlier ruling, but the fact that he continued to ask these questions despite the sustained objections proves otherwise.[108] Moreover, although the prosecutor used the words "death" and "killed" rather than "murdered," the effect was essentially the same: to incite the anger of the witnesses and jurors, and to elicit emotionally-charged, improper testimony.

B. The Prosecutor's Misconduct Was Prejudicial

As a matter of state law, prosecutorial misconduct involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) State law misconduct necessitates reversal where it is reasonably probable the prosecutor's behavior affected the verdict. (*Id.* at p. 821.) "'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." [Citations.] . . .'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1215.) Such pervasive misconduct requires reversal unless it is harmless beyond a reasonable doubt. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 819, 844.)

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[108] As noted above, a prosecutor may commit misconduct even if he or she acted in good faith. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 822-823.)

The prosecutor's misconduct prejudiced appellant by placing defense counsel in an untenable position. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 821 [issue preserved for appeal, despite lack of objection and/or request for admonition, where defense counsel was faced with choice between (1) continually objecting to the prosecutor's misconduct and risk repeatedly provoking the trial court's wrath, and (2) declining to object, thereby forcing the defendant to suffer the prejudice caused by the prosecutor's constant misconduct].) That is, they could either object at the risk of offending the witness and the jury, or (2) forego an objection and thereby waive the claim of error. (See *People v. Pollock* (2004) 32 Cal.4th 1153, 1181 [rejecting defendant's argument that ordinary requirement of a timely objection and request for an admonition should be excused because trial counsel could not have objected to victim impact evidence without appearing callous, thereby alienating the jury]; Evid. Code, § 353.) Significantly, defense counsel had already advised the court of this very quandary in its motion to limit victim impact evidence, stating:

> [A]s discussed in other hearings, this procedure [i.e., requiring defense counsel to object to improper questions or responses] puts defendant[']s attorneys in the difficult position of having to object to and litigate the admissibility of sensitive evidence in the middle of emotional testimony by surviving family members and risk offending the jury to the detriment of the client or to forego such objection and allow highly prejudicial testimony to be admitted, again to the detriment of the client. The defense's ability to competently respond to highly prejudicial evidence is irreparably crippled. The defense becomes ineffective to protect Mr. Trinh.

(CT Vol. 6 1628, fn. 1.)

Moreover, the prosecutor's questions were intended to, or, at the very least, likely to, incite antipathy towards the defense on the part of the

jurors and victim impact witnesses, and that is precisely what occurred. For instance, following the second penalty trial, the trial court commented about the increasing frustration demonstrated by the victims' relatives:

> I know [they are frustrated]. And I am thinking about their welfare. But, you know, controlling them in the courtroom is very, very difficult. First trial was fine. Second trial passes constitutional muster until the end when the verdict (*sic*) was read. I mean the courtroom went berserk. It was very, very upsetting. I have had spectator misconduct alleged in other cases, but I have never seen anything as loud and boisterous and troublesome to the jurors. Of course, they are finished. But if that is any indication of what we can expect during this trial, there should be concerns.

(RT Vol. 21 4790.) Thus, the third penalty trial took place amid an increasingly tense and emotional atmosphere.

Under these circumstances, it was entirely foreseeable that one or more of the victim impact witnesses would lash out at appellant and his attorneys. Indeed, after defense counsel objected to an improper question posed to witness Suzanne Robertson, she (Robertson) declared, "This is a never-ending story. I am real tired of your objections." (RT Vol. 24 5641.) She subsequently asked, "Can I say one more thing?" After the trial court overruled a defense objection, she addressed appellant, apparently trying to speak in Vietnamese. (RT Vol. 24 5643.)

At the bench, the interpreter surmised that Suzanne Robertson had tried to say, "It is your fault," among other things. The court and counsel agreed that she was speaking an unintelligible foreign language. Defense counsel further requested that the court strike her comments and admonish the jury to disregard them, noting that anyone would infer that she was trying to convey her distaste, anger and grief to appellant. The trial court

granted defense counsel's request. (RT Vol. 24 5645-5647.) However, as appellant has pointed out (Argument VII and fn. 105, *ante*), it is likely that the jury ignored the trial court's admonition to disregard her comments. (See, e.g., *Kelly v. California* (2008) 129 S.Ct. 567, 568 (statement of Breyer, J., dissenting from cert. denial) [discussing the uniquely upsetting nature of victim impact testimony]; *People v. Hill*, *supra*, 17 Cal.4th at p. 845 [quoting the axiom, "It has been truly said: 'You can't unring a bell.'"].)[109]

The prosecutor's questions also raised the danger that the jury would infer that he possessed additional, emotionally devastating facts regarding the impact on the victims, and that the trial court excluded such evidence as a result of the defense objections. (See *People v. Douglas*, *supra*, 83 Cal.App.2d at p. 82.) Therefore, it cannot be said that the prosecutor's misconduct was harmless because the jury heard properly-admitted victim impact evidence.

Under these circumstances, the jury instructions, including CALJIC Nos. 1.02m and 8.085m, could not have cured the harm that the prosecutor's questions engendered. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 845; *People v. Fabert* (1982) 127 Cal.App.3d 604, 610-611 [courts have

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[109] The prejudicial effect of Suzanne Robertson's conduct was likely exacerbated by an outburst by her son, Derek, who was seated in the audience. (See Argument IX, *post*.) Neither the trial court nor defense counsel described what he said at the time of his outburst (RT Vol. 24 5647.) In their motion for a new trial, however, defense counsel submitted a declaration from defense investigator Cathy Clausen regarding Derek's outburst. According to Clausen, after Suzanne Robertson told defense counsel she was tired of his objections, Derek Robertson exclaimed, "Shut up, bitch." In Clausen's opinion, Derek's statement was directed at defense counsel. (CT Vol. 8 2140.)

expressed serious reservations about the efficacy of curative instructions to correct prosecutorial error].)[110] For the same reasons, although a party is generally not prejudiced by a question to which an objection has been sustained (*People v. Mayfield* (1997) 14 Cal.4th 668, 755; *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1236), the prejudice was not cured in this case.

This Court should find that the prosecutor's misconduct infected appellant's penalty trial with fundamental unfairness within the meaning of *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at pp. 642-643, and *Darden v. Wainwright*, *supra*, 477 U.S. at p. 181, violating his federal and state due process guarantees and the requirements for a reliable death judgment. (U.S. Const., 8th and 14th Amends.; Cal. Const., art 1, §§ 7 and 15.) Because the state cannot demonstrate that these errors were harmless beyond a reasonable doubt, appellant's death sentence must be reversed. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) In addition, the death judgment must be reversed because there is a reasonable possibility that the jury would have rendered a different verdict had the prosecutor not committed the misconduct. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) These standards are the same in substance and effect. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965, disapproved on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

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[110] CALJIC No. 1.02m, as given in this case, advised the jury that statements made by the attorneys were not evidence, and that if an objection was sustained to a question, they were not to guess what the answer might have been. (CT Vol. 8 2029.) CALJIC No. 8.085m instructed the jury in pertinent part that it could not consider the characterization and opinions of the victims' family members regarding appellant or the appropriate sentence. (CT Vol. 8 2042.)

IX

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR A NEW TRIAL

A. Procedural Background

On April 9, 2003, five days before the sentencing hearing, appellant filed a motion for a new trial.[111] Among the grounds raised in his motion were the following: (1) the prosecutor committed misconduct by repeatedly and deliberately asking questions which the trial court had already found to be improper, and which called for inadmissible and prejudicial testimony;[112] (2) the misconduct of Derek Robertson during the penalty trial violated appellant's due process rights; and, (3) retrial of the penalty phase violated the due process clauses of the state and federal Constitutions and the Eighth Amendment's prohibition against cruel and unusual punishment. (CT Vol.

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[111] That same day, appellant also filed the following motions: (1) a motion requesting that the court modify the sentence to life imprisonment without the possibility of parole pursuant to Penal Code sections 190.4, subdivision (e), and 1181, subdivision (7) (CT Vol. 8 2141-2152); and, (2) a motion requesting that the court impose a sentence of life imprisonment without the possibility of parole based upon the improper granting of a third penalty trial (CT Vol. 8 2153-2158). Although appellant does not challenge the trial court's ruling as to the former motion, he argues that the trial court erred in denying the latter motion. (See Argument X, *post*.)

[112] As appellant discusses in Argument VIII, *ante*, the trial court barred the prosecutor from asking victim impact witnesses the following questions: (1) "What was the hardest thing to do after you found out he was murdered?;" and, (2) "Anything else you need to tell us?" Despite the court's ruling, the prosecutor asked all but two of the victim impact witnesses variations of those very questions. In each instance, defense counsel was forced to object, and the trial court sustained each of those objections.

