IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. RAMON SANDOVAL, JR., Defendant/Appellant.	)	Case No. S115872

Los Angeles County Superior Court, Case No. BA240074
Hon. Joan Comparet-Cassani, Presiding

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

On February 9, 2001, a Los Angeles County Grand Jury returned a four-count indictment against defendant and appellant, Ramon Sandoval, Jr. (2 CT 482-486.)[1]

In count I, Mr. Sandoval was charged with murder, in violation of Penal Code section 187, subdivision (a). The murder charge was accompanied by four special circumstance allegations, viz., 1) the murder was committed for the purpose of preventing or avoiding a lawful arrest (Pen. Code, § 190.2, subd.

[1] Charged along with Mr. Sandoval in the indictment were codefendants Adolfo Ramon Bojorquez and Miguel Angel Camacho. (2 CT 482-486.)

(a)(5)); 2) the victim was a peace officer who Mr. Sandoval intentionally killed while the victim was engaged in his official duties, and Mr. Sandoval knew, or reasonably should have known, the victim was a peace officer engaged in his official duties (Pen. Code, § 190.2, subd. (a)(7)); 3) the murder was intentionally committed by means of lying in wait (Pen. Code, § 190.2, subd. (a)(15); and 4) the murder was intentionally committed while Mr. Sandoval was an active participant in a criminal street gang, and the murder was carried out to further the activities of the gang. (Pen. Code, § 190.2, subd. (a)(22).) The murder charge was also accompanied by allegations that Mr. Sandoval personally and intentionally discharged an assault rifle, proximately causing the victim's death (Pen. Code, § 12022.53, subds. (c) and (d)), and caused the victim's death by discharging a firearm at an occupied motor vehicle. (Pen. Code, § 12022.5, former subd. (b)(1).) Finally, the murder charge was accompanied by allegations that a principal proximately caused the victim's death by intentionally discharging an assault rifle (Pen. Code, § 120222.53, subds. (c), (d), and (e)(1)), and that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members. (Pen. Code, § 186.22, subd. (b)(1).) (3 RT 332-333; 2 CT 482-484.)

In count II, Mr. Sandoval was charged with attempted murder, in violation of Penal Code sections 664 and 187, subdivision (a). That charge was accompanied by allegations that Mr. Sandoval proximately caused great bodily injury to the victim by intentionally discharging an assault rifle (Pen. Code, § 12022.53, subds. (c) and (d)), that a principal proximately caused great bodily injury to the victim by intentionally discharging an assault rifle (Pen. Code, § 120222.53, subds. (c), (d), and (e)(1)), and that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members. (Pen. Code, § 186.22, subd. (b)(1).) (3 RT 333-335; 2 CT 484-485.)

In count III, Mr. Sandoval was charged with assaulting a peace officer with an assault weapon, in violation of Penal Code section 245, subdivision (d)(3). That charge was accompanied by allegations that Mr. Sandoval proximately caused great bodily injury to the victim by intentionally discharging an assault rifle (Pen. Code, § 12022.53, subds. (c) and (d)), that a principal proximately caused great bodily injury to the victim by intentionally discharging an assault rifle (Pen. Code, § 120222.53, subds. (c), (d), and (e)(1)), and that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, and assist criminal conduct

by gang members. (Pen. Code, § 186.22, subd. (b)(1).) (3 RT 335-336; 2 CT 485-486.)

In count IV, Mr. Sandoval was charged with committing an assault with an assault rifle, in violation of Penal Code section 245, subdivision (a)(3). That charge was accompanied by allegations that Mr. Sandoval personally inflicted great bodily injury upon the victim (Pen. Code, § 12022.7, subd. (a)), and that he personally used an assault rifle. (Pen. Code, § 12022.5.) (3 RT 336; 2 CT 486.)

The foregoing charges and allegations are summarized in the table set forth on the following page:[2]

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[2] All statutory references in the table are to the Penal Code.

Count Victim	Charge	Enhancement Allegations
I	Murder (§ 187, subd. (a))	• Personal discharge of firearm causing death (§ 12022.53, subds. (c), (d)) • Fatal discharge of firearm at motor vehicle (§ 12022.5, former subd. (b)(1)) • Principal causing death by discharging firearm (§ 12022.53, subds. (c), (d), (e)(1)) • Offense committed for gang purposes (§ 186.22, subd. (b)(1))
Daryle Black		Special Circumstance Allegations • Preventing arrest (§ 190.2, subd. (a)(5)) • Killing a peace officer (§ 190.2, subd. (a)(7)) • Lying in wait (§ 190.2, subd. (a)(15)) • Gang-related (§ 190.2, subd. (a)(22))
II	Attempted Murder (§§ 664, 187, subd. (a))	• Personal discharge of firearm causing death (§ 12022.53, subds. (c), (d)) • Principal causing death by discharging firearm (§ 12022.53, subds. (c), (d), (e)(1)) • Offense committed for gang purposes (§ 186.22, subd. (b)(1))
Rick Delfin		
III	Assault Upon a Peace Officer with an Assault Weapon (§ 245, subd. (d)(3))	• Personal discharge of firearm causing death (§ 12022.53, subds. (c), (d)) • Principal causing death by discharging firearm (§ 12022.53, subds. (c), (d), (e)(1)) • Offense committed for gang purposes (§ 186.22, subd. (b)(1))
Rick Delfin		
IV	Assault with an Assault Weapon (§ 245, subd. (a)(3))	• Personal infliction of great bodily injury (§ 12022.7, subd. (a)) • Personal use of assault weapon (§ 12022.5)
Maria Cervantes		

On February 15, 2001, the superior court found the indictment to be a true bill. (2 CT 494.)

On February 16, 2001, Mr. Sandoval was arraigned on the indictment. He entered pleas of not guilty to all charges and denied all allegations. (2 RT 37-38; 2 CT 497.)

On April 10, 2001, the Los Angeles County Superior Court ordered the case transferred to the Long Beach Division of the Superior Court. (2 CT 523.)

On November 13, 2001, the prosecutor notified the court that the district attorney's office was seeking the death penalty for Mr. Sandoval. (2 RT 117; 1 Supp. III CT 66.)[3]

On March 6, 2002, the superior court severed the case against Mr. Sandoval from the case against Messrs. Bojorquez and Camacho. (2 RT 199; 4 CT 1083, 1086.)

On July 9, 2002, the superior court denied Mr. Sandoval's motion for a 90-day continuance of the jury trial. (4 CT 1098.)

Jury trial commenced on September 23, 2002. (5 CT 1137.)

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[3] The district attorney's office did not seek the death penalty as to Messrs. Bojorquez and Camacho. (2 RT 189.)

Twelve jurors and four alternates were sworn on October 3, 2002. (5 CT 1154.)

On October 7, 2002, the court excused juror number ten, and alternate juror number three was chosen by lot to fill the vacancy. (5 CT 1156.)

The prosecution rested its guilt phase case on October 16, 2002. The defense presented no case. (10 RT 1974; 5 CT 1716.) The prosecution and defense argued the case, and the court instructed the jury. Deliberations commenced at approximately 3:50 p.m. (5 CT 1176.)

The jury deliberated for a full day on October 17, 2002 (CT 1177), and for another full day on October 18, 2002. (5 CT 1180).

The jury returned its guilt phase verdicts on October 21, 2002, finding Mr. Sandoval guilty on every charge, and finding every allegation, including the four special circumstance allegations, to be true. (5 CT 1267-1272, 1277-1280, 1283-1286.)