8 2120-2140.)[113]

In support of his motion, appellant submitted a declaration by defense investigator Cathy Clausen describing an outburst by Derek Robertson. According to Clausen, after victim impact witness Suzanne Robertson (Derek's mother) told defense counsel, Assistant Public Defender Brooks Talley, that she was tired of his objections (see RT Vol. 24 5641),[114] Derek exclaimed, "Shut up, bitch."[115] In Clausen's opinion, Derek's statement was directed at Talley. (CT Vol. 8 2140.)

During the hearing on appellant's motion for a new trial, both counsel submitted on the basis of the pleadings. (RT Vol. 27 6406-6407.) The trial court then ruled in pertinent part as follows:

First, the court rejected appellant's claim that the prosecutor had engaged in misconduct by asking improper questions in violation of a prior court ruling. According to the court, there was no prejudice because the witnesses had not answered the challenged questions. Defense counsel maintained that the prosecutor knowingly asked questions the court had already deemed improper, thereby forcing them to object at the risk of alienating the jury. Nevertheless, the court reiterated its ruling, suggesting

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[113] Appellant does not challenge the trial court's rulings with respect to the remaining arguments raised in his motion for a new trial: (1) the prosecutor committed misconduct in final argument; and, (2) the verdicts and findings of the jury were contrary to the law and evidence. (RT Vol. 27 6410-6413; CT Vol. 8 2130-2136.)

[114] Suzanne Robertson's outburst is described in greater detail in Argument VII, *ante*, regarding the trial court's error in admitting irrelevant, unduly prejudicial victim impact evidence.

[115] To avoid confusion, appellant refers to Derek Robertson and Suzanne Robertson by their first names throughout this argument.

that the prosecutor did not act in bad faith or try to elicit information the jury did not or should not have. (RT Vol. 27 6407-6408.)

Second, the trial court rejected appellant's argument that Derek's conduct violated his due process rights. The court denied that it had heard Derek's comment, and surmised that defense counsel had not heard it either. The court also suggested that if Derek's comment had prejudiced appellant, the defense would have raised the matter earlier. Defense counsel (Deputy Public Defender Sharon Petrosino) countered that she had heard the comment and said so at the time, even if she did not describe the comment itself. (RT Vol. 27 6408-6410.)[116]

The trial court explained that when it called attention to Derek's

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[116] The trial court itself had first called attention to Derek's conduct and the risk that it would influence the jury, as the following exchange demonstrates:

[Court]:	I am telling you, based upon what I have seen right today, we are going to have a problem. Right today in the back of the courtroom. Nobody else saw it, I don't think.
[Defense counsel]:	*We heard it.*
[Court]:	You saw it?
[Defense counsel]:	*We heard it.*
[Court]:	[Robertson] is going to act up. And I really don't like to stop witnesses while they are testifying, and we're not going to be able to stop him. We'll have a donnybrook in here is what is going to happen.

(RT Vol. 24 5647; emphasis added.)

conduct, its concern was that his anger, which was evident from his facial expressions, would influence the jury. (RT 27 6409.) According to the court, Derek appeared to be angry while he was in the audience, but the jury seemed to focus on whomever was testifying; his anger was not apparent during his testimony; and, the court did not hear his comment. (RT Vol. 27 6409-6410.)

Finally, the trial court rejected appellant's argument that his third penalty trial was unconstitutional. In so ruling, the court concluded that *Furman v. Georgia* (1972) 408 U.S. 238, cited by appellant in his motion (CT Vol. 8 2138), did not support his position. (RT Vol. 27 6414.) The court did not state any other reasons for its ruling, either explicitly or implicitly.

As shown below, the trial court's analysis was flawed. As a result, the trial court abused its discretion by denying appellant's meritorious motion for a new trial, depriving him of his state law and federal constitutional rights.

B. The Trial Court Erred in Denying Appellant's Motion Because the Prosecutor Repeatedly and Deliberately Violated a Trial Court Ruling By Asking Questions Calling for Inadmissible and Prejudicial Responses

1. Applicable Law

Penal Code section 1181, subdivision (5), authorizes the trial court to grant a new trial "when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury." On appeal, a trial court's ruling on a motion for new trial is reviewed under a deferential abuse of discretion standard. (*People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27.) The trial court's ruling will not be disturbed on appeal "'unless a manifest and unmistakable abuse of

discretion clearly appears.' [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1159-1160.)

2. The Trial Court Abused Its Discretion in Denying Appellant's Motion for a New Trial Based on the Prosecutor's Misconduct

Appellant has demonstrated that the prosecutor committed prejudicial misconduct by repeatedly asking variations of questions which the trial court had already ruled were improper: to wit, "What was the hardest thing to do after you found out he was murdered?" and "Anything else you need to tell us?" (See Argument VIII, *ante*, incorporated by reference as if fully set forth herein.)

Contrary to the trial court's position, it is immaterial that the witnesses did not answer the prosecutor's improper questions. (RT Vol. 27 6407-6408.) As appellant has observed, the jury naturally would infer from the prosecutor's questions that he possessed additional, emotionally devastating facts regarding the impact on the witnesses, and that the trial court excluded such evidence as a result of the defense objections. (See *People v. Douglas* (1947) 83 Cal.App.2d 80, 82.) This risk was exacerbated when the prosecutor continued to ask these previously-barred questions even though the court repeatedly sustained defense counsel's objections. (*People v. Bell* (1989) 49 Cal.3d 502, 532.)

In addition, the trial court erroneously concluded that the prosecutor did not act in bad faith when he repeatedly posed them over defense objection. (RT Vol. 27 6408.) Even assuming, arguendo, that the prosecutor initially posed the question in good faith (notwithstanding the court's earlier ruling barring such questions), he asked the previously-barred questions *six* more times despite the fact that the trial court continued to sustain the defense objections. (RT Vol. 24 5618, 5622, 5625-5627,

5631, 5641.) His obstinate disregard of the court's rulings surely demonstrated bad faith. (See *People v. Bell*, *supra*, 49 Cal.3d at p. 532.)

In any event, the trial court's ruling was flawed because it was based upon an apparent misunderstanding of the law relating to prosecutorial misconduct – that is, its apparent belief that a showing of bad faith is required to demonstrate prosecutorial misconduct. As noted above, a prosecutor may commit misconduct even where he or she is acting in good faith. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 822-823.) It cannot be assumed that the court would have reached the same ruling had it applied the correct law.

Under these circumstances, the trial court's ruling is not entitled to deference, for it constituted a "manifest and unmistakable abuse of discretion." (*People v. Guerra*, *supra*, 37 Cal.4th at pp. 1159-1160.)

C. The Trial Court Erred in Denying Appellant's Motion Because Derek Robertson's Misconduct During the Penalty Phase Violated Appellant's Rights to Due Process

This Court has explained that,

> [a]lthough spectator misconduct constitutes a ground for new trial "if the misconduct is of such a character as to prejudice the defendant or influence the verdict," the trial court must be accorded broad discretion in evaluating the effect of claimed spectator misconduct. [Citation.] The reason is obvious: the court ordinarily is present in the courtroom at any time when a spectator engages in an outburst or other misconduct in the jury's presence and is in the best position to evaluate the impact of such conduct on the fairness of the trial. [Citation.]

(*People v. Cornwell* (2005) 37 Cal.4th 50, 87, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) A review of the record demonstrates that the court abused its discretion in finding that

Derek Robertson's misconduct was not prejudicial and in denying appellant's motion for a new trial.

First, as noted above, the trial court itself first called attention to Derek's unruly conduct, expressing concern that he was going to "act up" and cause a "donnybrook" in the courtroom. (RT Vol. 24 5647.)

Moreover, the trial court recognized that Derek was likely to engage in further misconduct. For instance, the court predicted that the prosecutor would be unable to control him. Then, after the prosecutor insisted that Derek had a right to testify, the court observed that the law does not allow "the hysteria, hatred, the vengeance, the wishes as to what this jury should do, and we are going to get all of that." (RT Vol. 24 5648.)

Second, contrary to the trial court's finding (RT Vol. 27 6408-6410), defense counsel addressed Derek's misconduct in a timely manner. Specifically, they informed the court that they had heard Derek, although they did not describe what he said. (RT Vol. 24 5647.) Moreover, defense counsel suggested a way to avoid further misconduct by Derek, offering to stipulate to the admission of his prior testimony (so long as it was redacted to delete any inappropriate matter). (RT Vol. 24 5648.)