Penalty phase proceedings commenced on October 23, 2002. (5 CT 1292.)

On October 29, 2002, the parties argued the case and the court instructed the jury. (5 CT 1305.)

Penalty phase deliberations commenced on October 30, 2002. (5 CT 1307.)

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On November 4, 2002, the court removed juror number three, and alternate juror number two was selected to fill the vacancy. (5 CT 1310.)

On November 5, 2002, the jury announced that it was deadlocked in its penalty phase deliberations. (5 CT 1312, 1343.) After ascertaining that the jurors were split seven-to-five, the court determined the jury was hopelessly deadlocked and declared a mistrial. (5 CT 1344.)

A penalty phase retrial commenced on March 17, 2003. (5 CT 1386.)

On March 27, 2003, twelve jurors and four alternates were sworn for the penalty phase retrial. (6 CT 1411.)

On April 1, 2003, per the stipulation of the parties, alternate juror number one was excused. (6 CT 1416.) Also on April 1, 2003, the parties gave opening statements and the presentation of evidence commenced. (6 CT 1416.)

On April 4, 2003, the court denied Mr. Sandoval's motion to dismiss alternate jurors due to juror misconduct. (19 RT 3897; 6 CT 1426.)

On April 11, 2003, the parties argued the case, and the court instructed the jury. Deliberations commenced at approximately 3:37 p.m. (6 CT 1440-1441.)

On April 14, 2003, the jury returned its verdict, fixing the penalty at death. (6 CT 1500, 1502-1503.)

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On May 5, 2003, Mr. Sandoval filed a motion for a new trial and a new penalty phase. (6 CT 1505-1508.)

On May 9, 2003, the superior court entered an order denying an automatic motion to modify the jury's death verdict pursuant to Penal Code section 190.4, subdivision (e). (6 CT 1522-1527, 1549.)

Also on May 9, 2003, the court denied Mr. Sandoval's new trial motion. (6 CT 1549.)

Also on May 9, 2003, the court sentenced Mr. Sandoval to death. (6 CT 1548A-1548-I,[4] 1549-1553, 1566-1567.) The court imposed an additional term of 35 years to life as to count I, a consecutive term of 50 years to life as to count II, and a consecutive term of 25 years as to count IV. The court ordered these terms stayed in light of Mr. Sandoval's death sentence, but stated its intention for the stay to be lifted in the event of a reversal, modification, or reduction of Mr. Sandoval's death sentence. Pursuant to Penal Code section 654, the court stayed the imposition of punishment as to count III. (6 CT 1548-F-1548-G, 1558-1561, 1568-1570A.)

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[4] Between pages 1548 and 1549 of the clerk's transcript are nine pages numbered 1548A to 1548I.

Mr. Sandoval's automatic notice of appeal was filed on May 13, 2003. (6 CT 1573.)

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STATEMENT OF APPEALABILITY

This is an appeal from a final judgment of death that disposes of all issues between the parties. This appeal to this court is automatic. (California Constitution, article VI, section 11, subdivision (a); Penal Code section 1239, subdivision (b); Rules of Court, rule 8.600(a).)

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STATEMENT OF FACTS

A. Guilt Phase Evidence

On the evening of April 29, 2000, Mr. Sandoval and several fellow gang members set out to retaliate against the leader of a rival gang. The leader of the rival gang was known as Toro. (6 RT 1139; 9 RT 1809; 2 CT 280-282, 287-289.) Mr. Sandoval belonged to the Barrio Pobre (B.P.)[5] gang. (6 RT 1157; 2 CT 277.) Toro was a member of the East Side Paramount (E.S.P.) gang. (9 RT 1817; 2 CT 287.) Earlier in the evening, individuals who identified themselves as E.S.P. members, had driven to a location where B.P. members frequently congregate, and fired gunshots at several B.P. members, including Mr. Sandoval. (10 RT 1969-1970; 2 CT 276-278.)

With the intention of retaliating against E.S.P., Mr. Sandoval and his cohorts armed themselves, drove to Toro's residence in two vehicles, and positioned themselves in front of Toro's home. (2 CT 281-282.) As one of Mr. Sandoval's fellow gang members was walking on the street in front of Toro's residence, an unmarked, albeit readily identifiable, police vehicle happened upon the scene. (7 RT 1505-1506; 9 RT 1762-1764, 1769-1770; 2 CT 292-293.) Two

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[5] Translated into English, "barrio pobre" means "poor town." (9 RT 1796; 2 CT 313.)

Long Beach Detectives, Daryle Black and Rick Delfin, were in the police vehicle. (8 RT 1560-1566.) Detective Delfin, who was driving, maneuvered the vehicle toward the gang member who was walking in front of Toro's residence. (9 RT 1773-1775; 2 CT 295-296.) Mr. Sandoval, who was holding a semi-automatic CAR-15, fired 28 shots at the police vehicle. (8 RT 1666-1667; 2 CT 296-299.) One of the shots struck Detective Black in the head and killed him. (8 RT 1732.) Detective Delfin was also struck by the gunfire. He was seriously injured, but survived. (7 RT 1493-1500; 8 RT 1570-1577.) Another one of the shots went through the wall of a nearby home and struck Maria Cervantes, who was sleeping in her bed. Ms. Cervantes was pregnant. The shot lodged in Ms. Cervates' abdomen, within inches of her unborn child. Ms. Cervantes survived, and she later successfully delivered her baby. (7 RT 1531-1539; 8 RT 1738-1742.)

1. Gang Evidence

Numerous Hispanic gangs exist in the greater Los Angeles area. The gangs have deep historical roots. (9 RT 1821.) Two of these gangs are B.P. and E.S.P. They are rivals. (8 RT 1593-1594; 9 RT 1809-1810, 1837, 1876.) The rivalry between these two gangs is violent, involving shootings and turf warfare. The rivalry exists despite the fact that B.P. and E.S.P. are both Sureño[6] gangs. (9 RT

[6] Translated into English, "Sureño" means "southerner." (9 RT 1873.)

1809-1811, 1817-1819, 1878-1879.)

Members of Sureño gangs such as B.P. and E.S.P. are ultimately controlled by the Mexican Mafia, a notorious prison gang. (9 RT 1873-1874.) B.P. and E.S.P. are both criminal street gangs. Over the years, B.P. and E.S.P. members have committed murders and a litany of other crimes. (7 RT 1275-1276; 9 RT 1822-1825.) A gang expert testified that B.P had approximately 200 members. (9 RT 1909.)

Gangs like B.P. and E.S.P. often subdivide into cliques. For instance, the B.P. members involved in this case belonged to separate cliques in Compton and Long Beach. (6 RT 1216-1217; 8 RT 1595; 9 RT 1791, 1876, 1910.) The E.S.P. gang is comprised of seven cliques. (8 RT 1594.) E.S.P., which is based in Paramount, began infiltrating areas in Long Beach in the 1990s. (8 RT 1594-1595.)

Sureño gangs in the Los Angeles area recruit members. They are selective in terms of those they accept to become members. Numerous young men aspire to become gang members. Aspiring members are only initiated if they are able to endure a violent initiation process, involving physical beatings. (9 RT 1913.) They must not show weakness during their initiation. The members are often quite young — in their early teenage years — when they are recruited and

initiated. (9 RT 1913-1914.)[7]

Members of Sureño gangs conduct themselves pursuant to a code of ethics. Respect is a prized characteristic in Sureño culture. It is attained by instilling fear in rivals as well as fellow gang members. (9 RT 1869-1871.) Loyalty amongst Sureño members can take precedence over familial loyalty. (9 RT 1821-1822.)