Finally, the fact that the court did not hear Derek's remark (RT Vol. 27 6409-6410) was an insufficient basis to deny appellant's motion because the court failed to investigate whether the jury may have heard it. (Cf. *People v. Chatman* (2006) 38 Cal.4th 344, 367, 369 [court investigated the defendant's complaints of a spectator's loud speech or other sounds by speaking to the bailiff, court clerk and court reporter].) The fact that defense counsel and a defense investigator heard it (CT Vol. 8 2140; RT Vol. 27 6409-6410) means that the jurors may well have heard it as well. Under these circumstances, it cannot be said that the court was in the best

position to evaluate the impact of Derek's conduct on the fairness of the trial. (See *People v. Chatman*, *supra*, 38 Cal.4th at pp. 368-369 ["Spectator misconduct is a ground for mistrial if it is 'of such a character as to prejudice the defendant or influence the verdict.'"]; *People v. Bolden* (2002) 29 Cal.4th 515, 555 [to warrant a mistrial, "a party's chances of receiving a fair trial [must] have been irreparably damaged"].)

The prejudicial effect of Derek's misconduct was exacerbated by his mother's outburst. (RT Vol. 24 5641; CT Vol. 8 2129.) The conduct of Derek and Suzanne Robertson introduced "irrelevant information or inflammatory rhetoric that divert[ed] the jury's attention from its proper role [and] invite[d] an irrational, purely subjective response . . . ." (*People v. Edwards* (1991) 54 Cal.3d 787, 836.) Moreover, their comments disparaged defense counsel and likely led the jurors to view defense counsel with disfavor, thereby undermining appellant's rights to a fair trial and to the effective assistance of counsel. (See Arguments VII and VIII, *ante*, incorporated by reference as if fully set forth herein.)

Under these circumstances, the trial court abused its discretion in denying appellant's motion for a new trial. (*People v. Cornwell*, *supra*, 37 Cal.4th at p. 87.)

D. The Trial Court Erred in Denying Appellant's Motion Because A Third Penalty Trial In this Case Violated Appellant's Rights to Due Process and the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment

The trial court may grant a new trial "[w]hen the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial. . . ." (§ 1181, subd. (5); see also *People v. Turner* (1870) 39 Cal. 370, 371 [any substantial error

of court on question or matter arising during trial is proper ground of motion for new trial].)

In his motion for a new trial, appellant argued that, "Having no new evidence to present in the third trial which would further aid the jury in making an *individualized* assessment of the crucial issue in this case, that is, whether the death penalty is appropriate for this particular defendant on trial, a 3rd penalty retrial became nothing more than jury shopping on behalf of the prosecution." (CT Vol. 8 2137; emphasis original.) Appellant further argued that subjecting him to a third penalty trial, virtually identical to the first two, (1) "infused 'randomness' into the decision[-]making process with a bias toward the death penalty" and (2) violated the "strong concern that a person's life not be taken if there is a chance his death sentence was inflicted in an arbitrary and capricious manner." (CT Vol. 8 2138, citing *Furman v. Georgia*, *supra*, 408 U.S. 238.)

As noted above, however, the trial court rejected appellant's argument that his third penalty trial was unconstitutional. The court stated no reasons for its ruling except to suggest that *Furman v. Georgia*, *supra*, 408 U.S. 238, did not support appellant's position. (RT Vol. 27 6414-6415.) For the reasons set forth below, the trial court's ruling constituted an abuse of discretion.

First, the trial court failed to directly address defense counsel's argument that the death verdict in this case was unconstitutionally arbitrary and capricious. (CT Vol. 8 2137-2138; RT Vol. 27 6414.) Similarly, the trial court failed to address the law and arguments raised in appellant's motion to bar a third penalty trial (CT Vol. 4 1115-1121; RT Vol. 14 3130; RT Vol. 21 4777), and his motion requesting that the court impose a sentence of life without parole pursuant to Penal Code section 190.4,

subdivision (b) (CT Vol. 6 1563-1594; RT Vol. 20 4713-4720), which he incorporated by reference into his motion for a new trial (CT Vol. 8 2137, fn. 9). (See Arguments V and VI, *ante*, incorporated by reference as if fully set forth herein.) Finally, the court failed to address the law and argument raised in appellant's separate post-verdict motion to reduce his sentence to life imprisonment with parole based upon the improper granting of a third penalty trial (CT Vol. 8 2153-2158, 2181-2182; RT Vol. 27 6415). (See Argument X, *post*, incorporated by reference as if fully set forth herein.)

Second, appellant has demonstrated that allowing a penalty retrial after two previous penalty trial had ended in hung juries constituted federal constitutional error. (Arguments V and VI, *ante*.) As such, Penal Code section 190.4, subdivision (b), is unconstitutional both on its face and as applied in this case, in that compelling appellant to endure the ordeal of a third, full-blown penalty trial concerning whether he would live or die was constitutionally inconsistent with the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) Similarly, the statute, on its face and as applied in this case, violated appellant's right to due process. (See *Gardner v. Florida* (1977) 430 U.S. 349, 358 [noting that the sentencing process must satisfy the requirements of the Due Process Clause].)

For these reasons, the trial court abused its discretion in denying appellant's motion for a new trial. (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 917, fn. 27.)

E. Conclusion

The trial court's failure to perform its statutory duty and properly address appellant's motion for a new trial violated the statutory mandate of Penal Code section 1181 and denied a state-created right in violation of

appellant's right to due process under the federal Constitution. (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, § 1, 7, and 15; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347 [defendant constitutionally entitled to procedural protections afforded by state law].)

Moreover, the trial court's denial of appellant's motion for a new trial violated the Eighth Amendment's requirement for reliability in capital sentencing by introducing the improper inferences raised by the prosecutor's misconduct and Derek Robertson's misconduct into the sentencing decision. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) The trial court's denial of appellant's motion also violated the Eighth Amendment's prohibition against cruel and unusual punishment by upholding a death verdict which was imposed arbitrarily and capriciously (see *Furman v. Georgia*, *supra*, 408 U.S. at pp. 239-240) and in contravention of evolving standards of decency (see *Trop v. Dulles*, *supra*, 356 U.S. at p. 101).

The trial court's error implicated constitutional protections and require reversal unless it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) However, even if the error is viewed as rising under state law, error that affects the penalty determination similarly requires reversal if there was a "reasonable possibility" that it affected the penalty decision. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) These standards are the same in substance and effect. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965, disapproved on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

For the reasons set forth above, each of the errors addressed above, either alone or in combination, requires reversal of the penalty judgment.

X

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION REQUESTING THAT THE COURT IMPOSE A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE BASED UPON THE IMPROPER GRANTING OF A THIRD PENALTY TRIAL

A. Introduction

Prior to the sentencing hearing, defense counsel filed a motion requesting that the trial court impose a sentence of life without the possibility of parole ("LWOP"), arguing that the improper granting of a third penalty trial violated appellant's rights to due process, a fair trial, and a reliable penalty verdict under the state and federal Constitutions. (CT Vol. 8 2153-2158.)[117]

Specifically, defense counsel argued that the trial court's decision to permit a third penalty trial violated appellant's rights to a fair trial and due process of law, as well as his right to a reliable penalty trial. (CT Vol. 8 2154-2156.) Defense counsel pointed out that it is of "vital importance" to both the defendant and the community that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (CT Vol. 8 2155, quoting *Gardner v. Florida* (1977) 430 U.S. 349, 357-358.) Here, the verdict was rendered unreliable because the trial court permitted appellant to testify despite its awareness that he was trying to obtain a death verdict and that he was testifying in an increasingly

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[117] As noted in footnote 111, *ante*, appellant also filed the following motions on the same date: (1) a motion for a new trial (CT Vol. 8 2120-2140); and, (2) a motion requesting that the court modify the sentence to life imprisonment without the possibility of parole pursuant to Penal Code sections 190.4, subdivision (e), and 1181, subdivision (7) (CT Vol. 8 2141-2152). To avoid confusion, appellant refers to the motion at issue in the instant argument as his "motion for LWOP."

strident and provocative manner to achieve that end. (CT Vol. 8 2155-2156.)

Defense counsel further argued that the trial court's decision to permit a third penalty trial effectively allowed appellant to waive his right to a fair trial, in contravention of the fundamental public policy that the state's interest in a fair and reliable trial may not be "thwarted through the guise of a waiver of a personal right by an individual." (CT Vol. 8 2156, quoting *People v. Blakeman* (1959) 170 Cal.App.2d 596, 598.)

The motion for LWOP was based upon the following: the motion itself and the points and authorities contained therein, including the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution, article I, sections 1, 7, 13, 15, 16, 17 and 22 of the state Constitution, and "all applicable statutory law"; and, any argument of counsel in connection with the motion. (CT Vol. 8 2154 and fn. 1.) Defense counsel also referred to their earlier motion to modify the death verdict pursuant to Penal Code section 190.4, subdivision (b). (CT Vol. 8 2155, fn. 3.)

Following a hearing on the separate defense motion for a new trial (see Argument IX, *ante*), the court and counsel discussed appellant's motion for LWOP as follows:

[Defense counsel]: Actually there is one other motion. I also filed a motion regarding the improper filing of a or trying of a third penalty phase, and I am prepared to submit on that.

[Court]: I thought I just addressed that.

[Defense counsel]: Thank you, Your Honor. As to the automatic motion for modification, Your Honor, I would just –

[Court]: If I didn't, would you like to be heard further?

[Defense counsel]: No, I wouldn't. I would submit on that further –

[Court]: Denied.

The court and counsel then proceeded to discuss appellant's automatic motion for modification of the verdict pursuant to Penal Code section 190.4, subdivision (e). (RT Vol. 27 6415.)

For the reasons set forth below, the trial court's erroneous denial of appellant's motion for LWOP requires that his sentence be reduced to LWOP, or, at a minimum, that he be granted a new penalty trial.

B. The State and Federal Constitutions, As Well As California's Death Penalty Law, Make Clear That Both the State and Criminal Defendants Have an Interest in Ensuring That Trials Be Fair and That Penalty Judgments Be Reliable

1. Constitutional Bases for Society's Independent Interest in the Fairness and Accuracy of Criminal Proceedings and the Reliability of Death Judgments

The federal Constitution demands that all criminal trials be fair. (U.S. Const., 5th and 14th Amends.) "Further, proceedings must not only be fair, they must '*appear* fair to all who observe them.'" (*Indiana v. Edwards* (2008) 554 U.S. 164, 128 S.Ct. 2379, 2387; emphasis added.)

In capital trials, the United States Supreme Court has repeatedly emphasized that given the "irremediable and unfathomable" nature of the death penalty, the Eighth Amendment demands a heightened degree of reliability in all stages of a capital proceeding. (*Ford v. Wainwright* (1986) 477 U.S. 399, 411; see also *Beck v. Alabama* (1980) 447 U.S. 625, 637 [Eighth Amendment demand for heightened reliability applies to both guilt and penalty determinations in capital cases]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 ["the penalty of death is qualitatively different

from a sentence of imprisonment, however long"]; accord, e.g., *Deck v. Missouri* (2005) 544 U.S. 622, 632, and authorities cited therein; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Lockett v. Ohio* (1978) 438 U.S. 586, 605 (plur. opn.); *Gardner v. Florida* (1977) 430 U.S. 349, 357-358 (plur. opn.).)

As defense counsel observed (CT Vol. 8 2155-2157), the *state* has a legitimate, vital interest – one that cannot and should not be overridden by a particular criminal defendant – in ensuring that criminal trials are both fair and *appear* to be fair, and that death verdicts are just, based on reason, and reliable. (See, e.g., *Indiana v. Edwards*, *supra*, 128 S.Ct. at p. 2387 [state has independent interest in ensuring that criminal trials are fair "and appear to be fair to all who observe them"]; *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638 [recognizing "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice and emotion"]; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 357-358 [same]; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1300, and authorities cited therein [recognizing state's independent and "strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings"]; *People v. Guzman* (1988) 45 Cal.3d 915, 962, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 ["Beyond doubt, the state has a strong interest in promoting the reliability of a capital jury's sentencing decision"]; *People v. Deere* (1985) 41 Cal.3d 353, 362-364; *People v. Chadd* (1981) 28 Cal.3d 739, 747-750.)

There are occasions in which these interests may be at odds with a particular defendant's desires. When the defendant's wishes – if followed – would subvert society's independent interest in the fairness of its criminal

proceedings and the reliability of death verdicts, the state's interests must win out. (See, e.g., *Indiana v. Edwards*, *supra*, 128 S.Ct. at p. 2387, and authorities cited therein [state's independent interest in the fairness of its proceedings permits it to impose a higher competency requirement for a defendant who wishes to control his trial through self-representation than that applied to a defendant's ability to stand trial]; *Sell v. United States* (2003) 539 U.S. 166, 179-182 [government's interest in "assuring that the defendant's trial is a fair one" and trying defendants while competent may, under certain circumstances, outweigh defendant's constitutionally protected liberty interest in avoiding involuntary medication]; *Martinez v. Court of Appeal of California, Fourth Appellate Dist.* (2000) 528 U.S. 152, 162 ["the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer"]; *Wheat v. United States* (1988) 486 U.S. 153, 160, 162 [the "independent interest [of federal courts] in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them" may override defendant's right to counsel of choice and willingness to waive conflict]; *Pate v. Robinson* (1966) 383 U.S. 375, 384 [defendant cannot waive due process prohibition against being tried if incompetent to stand trial]; *People v. Richardson* (2008) 43 Cal.4th 959, 994-997, and authorities cited therein [state's independent interest in fairness and appearance of fairness permits trial court to substitute counsel over defendant's objection]; *People v. Breverman* (1998) 19 Cal.4th 142, 155 [trial court's duty to provide lesser included offense instruction even over defendant's objection is grounded on policy concerns "[not only] for the rights of persons accused of crimes [but also] for the overall administration of justice"]; *People v. Stanley* (1995) 10

Cal.4th 764, 804-805 [in the face of substantial evidence of incompetence, due process demands competency hearing and "attorney representing the defendant is required to 'advocate the position counsel perceives to be in the client's best interests even when that interest conflicts with the client's stated position'"].) Indeed, California law has long provided that while criminal defendants may waive rights and procedures that exist for their own benefit, they may not waive rights or procedures that exist for the public's benefit. (See, e.g., *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371, and authorities cited therein [criminal defendants may not waive rights in which the public has an interest or when waiver would be against public policy]; *People v. Blakeman*, *supra*, 170 Cal.App.2d at p. 598; Civ. Code, § 3513 ["Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement"].)

This principle applies with equal force when the defendant's desire to be executed would subvert society's independent interest in the fairness of its proceedings and the reliability of death judgments. Certainly, this is true under California's death penalty scheme, which prohibits particular defendants from unilaterally waiving "rights" that exist not only for their own benefit but also to protect California's independent interest in the fairness of its proceedings and the reliability of its death judgments. (See, e.g., *People v. Alfaro*, *supra*, 41 Cal.4th at p. 1300 ["The consent requirement of [Penal Code] section 1018 has its roots in the state's strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings"]; *People v. Deere*, *supra*, 41 Cal.3d at pp. 362-364; *People v. Chadd*, *supra*, 28 Cal.3d at pp. 750, 753; *People v. Stanworth* (1969) 71 Cal.2d 820, 834,

and authorities cited therein.)

2. California's Death Penalty Scheme Reflects Society's Paramount, Independent Interest in the Fairness of its Criminal Proceedings and the Reliability of Death Judgments

Four features of California's death penalty scheme reflect the fundamental principle that, under state law, the state has an independent interest in the fairness and reliability of capital trials. First, Penal Code section 1018 explicitly provides in relevant part that no guilty plea to a capital offense "shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel." This statute, read together with the constitutional guarantee to the effective assistance of counsel, requires counsel to exercise his "independent professional judgment" in determining whether the defendant should enter a guilty plea to a capital case. (*People v. Massie* (1985) 40 Cal.3d 620, 625.) Counsel's duty to exercise his *independent* judgment in this regard overrides the defendant's own wishes. (*Ibid.* [trial court erred in accepting guilty plea to capital offense, and counsel erred in formally consenting to the plea, where it was clearly made against counsel's advice, but counsel felt pressured into "going along simply because his client was 'adamant' in his decision to plead guilty"].) Further, a particular defendant cannot avoid the statute's restrictions by discharging his attorney in order to represent himself and thereby enter a plea without the consent of counsel, even if he or she is found legally competent to do so. (*People v. Massie*, *supra*, 40 Cal.3d at p. 625; see also *People v. Alfaro*, *supra*, 41 Cal.4th at p. 1302; *People v. Chadd*, *supra*, 28 Cal.3d at pp. 747-750.)

Second, consistent with California's "independent interest in the accuracy of the special circumstance and penalty determinations . . . .