In neighborhoods in which B.P. has established a footing, it is frowned upon for individuals associated with the gang to testify in court concerning matters related to B.P. (6 RT 1184.)

Mr. Sandoval was a B.P. member. (6 RT 1157; 2 CT 277.) Specifically, he was a member of the B.P. Compton clique. (6 RT 1217; 2 CT 315.) He was known by his gang monikers — Gumby and Menace. (6 RT 1213, 1249; 2 CT 277.)[8] Mr. Sandoval's codefendants in this case, Adolfo Ramon Bojorquez and Miguel Angel Camacho, were also B.P. members. (6 RT 1125, 1162, 1217-1218;

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[7] A female member of B.P. testified in Mr. Sandoval's trial. Like her male counterparts, she was "jumped" into the gang. (6 RT 1252.)

[8] Mr. Sandoval has tattoos on his body reflecting his membership in B.P. (6 RT 1162-1163, 1240; 7 RT 1379, 1409; 9 RT 1795-1799; 1 CT 107; People's Exhibit 8.) At the time of the relevant events in this case, Mr. Sandoval also had one notch cut out of his right eyebrow and three notches cut out of his left eyebrow — together representing the number 13. (7 RT 1379.) The number 13 signifies affiliation with the Sureño gang. (9 RT 1798-1799, 1876-1881.)

8 RT 1589; Aug. RT[9] 25.)[10] They were known by their gang monikers, Grumpy and Rascal, respectively. (6 RT 1125, 1207; 2 CT 310-311.)[11] Mr. Camacho was one of B.P.'s leaders. (7 RT 1427.)

The intended victim in this case, Vincent Ramirez, a.k.a., Toro, was a high-level member of E.S.P. (6 RT 1136, 1139, 1266; 7 RT 1284; 9 RT 1809, 1817.) He was an active E.S.P. "shot-caller" from 1989 to 2000. (9 RT 1817; 2 CT 287.) Mr. Sandoval knew Toro from previous contacts. (2 CT 287.)[12]

2. B.P. Meeting at Lazy's Home

In the early afternoon on Saturday, April 29, 2000, numerous B.P. members convened for a meeting at Christine Estrada's residence. (6 RT 1158, 1222, 1236,

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[9] "Aug. RT" refers to the augmented reporter's transcript of proceedings conducted on November 16, 2001.

[10] As noted in the Statement of the Case, *ante*, prior to the commencement of trial, the superior court severed the case against Mr. Sandoval from the case against Messrs. Bojorquez and Camacho. (2 RT 199; 4 CT 1083, 1086.)

[11] Like Mr. Sandoval, Mr. Camacho was a member of the B.P. Compton clique. (6 RT 1217.) Although evidence was presented that Mr. Bojorquez also belonged to the Compton clique (6 RT 1918), the prosecutor told the jury in his opening statement that Mr. Bojorquez was a member of the Long Beach clique. (6 RT 1088.)

[12] Mr. Camacho told police that Toro had previously shot Mr. Sandoval. (Aug. RT 55-56.) However, that evidence was not presented to the jury.

1250-1251; 7 RT 1305-1315.)[13] Ms. Estrada is a B.P. member. (6 RT 1214; 2 CT 286.)[14] Her gang moniker is Lazy. (6 RT 1249; 2 CT 286.)[15] Her residence was located at 5567 Dairy Street in Long Beach. (9 RT 1858.) The meeting was conducted in the backyard. (6 RT 1197.) The meeting lasted approximately one-to-two hours. (7 RT 1315, 1380.) Only male B.P. members participated in the meeting. (7 RT 1315-1316.)[16] They drank quite a bit of beer during the meeting. (7 RT 1346.) Messrs. Sandoval, Bojorquez, and Camacho were present during the meeting. (6 RT 1227, 1240-1241; 7 RT 1307, 1310-1311.)

Mr. Camacho, who occasionally stayed at Lazy's Dairy Street residence (7 RT 1301-1302, 1351, 1390, 1396, 1424), had been involved in organizing the meeting. In the days leading up to the meeting, he had made calls to gang

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[13] Witness estimates as to the number of B.P. members present at the meeting varied from 10 to 40. (6 RT 1172-1173; 7 RT 1404.)

[14] At the time of her testimony in Mr. Sandoval's trial, Ms. Estrada was 26. She became involved with B.P. at the age of 14. (6 RT 1215.)

[15] Christine Estrada's sister, Angela Estrada (6 RT 1194), was also a witness at trial. (6 RT 1156.) Thus, for the sake of clarity, further references to Christine Estrada will be to her gang moniker, Lazy.

[16] Male B.P. members do not speak with female B.P. members about gang business. (6 RT 1253.)

members and had taken down notes. (7 RT 1398, 1403.)[17] One of the female residents at Lazy's home heard Mr. Camacho state that the purpose of the meeting was to address concerns on the part of certain gang members that other gang members were "slacking off" and allowing rival gang members to get away with displaying graffiti in B.P. territory. (7 RT 1404; 9 RT 1889.)

In his notes, Mr. Camacho listed the B.P. monikers for himself, Messrs. Sandoval and Bojorquez, and other members of the gang. (9 RT 1791, 1889; People's Exhibit 26[18].) He also wrote that B.P. members were spending too much time "hang[ing] out," that they had "no straps," i.e., guns, and that there were "not enough dead mother fuckers." According to a gang expert, the reference to "not enough dead mother fuckers" reflected Mr. Camacho's concern that B.P. members were not killing enough members of rival gangs. (9 RT 1889; People's Exhibit 26.) Additionally, Mr. Camacho's notes called for all B.P. members to contribute money to buy guns. (9 RT 1890; People's Exhibit 26.) Finally, the notes

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[17] Papers on which Mr. Camacho wrote out these notes were contained in People's Exhibit 26. (7 RT 1303, 1399.)

[18] One set of exhibit numbers was used for the guilt phase and the original penalty phase. (1 RT 1-F–1-I; 5 CT 1346-1356; 6 CT 1650-1671.) A somewhat different set of exhibit numbers was used for the penalty phase retrial. (1 RT 2-E–2-G; 6 CT 1634-1649.) Unless otherwise noted, references herein to exhibit numbers are to the exhibit numbers used in the guilt phase and the original penalty phase.

contained an exhortation to B.P. members: "Get your ride on you bitch-ass fools." (9 RT 1891; People's Exhibit 26.) According to the gang expert, this was a call for B.P. members to do whatever the gang required of them. (9 RT 1891.)

During the meeting, one of the gang members was physically disciplined and injured by fellow B.P. members. (6 RT 1224-1225; 7 RT 1315.)

The meeting concluded at approximately 3:00 to 4:00 p.m. (7 RT 1318.)

3. E.S.P. Drive-By Shooting

After the meeting at Lazy's home, approximately 15 B.P. members, including Mr. Sandoval, went to an alleyway off Atlantic Avenue. (2 CT 276-277.) The alleyway is in Compton, located approximately three and one-half miles away from Lazy's home in Long Beach. (9 RT 1858.) The alleyway was a common "hang out" for B.P. members. (9 RT 1859, 1861; People's Exhibits 66 & 67.) The alley is near an abandoned house that B.P. members also used. (9 RT 1861.) On the evening in question, the B.P. members were "hanging out" and drinking in the alleyway. (7 RT 1318-1319; 9 RT 1858-1861; 10 RT 1969-1970; 2 CT 276-278.)