[California does] not . . . permit a defendant to stipulate to the death penalty . . . ." (*People v. Teron* (1979) 23 Cal.3d 103, 115, fn. 7, citing *People v. Stanworth, supra,* 71 Cal.2d at pp. 833-834, overruled on other grounds in *People v. Chadd, supra*, 28 Cal.3d at p. 750 and fn. 7.) Rather, a penalty hearing is required in which a *trier of fact*, guided by strict constitutional and statutory guidelines intended to assure reliable death judgments, determines the appropriate penalty. (§§ 190.3 and 190.4, subd. (a).)

Third, if the trier of fact determines that death is appropriate, California law mandates an *automatic* motion before the trial judge to modify the death verdict. (§ 190.4, subd. (e) ["[i]n every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding . . . ."].) In other words, the motion is made irrespective of whether a particular defendant seeks or even desires modification.

Finally, Penal Code section 1239, subdivision (b), provides for an automatic appeal in capital cases, which a defendant has no power to waive. As this Court has explained, "[i]t is manifest that the state in its solicitude for a defendant under sentence of death has not only invoked on his behalf a right to review the conviction by means of an automatic appeal but has also imposed a duty upon this court to make such review. We cannot avoid or abdicate this duty merely because defendant desires to waive the right provided for him." (*People v. Stanworth*, *supra*, 71 Cal.2d at p. 834; accord, e.g., *People v. Massie* (*Massie II*) (1998) 19 Cal.4th 550, 566, 570-572 [whether to appeal capital conviction is not one of the few fundamental rights over which defendant has control; section 1239, subdivision (b), does not violate defendant's right to "control his defense" or create an

unconstitutional conflict of interest between a client's wishes and the state's independent interest in reliability of death judgments].)

Thus, California's death penalty scheme as a whole makes clear that capital trials may not be used as mere instruments for particular defendants to achieve their own desires. To the contrary, "[w]e are concerned with a principle of fundamental public policy." (*People v. Stanworth, supra*, 71 Cal.2d at p. 834; see also, e.g., *Cowan v. Superior Court*, *supra,* 14 Cal.4th at p. 371 [while criminal defendants may waive rights that exist for their *own* benefit, they may not waive rights in which the public has an interest or when waiver would be against public policy].) Three of this Court's decisions are illustrative.

In *People v. Chadd*, *supra*, 28 Cal.3d 739, the defendant sought to enter a guilty plea to a capital offense in order to receive the death penalty, but his counsel refused to consent on the ground that the "defendant's basic desire is to commit suicide, and he's asking for the cooperation of the State in that endeavor." (*Id.* at p. 744.) The trial court recognized Penal Code section 1018's requirement that counsel consent in guilty pleas to capital offenses, but ruled that if the defendant was sufficiently competent to discharge counsel and act as his own attorney under *Faretta v. California* (1975) 422 U.S. 806, then the defendant could enter his plea without the consent of counsel. (*Id.* at p. 745.) The trial court initiated competency proceedings, found the defendant competent, and accepted the defendant's plea of guilty without the consent of counsel. (*Id.* at pp. 745-746.)

The defendant appealed his conviction and the ensuing death judgment on the ground, inter alia, that the trial court violated section 1018 by accepting his guilty plea without the consent of counsel. (*People v. Chadd*, *supra*, 28 Cal.3d at p. 746.) Defending the judgment, the state

argued that section 1018 is unconstitutional because it "disturbs the 'uniquely personal' nature of the defendant's right to plead guilty, denies him his 'fundamental right' to control the ultimate course of the prosecution, and destroys the constitutionally established relationship of counsel as the defendant's 'assistant' rather than his master." (*Id.* at p. 747.)

This Court flatly rejected the state's reasoning because it "fails to recognize the larger public interest at stake in pleas of guilty to capital offenses." (*People v. Chadd*, *supra*, 28 Cal.3d at p. 747.) Although it is true that, under California law, the decision to plead is ordinarily personal to the defendant, "it is no less true that the Legislature has the power to regulate, in the public interest, the manner in which that choice is exercised." (*Id.* at pp. 747-748.)

The 1973 amendment to section 1018, prohibiting a guilty plea to a capital offense without the consent of counsel, was part of an extensive revision of California's death penalty law meant to satisfy the Eighth Amendment and avoid arbitrary and capricious imposition of the death penalty and thus was "intended . . . to serve as a further independent safeguard against erroneous imposition of a death sentence." (*People v. Chadd*, *supra*, 28 Cal.3d at p. 750.) Considering the interplay between that interest and a defendant's rights under *Faretta*, *supra*, this Court reasoned that while the *Faretta* decision recognized that the Sixth Amendment "grants to the accused personally 'the right to make his defense' . . . ," it does not necessarily follow that he also has the "right to make *no* such defense and to have *no* such trial, even when his life is at stake." (*Id.* at p. 751; emphasis original.)

To the contrary, "in capital cases, as noted above, the state has a

strong interest in reducing the risk of mistaken judgments." (*People v. Chadd*, *supra*, 28 Cal.3d at p. 751.) This strong interest is reflected in California's entire death penalty scheme – from plea through appeal. (*Id.* at pp. 751-752, citing *People v. Stanworth*, *supra*, 71 Cal.2d 820, 833, and quoting *Massie v. Sumner* (9th Cir. 1980) 624 F.2d 72, 74 ["While Massie is correct in that he enjoys a constitutional right to self-representation, this right is limited and a court may appoint counsel over an accused's objection in order to protect the public interest in the fairness and integrity of the proceedings"].) Consistent with the intent of California's statutory death penalty scheme, section 1018 furthers the state's independent interest in the reliability of death judgments and reducing the risk of mistaken death judgments by "serv[ing] inter alia as a filter to separate capital cases in which the defendant might reasonably gain some benefit by a guilty plea from capital cases in which the defendant . . . simply wants the state to help him commit suicide." (*Id.* at p. 753.) This strong interest outweighs any possible "minor infringement" on a defendant's rights under *Faretta*. (*Id.* at p. 751; accord, *People v. Massie*, *supra*, 40 Cal.3d at p. 625 [*Faretta* right to self-representation does not trump society's independent interest in the reliability of death judgments so as to allow defendant to discharge counsel and enter guilty plea to capital offense against counsel's advice].)

Four years after *Chadd*, in *People v. Deere*, *supra*, 41 Cal.3d 353, this Court again had occasion to consider the tension between society's interest in the reliability of death judgments and a particular defendant's desire for execution. This Court recognized, as it had in *Chadd* and *Stanworth*, *supra*, that """[a]lthough a defendant may waive rights that exist for his own benefit, he may not waive those which also belong to the public generally."""" (*People v. Deere*, *supra,* 41 Cal.3d at pp. 363-364, quoting

from *People v. Stanworth*, *supra*, 71 Cal.2d at p. 834.) In this regard, and as it had in *Chadd*, *supra*, this Court recognized that California has an independent, constitutionally compelled interest in the reliability of death judgments and "reducing the risk of mistaken judgments," as well as "a fundamental public policy against misusing the judicial system." (*Id.* at p. 363.) The Legislature has legitimately determined that these interests override a defendant's contrary wishes throughout capital proceedings, from the entry of plea through appeal. (*Ibid.*) A capital trial that amounts to nothing more than an instrument by which the defendant commits state-assisted suicide violates public policy, defeats state and federal constitutional interests in the reliability of death judgments, and thus the death verdict it produces cannot stand. (*Ibid.*)

In *Deere*, this Court applied these principles to hold that where defense counsel acceded to the defendant's wish not to present available mitigating evidence and the defendant made a statement to the factfinder in which he asked for the death penalty, the resulting death verdict was unreliable. (*People v. Deere*, *supra*, 41 Cal.3d at pp. 361, 364; accord, *People v. Burgener* (1986) 41 Cal.3d 505, 541-543, disapproved on another ground by *People v. Reyes* (1998) 19 Cal.4th 743, 756.) This Court has since disapproved of *Deere* to the extent that it held that "failure to present mitigating evidence in and of itself is sufficient to make a death judgment unreliable." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9; accord, e.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1372, and authorities cited therein; *People v. Sanders* (1991) 51 Cal.3d 471, 524-527.)[126] But it still

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[126] In addition, this Court held that the failure to present available mitigating evidence necessarily amounts to ineffective assistance of counsel. (*People v. Deere*, *supra*, 41 Cal.3d at pp. 364.) This aspect of (continued...)

adheres to the fundamental principles that the state has an independent interest in fair and reliable capital trials.

According to this Court's post-*Deere* decisions, a death verdict is not rendered unreliable simply because disinterested counsel accedes in his competent client's knowing, voluntary, and intelligent decision to present no penalty phase defense. (*People v. Sanders*, *supra*, 51 Cal.3d at pp. 524-527 ["in the absence of evidence showing counsel failed to investigate available mitigating evidence or advise defendant of its significance," death verdict was not rendered unreliable where presumably competent defendant made "knowing and voluntary" decision not to present penalty phase defense, failure to present defense "did not amount to an admission that he believed death was the appropriate penalty," and jurors heard mitigating evidence from guilt phase]; *People v. Bloom*, *supra*, 48 Cal.3d at p. 1228 [a death verdict is not necessarily unreliable simply due to competent, self-represented defendant's decision not to present mitigating evidence at the penalty phase; so long as a death verdict is returned under "proper instructions and procedures" the reliability requirement is satisfied].) Nevertheless, the essential premise of *Deere* – that society has an independent and constitutionally guaranteed interest in the fairness and reliability of its capital proceedings and judgments, which may be violated when a capital murder trial becomes nothing more than an instrument for a particular defendant's self-defeating desires – remains the law today. (See *People v. Sanders*, *supra*, 51 Cal.3d at p. 526, fn. 23 [while competent defendant's decision not to present available mitigating evidence or closing

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[126](...continued)
Deere has also been disapproved. (See, e.g., *People v. Lang* (1989) 49 Cal.3d 991, 1031.)

argument does not itself render death verdict unreliable, the "state's interest in a reliable penalty verdict may be compromised when, in addition to the defendant's failure to present mitigating evidence, the jury was also given misleading instructions and heard misleading argument"]; accord, *People v. Bloom*, *supra*, 48 Cal.3d at p. 1228 and fn. 9; *People v. Williams* (1988) 44 Cal.3d 1127, 1152 [in absence of misleading instructions or argument, or defendant's request to factfinder to return death verdict as in *Deere* and *Burgener*, *supra*, failure to present available mitigation does not, in and of itself, render death verdict unreliable].)[127]

Indeed, this Court recently reaffirmed California's paramount, independent interest in the reliability of death judgments, in *People v. Alfaro*, *supra*, 41 Cal.4th 1277. There, defense counsel refused to consent to the defendant's unconditional guilty plea to a capital offense, explaining that he knew she was "pleading guilty for all intents and purposes to a death sentence." (*Id.* at p. 1297.) Pursuant to section 1018, the trial court refused to accept the defendant's plea or to remove or substitute counsel. (*Id.* at pp. 1296-1298, 1319.) The defendant was convicted of murder and sentenced to death. (*Id.* at pp. 1282, 1297.)

On appeal, the defendant argued both that her counsel unreasonably withheld his consent to her guilty plea and that she had a fundamental right to enter a guilty plea, and make fundamental decisions about her defense, even against the advice of counsel, which the trial court violated when it

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[127] This Court has also held that a defendant who exercises his Sixth Amendment right to self-representation may present no defense. (See, e.g., *People v. Koontz* (2002) 27 Cal.4th 1041, 1074.) Appellant did not move to represent himself, nor did he suggest that he would do so if defense counsel refused to acquiesce in his purported death wish. Therefore, the tension between a defendant's Sixth Amendment right to self-representation and the state's interest in the reliability of death judgments is not at issue here.

refused to allow her to do so. (*People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1294-1295, 1298, 1301.) The defendant attempted to distinguish *Chadd*, *supra*, on the ground that Chadd had sought to enter a plea in order to commit state-assisted suicide, whereas she had sought to enter a guilty plea in order to gain an advantage at the penalty phase by urging her remorse and acknowledgment of wrongdoing. (*Id.* at pp. 1299-1300.) She thus urged this Court to limit its holding in *Chadd* to those facts and argued its application to her case violated her rights to the assistance of counsel, to control over her own defense, and to a fair trial. (*Id.* at pp. 1295, 1300.) This Court rejected each of her arguments.

Central to this Court's rejection of her arguments was its finding that she did not seek to enter her plea in order to gain a tactical advantage in her penalty phase *defense*. (*People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1299-1300.) Instead, she wanted to enter an unconditional plea in order to prevent or avoid her counsel's intended strategy of implicating a third party as an accomplice in the charged murder. (*Ibid.*)

Thus, like defense counsel's refusal to consent to a plea made "in order to effectuate a state-assisted suicide" in *Chadd*, counsel's refusal to consent to an unconditional plea that was not intended to benefit his client's *defense* served the function that section 1018, and the extensive revision of California's death penalty legislation of which it was a part, were intended to serve: as a "safeguard against the erroneous imposition of a death sentence" and in furtherance of "the state's strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings. [Citation.]" (*People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1300-1301.) A death judgment may be erroneously imposed when the trier of fact has not determined, in accord

with constitutionally- and statutorily-compelled procedures intended to ensure reliable death judgments, that the death penalty is warranted. In this regard, "[h]ad defense counsel capitulated to defendant's desire to plead guilty unconditionally despite the information she had conveyed to him implicating another person in the murder, defendant's plea would have cast doubt on potentially critical mitigating evidence. A guilty plea entered under such circumstances might very well lead to the erroneous imposition of the death penalty – precisely the outcome section 1018 is intended to prevent." (*Id.* at p. 1301.)

Moreover, while a defendant may have a right to control a fundamental aspect of his or her *defense* and the right to counsel to assist in his or her *defense*, those rights were not implicated or violated in that case because the defendant did not seek to enter the plea in order to benefit her penalty phase *defense.* (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1302.) Hence, defendant's dispute with her counsel "did not implicate a constitutionally protected fundamental interest that might override the plain terms of section 1018" or – it necessarily follows – society's independent interest in the reliability of death judgments that section 1018 and California's death penalty scheme are intended to serve. (*Ibid.*)[128]

In other words, this Court implicitly, but undeniably, held that although a defendant enjoys the rights to present, control fundamental aspects of, and to the assistance of counsel in presenting, a *defense*, he or

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[128] In this regard, this Court distinguished situations wherein a defendant has a personal, constitutionally protected right to accept or reject a plea *bargain* offer in which the defendant is offered some *benefit* in exchange for the plea. (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1302 and fn. 5, citing *In re Alvernaz* (1992) 2 Cal.4th 924.) There is no corresponding right to enter an *un*conditional plea. (*Ibid.*)

she enjoys no concomitant right to present *no defense* that will override the state's independent interest in the reliability of death judgments. This holding is entirely consistent with *Chadd*, with the fundamental premise of *Deere*, *supra*, and indeed with the very text of the Sixth Amendment, which "requires not merely the provision of counsel to the accused, but 'Assistance,' which is to be '*for his defence*.' . . . If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated." (*United States v. Cronic* (1984) 466 U.S. 648, 654, quoting text of Sixth Amendment; emphasis added.)

C. The Trial Court Erred in Failing to Address the Merits of Appellant's Motion

In their motion for a new trial, defense counsel argued that retrial of the penalty phase resulted in the arbitrary and capricious imposition of the death verdict in this case, violating the due process clauses of the state and federal Constitutions and the Eighth Amendment's prohibition against cruel and unusual punishment. (See CT Vol. 8 2137-2138; see also Argument IX, *ante*.) By contrast, the motion for LWOP was grounded upon an analytically distinct principle: the right of both the defendant *and the state* to a fair and reliable penalty trial.

As appellant discusses in Argument IX, *ante*, the trial court rejected the argument, raised in appellant's motion for a new trial (CT Vol. 8 2137-2138), that retrial of the penalty phase for a third time resulted in an arbitrary and capricious death verdict. The court's sole basis for its ruling was that *Furman v. Georgia* (1972) 408 U.S. 238, cited by appellant in his motion (CT Vol. 8 2138), did not support his position. (RT Vol. 27 6414.) Significantly, the court did not consider either of the central points raised in appellant's motion for LWOP – i.e., that a third penalty retrial violated (1) the interest of both the state and appellant that the penalty trial be fair and

reliable, and (2) the fundamental public policy that the state's interest in a fair and reliable trial not be "thwarted through the guise of a waiver of a personal right by an individual." Therefore, the trial court was mistaken when it stated that it had "just addressed" the motion for LWOP. (RT Vol. 27 6415.)