While the B.P. members were in the alleyway, individuals identifying themselves as E.S.P. members drove by in a car, screamed out, "Fuck B.P.," and fired gunshots at the B.P. members. (10 RT 1969-1970; 2 CT 278.) No one was

hit by the gunfire. (2 CT 278.) The E.S.P. members drove off. B.P. members pursued them, but were unable to catch up with them. (9 RT 1892; 2 CT 278.)

4. B.P. Members Arm Themselves and Return to Lazy's Home

Mr. Sandoval and fellow B.P. members decided to retaliate against E.S.P. (2 CT 281.) Specifically, they decided to go after Toro, who, as noted above, was an E.S.P. shot-caller. (2 CT 287.) They planned to go to Toro's residence in Long Beach, knock on his door, and shoot him. (2 CT 288-289.)[19]

Five B.P. members set out to retaliate against Toro: Mr. Sandoval and Juan Camacho got into Juan Camacho's red Chevy Beretta. (7 RT 1328; 2 CT 281-282.) Juan Camacho, whose moniker is Pipas (6 RT 1208), is Miguel Camacho's brother. (2 RT 176-178; 6 RT 1080; 17 RT 3526; 18 RT 3569, 3607.)[20] Mr. Bojorquez, Rascal,[21] and Julio del Rio got into Mr. Del Rio's grey four-door

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[19] Gang experts called to testify by the prosecution explained that, in the street-gang culture in which B.P. and E.S.P. members were immersed, the E.S.P. drive-by shooting was a showing of disrespect for B.P., which essentially necessitated retaliation. A failure on B.P.'s part to seek "payback" would have been perceived as a sign of weakness. (9 RT 1812-1813, 1893.)

[20] For the sake of clarity, further references to Juan Camacho and Miguel Camacho will be to their gang monikers, Pipas and Rascal, respectively.

[21] Throughout the record, Miguel Camacho's moniker is alternately spelled Rascal (6 RT 1162, 1178, 1187; 2 CT 285; Supp. V CT 43) and Raskal. (6 RT 1079, 1125; 7 RT 1424; 8 RT 1596; 10 RT 1934.) The former spelling is used in this brief.

Honda. (10 RT 1093; 2 CT 281-282.) Mr. Del Rio's B.P. moniker is Sparky. (6 RT 1079; 10 RT 1959.)

According to Mr. Sandoval, the five of them drove to Lazy's home, where the meeting had occurred earlier in the day. (2 CT 282-283.)[22] En route to Lazy's home, Messrs. Sandoval and Del Rio stopped at Mr. Del Rio's home in order to retrieve a CAR-15. (9 RT 1892; 2 CT 284-285.) Mr. Del Rio, Mr. Bojorquez, Rascal, and Pipas already had guns: Mr. Del Rio had a .38 Super, Mr. Bojorquez had a .45-caliber Gold Cup, Rascal had a Colt .45 pistol, and Pipas had a .38-caliber revolver. (2 CT 283-286.)

Mr. Bojorquez's girlfriend, Lucinda Lara, had a recollection regarding the foregoing that differed slightly from Mr. Sandoval's recollection. (7 RT 1318.) Ms. Lara testified that she, Lazy, and Lazy's sister (Angela Estrada) had driven to the alleyway in Compton. They picked up Mr. Bojorquez and Miguel Lozano,[23] and, at approximately 8:30 to 9:00 p.m., drove them back to Lazy's home. (7 RT 1318-1321.) At approximately 10:20 p.m., five people arrived — Mr. Sandoval,

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[22] Mr. Sandoval divulged this information to homicide detectives during the course of his confession on May 2, 2000. Further details regarding Mr. Sandoval's confession are discussed below.

[23] Mr. Lozano is a B.P. member. His moniker is Wackoe. He was dating Lazy. (6 RT 1223.)

Rascal, Pipas, Refugio Angulo,[24] and a person Ms. Lara did not recognize. (7 RT 1323-1324.) Before those five people had arrived, Ms. Lara and Mr. Bojorquez had been together inside a bedroom in the residence. (7 RT 1321-1322.)[25]

According to Ms. Lara's step-sister, Kristen Trochez, the five B.P. members who arrived at Lazy's home on the evening of April 29, 2000, were Mr. Sandoval, Pipas, Rascal, Mr. Bojorquez, and Mr. Lozano (Wackoe). (7 RT 1382.)

In any event, a group of B.P. members stayed at Lazy's home for approximately 30 minutes. (2 CT 286.) While they were in Lazy's home, they turned off the lights and frequently looked outside. They mentioned a jeep that was repeatedly driving by the residence, and they seemed concerned about it. (7 RT 1324-1325, 1343, 1346-1347, 1404-1405.) Mr. Sandoval held the CAR-15. The other B.P. members also had guns. (6 RT 1207-1208; 7 RT 1326, 1348.) Rascal retrieved a dark sweater, and Mr. Bojorquez retrieved a dark jacket. (7 RT 1330, 1383-1384, 1406.) Then, the B.P. members departed together. (7 RT 1328, 1382.)

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[24] Mr. Angulo is a B.P. member. His moniker is Cuko. (7 RT 1293, 1309.)

[25] At the time, Ms. Lara was residing in Lazy's home. (7 RT 1299-1300.)

5. B.P. Members Go to Toro's Residence on Lime Avenue

Toro resided at 1968 Lime Avenue with his common-law wife, Desirée Rodriguez. (6 RT 1266; 7 RT 1277.)[26] Toro was present inside his residence when the B.P. members arrived there at approximately 11:00 p.m. (7 RT 1279, 1287.) Also present with him in the home were Ms. Rodriguez and approximately 20 young girls, ranging in ages from two months to 16 years. They were all there celebrating the birthday of Ms. Rodriguez's niece. (7 RT 1280.)

When the B.P. members arrived at the block on Lime Avenue where Toro resided, Pipas parked his red Chevy Beretta facing southbound in the middle of the block on the west side of the street. (CT 290-292.) Mr. Camacho exited Mr. Del Rio's Honda, which was parked in front of the Beretta. Mr. Camacho proceeded northbound on foot toward Toro's house on the sidewalk on the east side of the street. (9 RT 1772; 2 CT 292-293.) Mr. Sandoval alighted from the Beretta and was getting ready to walk to Toro's house too. (2 CT 293-294.) However, Mr. Sandoval then saw an unmarked police vehicle to his north about two house lengths away, heading south on Lime Avenue. (2 CT 293-294, 317-318.)

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[26] Ms. Rodriguez testified that, at the time of Mr. Sandoval's trial, she was no longer with Toro. He had abused her physically, and she obtained a restraining order against him. (7 RT 1286.)

6. *Detectives Daryle Black and Richard Delfin Arrive on the Scene*

Detectives Daryle Black and Richard Delfin of the Long Beach Police Department had been conducting routine gang investigations on the evening of April 29, 2000. (8 RT 1560, 1565.) They were in a plain, unmarked vehicle. (8 RT 1563.) Though the vehicle was unmarked, it was readily identifiable as a police vehicle. (8 RT 1565.) Detective Delfin was driving, and Detective Black was in the front passenger seat. (8 RT 1566.) After investigating a possible gang fight at approximately 11:00 p.m., they decided to go get some coffee. (8 RT 1560, 1566.)