The court's use of the phrase "just addressed" makes clear that it did not mean to suggest that it had addressed appellant's motion for LWOP when it ruled on his motion requesting that the court impose LWOP pursuant to Penal Code section 190.4, subdivision (b), and/or his motion to prohibit retrial of the penalty phase. Both of those motions were raised and argued prior to the third penalty trial. (CT Vol. 4 1115-1121; CT Vol. 6 1563-1594; RT Vol. 20 4713-4720; RT Vol. 21 4777.) Even assuming the court was referring to either or both of those motions, neither one raised the arguments raised in his motion for LWOP. In the former motion, defense counsel requested that the court exercise its authority under section 190.4, subdivision (b), to impose a sentence of LWOP; their request was based largely on a recitation of various factors demonstrating that LWOP was the appropriate sentence. (CT Vol. 6 1563-1594; RT Vol. 20 4713-4720.)[129] In

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[129] As appellant explained in Argument V, *ante*, defense counsel cited or otherwise referred to evidence that: (1) appellant's motive and his lifetime of laudable character traits made LWOP the appropriate sentence (CT Vol. 6 1566-1572); (2) any death verdict reached during the third penalty trial would be based largely upon additional fabrications by appellant (referring to his transparent attempts to induce the prosecutor to seek, and the jury to return, a death verdict), not on a fair evaluation of the evidence in mitigation and aggravation (CT Vol. 6 1572-1576); (3) despite appellant's efforts to provoke the previous two juries to vote to impose the death sentence, neither jury reached a unanimous verdict of death (CT Vol. 6 1576-1578); and, (4) confinement in state prison without the possibility of parole would be an appropriately harsh sentence for appellant (CT Vol. 6 (continued...)

the latter motion, defense counsel argued that retrial of the penalty phase would violate the due process clauses of the state and federal Constitutions and the Eighth Amendment's prohibition against cruel and unusual punishment; their argument centered on the point that a third retrial would subject appellant to the arbitrary and capricious imposition of a death verdict. (CT Vol. 4 1115-1121; RT Vol. 21 4777.)

It is immaterial that defense counsel did not argue the motion, but simply submitted the matter. Their arguments were set forth clearly in the motion, and additional argument was unnecessary. In any event, it would have been futile to press the court for a ruling, as the trial court had already denied appellant's motion to bar a third penalty trial (CT Vol. 4 1115-1121; RT Vol. 14 3130; RT Vol. 21 4777), his motion requesting that the court impose a sentence of life without parole pursuant to Penal Code section 190.4, subdivision (b) (CT Vol. 6 1563-1594; RT Vol. 20 4713-4720), and his motion for a new trial (CT Vol. 8 2120-2140; RT Vol. 27 6407-6414). The law does not require "futile rituals to preserve a claim for appeal." (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 820; see also *U.S. Western Falun Dafa Ass'n v. Chinese Chamber of Commerce* (2008) 163 Cal.App.4th 590, 603, fn. 5 [noting that it is counsel's job to remind the court of the necessity to rule on previously-filed objections, unless further requests for a ruling would be futile].) It was pretty much a foregone conclusion that the court would deny this motion as well.

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[129](...continued)
1578).

D. The Trial Court Should Have Reduced Appellant's Sentence to LWOP, or, At a Minimum, Reversed the Death Judgment

The trial court had the statutory authority to grant the relief sought by defense counsel, that is, to reduce appellant's sentence to LWOP. (See §§ 1181, subd. (7), and 190.4, subd. (e).)[130] Alternatively, the trial court could have ordered a new trial. (See, e.g., § 1181, subd. (7).)

Here, the trial court's failure to address the merits of appellant's motion for LWOP before denying it constituted prejudicial error. (Cf. *People v. Spencer* (1962) 60 Cal.2d 64, 91 [rejecting defendant's contention

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[130] Penal Code section 1181, subdivision (7), provides:

> When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed[.]

Penal Code section 190.4, subdivision (e), provides in pertinent part as follows:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding . . . . [Footnote omitted.] In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

that the trial court failed to rule on his motion for reduction of the penalty to life imprisonment where the record showed that it was incorporated in his motion for a new trial, which was heard and ruled upon it its entirety].) The trial court's failure to address the merits of the motion for LWOP denied a state-created right in violation of appellant's right to due process under the federal Constitution. (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, § 1, 7, 15; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347 [defendant constitutionally entitled to procedural protections afforded by state law].)

Even assuming, arguendo, that the trial court ruled on the motion for LWOP, its ruling was clearly erroneous. Appellant has amply demonstrated that the trial court's granting of a third penalty phase constituted prejudicial error. (Arguments V, VI and IX, *ante*, which are incorporated by reference as if fully set forth herein.) Moreover, appellant has amply demonstrated that, because the trial court permitted a third penalty trial, the jury heard highly prejudicial victim impact evidence and improper questions by the prosecutor, rendering its death verdict unreliable. (Arguments VII and VIII, *ante*, which are incorporated by reference as if fully set forth herein.)

Therefore, the trial court's denial of appellant's motion violated the interest of both appellant and the state in a fair trial (see, e.g., *Indiana v. Edwards*, *supra*, 128 S.Ct. at p. 2387) and a reliable penalty verdict (see, e.g., *Ford v. Wainwright*, *supra*, 477 U.S. at p. 411; *People v. Deere*, *supra*, 41 Cal.3d 362-364). The trial court's denial of appellant's motion also violated the Eighth Amendment's prohibition against cruel and unusual punishment by upholding a death verdict which was imposed arbitrarily and capriciously (see *Furman v. Georgia*, *supra*, 408 U.S. at pp. 239-240) and in contravention of evolving standards of decency (see *Trop v. Dulles*

(1958) 356 U.S. 86, 101).

Accordingly, appellant's sentence should be reduced to LWOP. At a minimum, the trial court's error implicated federal constitutional protections and requires reversal unless the state can show that it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) However, even if the error is viewed as arising under state law, error that affects the penalty determination similarly requires reversal if there was a "reasonable possibility" that it affected the penalty decision. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) These standards are the same in substance and effect. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965, disapproved on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

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XI

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 both the United States Constitution and international law. This Court consistently has rejected a number of arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.[131]

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*

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[131] These claims of error are cognizable on appeal under section 1259, even when appellant did not seek the specific instruction or raise the precise claim asserted here.

(1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the 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 CT Vol. 8 2040-2041 [CALJIC No. 8.85m].) 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, 749 ["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 that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As a result, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were sufficient, by themselves and without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].) Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) He urges this Court to reconsider this holding.

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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 and 8.87; see *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see also *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. (CT Vol. 8 2040-2041 [CALJIC No. 8.85m], 2048 [CALJIC No. 8.88].)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, 280-282, 293, 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. (CT Vol. 8 2048 [CALJIC No. 8.88].) 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; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). This Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process clause and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court previously has rejected the claim that either the Fourteenth Amendment due process or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.)

Appellant requests that this Court reconsider its holding. In the instant case, the first two penalty phase juries could not reach a unanimous decision; moreover, the second jury did not reach a death verdict despite the fact that several jurors engaged in serious misconduct in an attempt to persuade fellow jurors to vote for death. The third jury did reach a death verdict, but only after the penalty trial was tainted by, among other things, unduly prejudicial victim impact evidence and appellant's irrelevant, inflammatory testimony. Without a standard identifying that death had to be the appropriate penalty beyond a reasonable doubt, this Court can have no confidence in either the strength or the reliability of the ultimate verdict. Accordingly, the judgment must be set aside.

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

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's 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 (CT Vol. 8 2040-2041, 2048), fail to provide the jury with the guidance legally required

for administration of the death penalty to meet constitutional minimum standards and consequently violate the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court also has rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that fact to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict was Not Premised on Unanimous Jury Findings

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance 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* (1976) 428 U.S. 280, 305.) This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) This Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. 584. (See *People v. Prieto,*

supra, 30 Cal.4th at p. 275.) Appellant asserts that *Prieto* was incorrectly decided, and that application of *Ring*'s reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual

punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

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

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." (CT Vol. 8 2048 [CALJIC No. 8.88].) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant asks this Court to reconsider that opinion.

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 that they may return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

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

The presumption of innocence is a core constitutional and adjudicative value 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, 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., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th and

14th Amends.), and his right to the equal protection of the laws (U.S. Const., 14th Amend.).

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 ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required in all cases.

The need for such an instruction, and the prejudice from its omission, was particularly acute in this case. The first two penalty phase juries could not reach a unanimous decision; moreover, the second jury did not reach a death verdict despite the fact that several jurors engaged in serious misconduct in an attempt to persuade fellow jurors to vote for death. The third jury did reach a death verdict, but only after the penalty trial was tainted by, among other things, unduly prejudicial victim impact evidence and appellant's irrelevant, inflammatory testimony. Under these circumstances, the presumption of life was vital, and its omission violated appellant's Eighth and Fourteenth Amendment rights.

D. Failing to Require That The Jury Make Written Findings Violates Appellant's Right To Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth,

and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.)