Detective Delfin drove westbound on 20th Street and then turned left onto Lime Avenue, heading southbound. (8 RT 1566.) He drove down Lime Avenue, because gang activity often takes place on that street. (8 RT 1591-1592.) Detective Delfin saw a double-parked vehicle facing south on Lime Avenue "about mid-block" between 20th and 19th Streets. (8 RT 1567.) The detective observed a bald-headed Hispanic male walking near the rear of the double-parked vehicle. The detective made eye contact with the Hispanic male. (8 RT 1567-1568.) Detective Delfin testified that he "slowed up and ... stopped about two car lengths behind" the double-parked vehicle. (8 RT 1567.)

Detective Delfin later identified the Hispanic male as Rascal. (8 RT 1591.) Although the detective had previously arrested Rascal several times in connection with gang-related activities (8 RT 1596, 1589), he did not recognize him at the time of the incident. (8 RT 1591.)

A man named Jimmy Lee Falconer was driving his vehicle out of a residential driveway on Lime Avenue just before the shooting. Mr. Falconer saw the detectives slow down, focus their attention on Rascal, and maneuver their vehicle toward him. (9 RT 1763-1764, 1767, 1773.) It appeared to Mr. Falconer that the detectives were preparing to "jack" Rascal, i.e., stop him. (9 RT 1764, 1773-1775.)[27]

7. The Shooting

Detective Delfin testified that as he was getting ready to contact Rascal, someone located to his right/west "started unloading" on the detectives' vehicle with an assault weapon. Detective Delfin felt a sensation of heat in the vehicle. (8 RT 1570.) Before the shooting had commenced, Detective Delfin's attention had been focused on Rascal, and he had been unaware of the presence of anybody at the location from which the shots were fired. (8 RT 1571.) In the vehicle,

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[27] Mr. Falconer explained that he has "lived in the hood" and frequently witnessed police encounters of this type. (9 RT 1773.)

windows were shattering, and debris was flying about. The gunfire was loud and intimidating. Something struck the right side of Detective Delfin's head. He felt immediate, severe pain. He sensed an impairment of his motor skills. (8 RT 1572-1574.) His fingers were numb and bloody. A gunshot struck his right knee, causing excruciating pain. Another gunshot passed across the vest he was wearing but did not strike his body. (8 RT 1574-1575.)

Jimmy Lee Falconer testified that while the detectives were "preoccupied with the kid" on one side of the street, they were "ambush[ed]" by gunfire coming from the other side of the street. (9 RT 1764.) To Mr. Falconer, the "kid," i.e., Rascal, appeared to be 13 to 15 years old. (9 RT 1770.) And, it seemed to Mr. Falconer, who is a navy veteran (9 RT 1765), that more than one gun was being fired at the detectives. (9 RT 1764.)

Detective Delfin believes Detective Black was mortally wounded right when the shooting started, because Detective Black was completely quiet. (8 RT 1573, 1576.)

The shooting stopped after Detective Delfin's knee was struck. (8 RT 1577.) Detective Delfin lowered himself in the driver's seat and moved his body next to Detective Black. (8 RT 1576.) Detective Delfin was unable to use his right leg, but he used his left leg to press the accelerator. Looking up at street

lights and telephone wires, he was able to guide the vehicle down the middle of the street. (8 RT 1577-1578.) According to a witness, the detectives' vehicle appeared to be drifting after the shooting. (9 RT 1766.) A Lime Avenue resident saw the detectives' vehicle "rolling by" after the shooting, and it appeared that no one was in the vehicle. (7 RT 1474.) Detective Delfin drove the car a short distance and then put it in park. He grabbed his radio and placed a call for help. (8 RT 1579.) He thought he was going to die. (8 RT 1577.)[28]

The detectives' patrol vehicle ultimately came to rest at the intersection of 19th Street and Lime Avenue, facing southbound. (6 RT 1122-1123, 1264; 7 RT 1507.)

Mr. Falconer, who, as noted above, witnessed the shooting, testified that when Mr. Sandoval was firing the gunshots,[29] he was standing on the passenger side of a grey or red car that was legally parked against the curb on the west side of the street. Mr. Sandoval fired the shots over that parked car. The detectives'

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[28] During Detective Delfin's testimony, 25 police officers were in the courtroom. The officers were not in uniform. (8 RT 1580.)

[29] Mr. Falconer testified in court that Mr. Sandoval does not look like the shooter he saw. (9 RT 1765.) However, Mr. Falconer testified that the picture of Mr. Sandoval in People's Exhibit 8 does resemble the shooter. (9 RT 1765-1766.) In pretrial photographic line-ups, Mr. Falconer was unable to identify Mr. Sandoval as the shooter. (9 RT 1777-1779.)

vehicle was approximately ten feet away from Mr. Sandoval when the shooting began. Two males were standing next to Mr. Sandoval. (9 RT 1775-1777.)

8. Maria Cervantes

At approximately 11:00 p.m. on April 29, 2000, Maria Cervantes, who was pregnant, was asleep in her home at 1960 Lime Avenue. (7 RT 1531.)[30] She and her husband, Alberto Cervantes, were on their bed. (7 RT 1525, 1534.) She was awakened by loud noises and the sensation of a blow to her leg. She realized she had been shot and called out to her husband. (7 RT 1533.) Mr. Cervantes got up and looked around to try to find out what was happening. He lifted the bed sheets and saw that Ms. Cervantes was bleeding. He then went to the phone and called for emergency assistance. (7 RT 1534.)

9. B.P. Members Flee

After the shooting, Toro's erstwhile common-law wife, Desirée Rodriguez, saw the red Chevy Berreta back up quickly onto the curb. (7 RT 1281-1283.) Pipas and Mr. Sandoval were in the vehicle. Pipas was driving. They pulled out fast and drove away, heading northbound on Lime Avenue toward 19th Street. (7 RT 1281-1283; 2 CT 300-301.) One neighborhood resident saw "burning tires"

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[30] The Cervantes home was located immediately to the south of Toro's residence. (6 RT 1136.)

out on the street right after the shooting. (7 RT 1466.) Mr. Falconer, who was trying to get out of the area after the shooting, nearly collided with the fleeing red car. (9 RT 1766.) Messrs. Bojorquez and Del Rio got out of the area in the Honda, driving southbound on Lime Avenue. (2 CT 302.) Rascal did not make it into either of the fleeing vehicles.

Shortly after the shooting, a resident in a ground-level apartment at 1983 Lime Avenue stepped outside to see what was going on. (7 RT 1363-1364.) She saw a person she was later able to identify as Rascal. Rascal asked if he could use her telephone. She refused and stepped back inside her apartment. (7 RT 1365, 1367-1369.)

10. Rapid Police Response

At approximately 11:08 p.m., a police dispatcher fielded an emergency radio transmission from Detective Delfin. (6 RT 1113, 1115; 6 CT 1591-1593; People's Exhibits 1 and 1-A.) Detective Delfin indicated that he and Detective Black had been shot and needed assistance. (6 RT 1115; 6 CT 1591-1592; People's Exhibits 1 and 1-A.) Detective Delfin is usually "very even-keel[ed]." However, to the dispatcher, the detective seemed quite disoriented. The dispatcher requested all available officers to respond and provide assistance to the detectives. She also dispatched the Long Beach Police Department helicopter to the scene. (6

RT 1115-1116; 6 CT 1591-1593; People's Exhibits 1 and 1-A.)

One of the residents of the 1900 block of Lime Avenue testified that "immediately after the gun shots, there were sirens and police cars coming around all the corners." (7 RT 1364.) Another neighborhood resident, who made a 911 call after the shooting, testified that police began arriving on scene less than one minute after she made the call. (7 RT 1474-1475.) Yet another neighborhood resident testified that when she went outside after the shooting, the scene was chaotic, with neighbors milling about and numerous police officers on the scene on foot and in police vehicles. (7 RT 1456-1457.)

The officers who initially arrived on scene observed that a white vehicle was in the intersection of 19th Street and Lime Avenue located near the vehicle in which Detectives Black and Delfin were seated. The white vehicle was facing the detectives' vehicle. Officers drew their weapons on the occupants of the white vehicle, but, after making contact with the occupants of that vehicle, determined they had not been involved in the shooting. (7 RT 1518.)

The officers then turned their attention to the vehicle Detectives Black and Delfin were in. It was badly damaged. As they ran to the vehicle, they saw bullet holes in the windshield and noticed that the passenger side front window had been completely shot out. (7 RT 1507.) The engine was running and the vehicle lights

were on. Detective Black was slumped over to his right, his head was tilted back, and he was covered with blood. Detective Delfin was in shock. He was holding the steering wheel, with a dazed look on his face. Blood was visible in the area of his right temple. (7 RT 1508-1509, 1519-1520.)

Officers removed Detective Black from the vehicle. (7 RT 1509-1510.) An observer noticed that as the officers were carrying Detective Black, his head hung back and was not moving. (7 RT 1483.) Officers observed a large bullet hole in Detective Black's scalp. He had limited vital signs and was not responsive. (7 RT 1510, 1519.) One officer believed Detective Black was already dead. (7 RT 1520.)

It was difficult for officers to get Detective Delfin to remove his hands from the steering wheel. (7 RT 1520.) Serious damage to his right knee was evident. Officers had to exert a great deal of effort to remove Detective Delfin from the vehicle, and the detective cried out in pain as his fellow officers essentially pried him out of the vehicle. (7 RT 1521; 8 RT 1583.)

After officers arrived on the scene, Alberto Cervantes, who was covered in blood, made contact out on the street with Felipa Guerrero of the Long Beach Police Department. In a panic, Mr. Cervantes told Officer Guerrero that his wife, Maria Cervantes, had been shot. He grabbed the officer by the arm, and she went

with him into his house. (7 RT 1524.) Ms. Cervantes was in her bed, covered in blood. She was bleeding from her abdomen and legs. Officer Guerrero, who had previously been a nurse, applied pressure to Ms. Cervantes' wounds. (7 RT 1525.) Officer Guerrero radioed for help, but paramedics and officers were unable to respond for approximately one hour, because of police safety concerns regarding possible armed suspects in the area. (7 RT 1526.)

Police set up a large perimeter. (6 RT 1123.) SWAT officers began searching for suspects. (6 RT 1122.)

Police set up a command post at a location on Pacific Coast Highway two blocks away from the scene of the shooting. (6 RT 1121.)

11. Rascal's Arrest

Approximately 20 minutes after the shooting, residents of 2051 Lime Avenue called police to report observing a Hispanic male with a handgun hiding in their backyard. (6 RT 1124.)

At approximately 2:00 a.m., Rascal was arrested in the backyard at 2051 Lime Avenue. (6 RT 1124-1125, 1234-1235, 1268; 1 CT 110.) At the time of his arrest, Rascal was wearing only one shoe. (10 RT 1958.)[31]

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[31] Police found his other shoe nearby. (10 RT 1956-1958; People's Exhibit 71.)

After Rascal's arrest, officers found a semi-automatic .45 caliber handgun located at the base of a fence at 1985 Lime Avenue. That was the gun that had been in Rascal's possession at the time of the shooting. (6 RT 1267.)

12. Mr. Sandoval's Post-Homicide Activities

After the shooting, Mr. Sandoval and his cohorts went to the abandoned house near the B.P. "Hang out" at the alleyway off Atlantic Avenue in Compton. The B.P. members put some of their guns in the abandoned house. (2 CT 302.) Then, Mr. Sandoval, Mr. Del Rio, and Pipas went to Mr. Del Rio's home, where they spent the night. (2 CT 303.)

The following day, April 30, 2000, Mr. Sandoval watched a Lakers basketball game on television. (10 RT 1968; 2 CT 303.) That evening, Mr. Sandoval spent time at the B.P. hang out with fellow gang members. He was quiet and kept to himself. (7 RT 1357-1358.)

At some point, Mr. Sandoval burned all of the articles of clothing he had worn during the shooting, with the exception of his shoes. (10 RT 1968.)

13. Rascal's Cooperation with Police

After Rascal's arrest, he assisted officers in their effort to locate Mr. Sandoval. (8 RT 1599.)

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At approximately 2:00 a.m. on May 2, 2000, Rascal made a telephone call to Mr. Sandoval at the behest of a Long Beach detective. Rascal was in custody. The detective had Rascal make the call from the detective's department-issued cellular telephone. (8 RT 1599-1600, 1610, 1616-1617.) Rascal made contact with Mr. Sandoval on Mr. Sandoval's residential phone line. Their conversation was recorded. (8 RT 1610; 2 Ct 323-328; People's Exhibits 41 and 41-A.) Most of their conversation was in English. (8 RT 1615; 2 CT 323-328; People's Exhibits 41 and 41-A.)[32]

The detective directed Rascal to discuss the shooting with Mr. Sandoval. (8 RT 1618.) During the conversation, Rascal stated that he had thrown his gun to the ground after the shooting. (2 CT 325.) He said police had contacted him at around 4:00 a.m., but let him go, because even though he had been on parole, his parole was discharged. (2 CT 325-326.) Rascal asked Mr. Sandoval if a police officer had been killed. Mr. Sandoval answered, "Yeah[,] fuck 'em." (2 CT 327.) Rascal asked if one or two police officers had been killed. Mr. Sandoval said only one had been killed. (2 CT 327.) They agreed to meet later at Mr. Sandoval's home. (2 CT 327-328.)

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[32] The telephone conversation was played for the jury. (8 RT 1611-1612.) Portions of the conversation conducted in Spanish were translated by a bilingual officer. (8 RT 1623-1628.)

Based on this conversation, police were able to determine Mr. Sandoval's location in order to arrest him. (8 RT 1613.)

14. Mr. Sandoval's Arrest and the Seizure of the Murder Weapon

On the morning of May 2, 2000, Long Beach detectives and SWAT officers executed a search warrant at Mr. Sandoval's home in Compton. During the course of the execution of the search warrant, officers placed Mr. Sandoval under arrest. (8 RT 1630-1632; 9 RT 1855; 2 CT 269.)[33]

Hidden behind a stove in the kitchen, police found the CAR-15 Mr. Sandoval had used on April 29, 2000. The gun was covered with a towel. A magazine containing 11 rounds was in the gun. (8 RT 1636-1638.) The gun was covered with an oily lubricant that prevented police from being able to lift fingerprints off the gun. (8 RT 1648, 1691.)

Also located at Mr. Sandoval's residence was the red Chevy Berreta in which Mr. Sandoval had traveled to Lime Avenue on April 29, 2000. (8 RT 1636.) Police found the keys to that vehicle inside the residence. (8 RT 1639.) Police lifted latent fingerprints off of the Chevy Beretta, and those fingerprints were later determined to have been left by Mr. Del Rio and Pipas. (10 RT 1954.)