Appellant urges this Court to reconsider its decisions on the necessity of written findings. Written findings in this case would have allowed this Court to determine if the death verdict was the result of improper aggravating factors. If this Court is to affirm the judgment in this case, it must find that these errors were harmless. This Court cannot and should not do so without written findings allowing meaningful review of the basis for the penalty determination.

E. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. The trial court failed to omit those factors from the jury instructions (CT Vol. 8 2040-2041), 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 this 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. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325.) In a capital case, there is no burden of proof at all, and the jurors need not agree on which aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider its ruling.

H. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms

This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates

international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency (*Trop v. Dulles* (1958) 356 U.S. 86, 101)." (*People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment, as well as decisions of the United States Supreme Court citing international law in prohibiting the imposition of capital punishment under various circumstances (see *Roper v. Simmons* (2005) 543 U.S. 551, 554 [prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles]; *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21 [noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved," citing the Brief for European Union as Amicus Curiae]; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22 [noting that "'[T]he climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant.' [Citation.]"]), appellant urges this Court to reconsider its previous decisions.

Even if the death penalty as a whole does not violate international law, appellant submits that his trial violated specific provisions applicable to his trial. These rights include the right to an impartial tribunal, which demands that each of the decision-makers, including the jury, be unbiased. (*Collins v. Jamaica* (1991) IIHRL 51, Communication No. 240/1987 [impartial juries]; see also International Covenant on Civil and Political Rights [ICCPR] (June 8, 1992) 999 U.N.T.S. 171, article 14(1) [criminal defendants entitled to fair hearing by impartial tribunal].) It also encompasses standards that require prosecutors to "perform their duties

fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system." (*Guidelines on the Role of Prosecutors*, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (1990).) Finally, international law encompasses a right to a fair trial that includes specific rights but is broader than any one provision of national or international law. (Article 10 of the Universal Declaration; Article 14(1) of the ICCPR; Article 6(1) of the European Convention; Article XXVI of the American Declaration; and, Article 8 of the American Convention.)

Here, among other violations: appellant's right to a fair trial was violated by the trial court's denial of appellant's recusal motion, which resulted in an arbitrary and capricious capital prosecution (Argument I, *ante*), its failure to bar a third penalty trial (Arguments V, VI, IX and X, *ante*), and its admission of unduly prejudicial victim impact evidence (Argument VII, *ante*); appellant's right to an impartial tribunal was violated by the trial court's denial of appellant's recusal motion, which in turn resulted in the selection of a death-prone jury, and by the prosecutor's exercise of a race-based peremptory challenge (Arguments I and II, *ante*); and, the prosecutor violated his duty to uphold human rights by introducing improper considerations into the penalty decision (Argument VIII, *ante*). Appellant submits that the individual and combined effect of each claim raised in this case (see Argument XII, *post*, incorporated by reference as if fully set forth herein) violated his right to a fair trial under international standards, and therefore this Court should reverse the judgment in this case.

XII

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Even if this Court should find 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 both 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. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *People v. Hill* (1998) 17 Cal.4th 800, 844-848 [reversing entire judgment in capital case due to cumulative error]; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [addressing claim that cumulative errors so infected "the trial with unfairness as to make the resulting conviction a denial of due process"].) 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* (1967) 386 U.S. 18, 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 Ninth Circuit Court of Appeals has pointed out that, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the

The Supreme Court's observation is uniquely applicable to this case, given not only the sheer number of substantial errors, but the way in which those errors operated *synergistically* to deny appellant his state and federal constitutional rights. (See Arguments I through XI, *ante*, each of which is hereby incorporated by reference as if fully set forth herein.)

First, appellant simply could not have had a fair trial in Orange County given Orange County District Attorney Tony Rackauckas's personal involvement in the case (specifically, the fact that his father had been hospitalized at West Anaheim Medical Center just days before the shootings), which prompted his unilateral decision to change office policy and effectively mandated that the death penalty be pursued against appellant. Moreover, Rackauckas's failure to disclose the fact that his father had been a patient at the hospital and his refusal to consider any course except prosecution of the case as a capital case further suggests that the entire trial process was infected with unfairness. (Argument I, *ante*.)

Second, the entire trial process was further undermined when the prosecutor improperly exercised a peremptory challenge on the basis of race, denying appellant's right to trial by a representative jury. (Argument II, *ante*.)

Third, instructional error relating to the definition of provocation improperly undermined the defense theory that appellant committed the shootings while in the heat of passion, while at the same time improperly lowering the prosecution's burden of proving the charged offenses beyond a reasonable doubt. (Argument III, *ante*.) Moreover, the trial court's failure to provide written copies of CALJIC Nos. 2.60 and 2.61 effectively permitted the jury to consider the fact that appellant did not testify in assessing the guilt-phase evidence. (Argument IV, *ante*.)

As appellant has argued, any of the guilt phase errors, standing alone, was sufficient to undermine the prosecution's case and the reliability of the jury's ultimate verdict, and none can properly be found harmless beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-282, *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Taken separately or in combination, the errors and violations of appellant's constitutional rights deprived appellant of a fair trial, due process and a reliable determination of guilt. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 and 17; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

The cumulative effect of the errors in this case so infected appellant's trial with unfairness as to make the resulting convictions a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant's convictions, 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*, *supra*, 848 F.2d at p. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for

cumulative error].)

Even though the penalty phase jury did not participate in the guilt phase, the guilt phase errors affected its penalty verdict; at a minimum, its evaluation of the penalty phase evidence was necessarily informed by the baseline premise that appellant committed the offenses with malice, premeditation and deliberation. Notwithstanding the prejudicial effect of the guilt phase errors on the penalty phase, a number of serious penalty phase-related errors occurred as well. Indeed, there should not have been a penalty trial at all, but the trial court erred in denying appellant's motions requesting that it bar a third penalty trial and instead impose a sentence of LWOP pursuant to Penal Code section 190.4, subdivision (b). (Arguments V and VI, *ante*.)

In addition, the trial court's admission of highly prejudicial victim impact evidence permitted the jury to consider cumulative, irrelevant and unduly inflammatory testimony, and even improper witness and spectator conduct, in reaching its death verdict. (Argument VII, *ante*.) The prejudicial impact of that victim impact evidence was exacerbated by the prosecutor's misconduct in repeatedly asking victim impact witnesses questions which the court had already deemed improper. (Argument VIII, *ante*.)

The fundamentally flawed verdicts further contributed to an unreliable determination of penalty by the jury. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Stringer v. Black* (1992) 503 U.S. 222, 230-232; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *Silva v. Woodford* (9th Cir.

2002) 279 F.3d 825, 849; *People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

The case in aggravation presented at the penalty phase was not so overwhelming compared to the evidence in mitigation that the death penalty was a foregone conclusion. The only aggravation presented and argued was evidence relating to the circumstances of the crime and to victim impact evidence. By contrast, the mitigating evidence overwhelmingly demonstrated that, until the date of the offenses, appellant had lived an extremely sympathetic life; in particular, the evidence showed that appellant was a kind and thoughtful friend, an exemplary employee, and, above all, an unusually devoted son who had sacrificed a great deal to care for his mother. However, the prejudicial effect of the foregoing errors, singly and in combination, were reasonably likely to have a continued prejudicial effect upon the jury's consideration of the evidence presented at penalty, as well as upon the jury's ultimate decision to return a sentence of death.

Reversal of the death judgment is mandated here because it cannot be shown that the 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, special circumstance finding, and death sentence.

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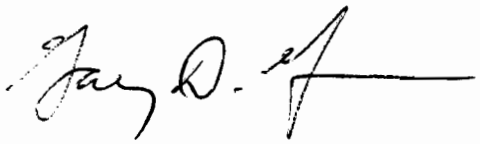
CONCLUSION

For all of the foregoing reasons, the judgment must be reversed.

DATED: November 8, 2010

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(1)(A))

I, GARY D. GARCIA, am the Deputy State Public Defender assigned to represent appellant DUNG DIHN AHN TRINH in this automatic appeal. I directed a member of our staff to conduct 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 84,625 words in length.

DATED: November 8, 2010

GARY D. GARCIA
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. Dung Dinh Anh Trinh

Cal. Supreme Ct. No. S115284
Orange County Superior Ct. No. 99NF2555

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, CA 94015. On this day, I served true copies of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
Attn: Lynne McGinnis, D.A.G.
110 W "A" Street., Ste. 1100
San Diego, CA 92101

DUNG DINH ANH TRINH
(Appellant)

Superior Court of California
County of Orange
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92701

Each said envelope was then, on November 8, 2010, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on November 8, 2010, at San Francisco, California.

Glenice Fuller

DECLARANT