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[33] At the time of Mr. Sandoval's arrest, Mr. Sandoval's father and his father's girlfriend were present at the residence. (8 RT 1654-1655.)

15. Mr. Sandoval's Confession

Following his arrest on May 2, 2000, Mr. Sandoval began speaking with detectives at approximately 8:45 to 9:00 a.m. (10 RT 1945, 1960; 2 CT 268-269.) By that time, Mr. Sandoval had been in custody for approximately two and one-half hours. (10 RT 1945.)

For two hours and forty minutes, the detectives conducted an un-recorded interview of Mr. Sandoval. Then, the detectives conducted a recorded interview of Mr. Sandoval, in which he confessed to shooting Detectives Black and Delfin. (10 RT 1967-1969, 1972; 2 CT 268-322, 439-481; Supp. V CT 37-92; People's Exhibits 73 and 73-A.)[34]

When Mr. Sandoval first spoke with detectives, he falsely stated that he had been at a friend's home when the shooting occurred. (2 CT 271.) He also gave the detectives another false account before stating, "I want to come clean." (10 RT 1964-1967.) Thereupon, Mr. Sandoval imparted the following information to the detectives:

Subsequent to the afternoon meeting at Lazy's home, approximately 15 B.P. members, including Mr. Sandoval, met in the alleyway near the abandoned house

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[34] In the penalty phase retrial, a partially redacted version of the transcript of the recorded interview was admitted in evidence as People's Exhibit 76-A. (21 RT 4286-4287; 6 CT 1648; Supp. V CT 37.)

at San Vincente and Atlantic. (2 CT 276-277, 283.) While they were hanging out and drinking at that location, E.S.P. gang members drove by, shouted out profanities, and shot at the B.P. gang members. (2 CT 276, 278.) B.P. members pursued their E.S.P. assailants, but were unable to catch them. (2 CT 278.)

B.P. decided to get "pay back." (2 CT 280.) Specifically, B.P. decided to go after Toro, the E.S.P. shot-caller. Mr. Sandoval knew Toro from prior contacts. (2 CT 287.) Five B.P. members — Mr. Sandoval, Mr. Bojorquez, Rascal, Pipas, and Sparky — planned to shoot and kill Toro. They planned to go to his home, knock on the door, and shoot him. (2 CT 281-282, 288-289.)

The five B.P. members went back to Lazy's home. Mr. Sandoval and Pipas drove there in a red Beretta. Sparky, Rascal, and Mr. Bojorquez drove there in Sparky's grey Honda. On the way, they stopped at Sparky's home to retrieve the CAR-15, which was fully automatic. (2 CT 282-286, 306, 308-309.) They obtained additional guns at Lazy's home: Mr. Bojorquez had a .45-caliber Gold Cup; Rascal had a Colt .45 pistol; Pipas had a .38-caliber revolver; and Sparky had a .38 Super. (2 CT 283-286.) Mr. Sandoval loaded the CAR-15. (2 CT 305.) They spent approximately 30 minutes at Lazy's home. (2 CT 286.)

Then, the five B.P. members headed over to Toro's home on Lime Avenue in the Beretta and the Honda. (2 CT 281-282.) Following behind the Honda,

Pipas drove south on Lime Avenue past 20th Street. He stopped and parked about half-way down the block on the west side of the street. (CT 290-292.) Rascal exited the Honda and proceeded northbound on foot toward Toro's house on the sidewalk on the east side of the street. (2 CT 292-293.) Mr. Sandoval exited the Beretta and was planning to walk over to Toro's house. (2 CT 293-294.) However, Mr. Sandoval then saw an unmarked police vehicle to his north about two house lengths away, heading south on Lime Avenue. (2 CT 293-294, 317-318.) Mr. Sandoval was able to tell it was a police vehicle when he saw it up close. (2 CT 317.) Mr. Sandoval ducked down behind the passenger side of the Beretta. (2 CT 295-297.) Pipas, who had opened the driver's side door and was getting ready to get out of the Beretta, stayed in the vehicle and shut the door as the police vehicle approached. (2 CT 293-294.) Mr. Sandoval saw the police focusing their attention on Rascal. Rascal was on parole. If the police made contact with him, they would have taken him to jail. In an effort to "save" Rascal, Mr. Sandoval stood up and opened fire on the police vehicle. He estimated that he fired 15 shots. (2 CT 295-297.) The police vehicle was approximately ten feet away from Mr. Sandoval as he fired the shots. (2 CT 297.) Mr. Sandoval saw the gun fire striking the police officers and breaking the car windows. (2 CT 299-300.) Mr. Sandoval knew the occupants of the vehicle were police officers before

he opened fire. (2 CT 319.) The police vehicle continued driving slowly down Lime Avenue past Mr. Sandoval's location. (2 CT 300.)

After the shooting, Mr. Sandoval got back in the Beretta. Pipas backed up, made a U-turn, and drove off northbound on Lime Avenue. (2 CT 300-301.) Mr. Sandoval saw the Honda leaving southbound on Lime Avenue. (2 CT 302.) As they were leaving, Mr. Sandoval did not see anybody else on Lime Avenue. (2 CT 316.)

At the conclusion of the tape-recorded statement/confession, Mr. Sandoval acknowledged that the interviewing detectives had not made any promises of leniency to induce him to speak with them. (2 CT 322.)

16. Mr. Sandoval's Knowledge of B.P.'s Pattern of Criminality

Mr. Sandoval stipulated that he knew his fellow B.P. gang members had engaged in a pattern of criminal gang activity. (9 RT 1846-1853.)[35]

17. Firearm and Ballistics Evidence

According to the prosecution's firearm expert, the CAR-15 Mr. Sandoval used in this case only fires in semi-automatic mode (8 RT 1693), and each round discharged from the gun requires a separate trigger pull. (8 RT 1660.) However,

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[35] The stipulation fulfilled the prosecution's proof requirements with respect to one of the elements of the gang related special circumstance allegation brought pursuant to Penal Code section 190.2, subdivision (a)(22).

in Mr. Sandoval's tape-recorded confession, a redacted version of which was played for the jury (10 RT 1968), he told the detectives who interviewed him that the gun is fully automatic. (2 CT 306.)[36] In any event, the gun has the capacity to fire many rounds "in a very short period of time." (8 RT 1694.) Bullets fired out of the gun travel at a high velocity — approximately three times faster than bullets fired out of standard-issue police guns. Thus, bullets fired out of the CAR-15 can cause great damage. (8 RT 1665.)

After the shooting, police recovered 28 .223 caliber Remington shell casings on Lime Avenue. Twenty-four of the shell casings were grouped together in front of the residence at 1951 Lime Avenue, and the remaining four casings were grouped together approximately 40-50 feet down the road in front of the residence at 1968 Lime Avenue. (6 RT 1126-1127, 1265; 7 RT 1432-1437; 8 RT 1666, 1669-1670.) Ballistics testing established that each of the 28 casings was discharged from the CAR-15. (8 RT 1696.)

The prosecution's firearm expert, who participated in "processing" the crime scene (8 RT 1658-1659), concluded that all 28 shots were fired from the same location. He felt the four shell casings located 40-50 feet away from the

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[36] Mr. Sandoval told the detectives he had fired the gun prior to incident in this case. (2 CT 306.)

other 24 may have been moved by a get-away vehicle fleeing the scene. (8 RT 1669-1671.) Skid marks were visible near those four shell casings. (7 RT 1437-1438.)

Investigators observed 20 bullet holes in the detectives' vehicle, including seven bullet strikes to the windshield and five bullet strikes to the passenger side of the vehicle. One bullet went through both the passenger's side and driver's side head rests. (8 RT 1674-1675.) Eight bullet fragments were recovered inside the detectives' vehicle. (8 RT 1674.)

Bullet trajectory analysis revealed that the detectives' vehicle was in motion as Mr. Sandvoal fired on the vehicle, and that Mr. Sandoval was basically perpendicular to the vehicle as he fired the shots. The trajectories of all the shots but one were from the rear to the front of the vehicle, and that one had a slightly front-to-rear trajectory. (8 RT 1685-1687.) There were no bullet strikes to the rear of the vehicle. (6 RT 1688.) The "compact" grouping of the 24 shell casings indicates that Mr. Sandoval was stationary as he fired the shots. (8 RT 1686.)

In a test conducted with a weapon with "the same mechanical features" as the CAR-15 involved in this case, the prosecution's firearm expert was able to fire 28 rounds in under seven second. (8 RT 1694-1695, 1701; 20 RT 4263.)

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18. The Autopsy of Detective Black

An autopsy revealed that Detective Black's cause of death was a single gunshot wound to the head. (8 RT 1725, 1732.) Gunshot projectile material was observed in the detective's right forearm, right hand, right thigh, and the right side of his chest. (8 RT 1718.) The only lethal injury was the gunshot wound to the head. (8 RT 1719-1729, 1732.)

19. The Injuries Suffered by the Surviving Victims

Maria Cervantes and Detective Delfin both suffered serious injuries from the shooting.

a. Maria Cervantes

The bullet that struck Ms. Cervantes entered her right shin, exited her calf, re-entered her right leg at the back of her thigh, re-exited the front of her thigh, and then re-entered the abdominal area of her body located just above her pelvis. (7 RT 1536-1537; 8 RT 1739-1743.) As noted above, Ms. Cervantes was pregnant at the time of this incident. (7 RT 1525; 8 RT 1739.)[37] The bullet came to rest in Ms. Cervantes' abdomen just a couple inches from the head of the fetus in her

[37] In the original trial, one of the physicians who treated Ms. Cervantes testified that she was near full-term at the time of the incident. (7 RT 1739.) In the penalty phase retrial, that doctor testified she was seven months along in her pregnancy. (19 RT 3906, 3912.)

uterus. (8 RT 1741-1742.) Attending physicians left the bullet inside Ms. Cervantes. (7 RT 1538.) Her baby was eventually delivered via cesarean section. (7 RT 1538.) Her baby is healthy. (7 RT 1539.) Ms. Cervantes has a small scar under her navel caused by the bullet that struck her. (7 RT 1537.)

b. Detective Delfin

Detective Delfin suffered multiple gunshot injuries. During the shooting, bullet fragments, glass, and debris struck his head and hands. He has a scar and indentation on the right side of his head, between his eyebrow and temple. (8 RT 1572-1574.) His fingers were struck, and as of the date of his trial testimony, he was experiencing numbness in one of his fingers. (8 RT 1575.)

The detective suffered an extremely serious injury to his right knee. A bullet entered his right leg about four-to-five inches below the knee, then traveled upward. It fractured his tibia in several places and fractured his femur in one place. (7 RT 1495.) According to an orthopedic surgeon who treated Detective Delfin, the bullet "destroyed" his knee. (7 RT 1495.)

Detective Delfin was hospitalized for 19 days after the shooting. During that period of hospitalization, one surgical procedure was performed on his knee. (8 RT 1583-1584.) Originally, an external fixator was placed on his knee. (7 RT 1493; 8 RT 1584-1585.) He had to "wear" the fixator for nine months. (8 RT

1585.) However, a serious infection developed, penetrating into the bones of the detective's leg. (7 RT 1493-1494.) The detective had to undergo additional surgical procedures. (8 RT 1589.) At one point, one of the treating physicians felt the best option was to amputate the detective's leg. (7 RT 1494.) However, the detective's orthopedic surgeon, along with a plastic surgeon, replaced the detective's knee joint with an artificial knee joint. (7 RT 1494-1495.) In all, Detective Delfin underwent 10 surgical procedures on his knee. (7 RT 1499-1500; 8 RT 1589.)

Detective Delfin is not able to walk normally. The damage done to his leg caused permanent weakening of his quadriceps muscle. He is unable to completely straighten his leg. (7 RT 1500.)

Due to his injuries, Detective Delfin was unable to return to work in the gang unit. He had to assume a desk job in the police station. (8 RT 1596.)

20. Search of Lazy's Home

Police searched Lazy's residence approximately one week after the shooting. (6 RT 1228-1229, 1253.) The police seized various items from the home, including photographs of gang members. (6 RT 1229.)

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21. Belated Discovery of Rascal's Notes

As noted above, before the B.P. meeting that took place at Lazy's home during the afternoon on April 29, 2000, Rascal had written out some gang-related notes. (7 RT 1398-1399; 9 RT 1888-1889; People's Exhibit 26.) Shortly after the shooting, Lazy gave Mr. Bojorquez's girlfriend, Lucinda Lara, a folder containing Rascal's notes. (7 RT 1302-1303, 1350-1356.) Approximately one week after the shooting, Ms. Lara gave Rascal's notes to her step-sister, Kristen Trochez. (7 RT 1303, 1354, 1385-1386, 1391-1392.) Ms. Lara asked Ms. Trochez to hide the notes. (7 RT 1385-1386.) Ms. Trochez kept the notes for one and one-half years, until November 17, 2001, at which time she provided them to a detective who was questioning her about the case. (7 RT 1393-1394.)

B. Original Penalty Phase

From opening statements through closing arguments and final instructions to the jury, the original penalty phase lasted five court days. (5 CT 1292-1295, 1298-1299, 1301-1302, 1305, 1344.) Then, the jury deliberated over the course of five more court days before declaring itself deadlocked. (5 CT 1307-1311, 1344.) Whereupon, the trial court declared a mistrial. (5 CT 1344.)

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1. The Prosecution's Case

The prosecution's penalty phase case-in-chief consisted of three categories of evidence: First, the prosecution presented evidence of Mr. Sandoval's involvement in a gang-related shooting and homicide that occurred approximately six months before the fatal shooting on Lime Avenue. Second, the prosecution presented evidence regarding Daryle Black's background and character. This evidence consisted of testimony from the detective's friends, family members, and professional colleagues. Some of these individuals also testified about the impact on them of the loss of Daryle Black. Third, the prosecution presented evidence regarding the impact on Rick Delfin and his family of the injuries he suffered in the shooting on Lime Avenue.

a. The Murder of Jesus Cervantez

Jesus Cervantez was a member of Just Kicking It (J.K.I.), an emerging criminal street gang. (11 RT 2135, 2145, 2187, 2196, 2200.) Early in the evening on October 10, 1999, Mr. Cervantez and a fellow J.K.I. member, Steve Romero, were outside a McDonald's restaurant in Lynwood. Mr. Sandoval and Rascal drove to a point near the spot where Messrs. Cervantez and Romero were located outside the McDonald's restaurant. (11 RT 2103, 2109-2110, 2139-2143, 2178-

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2179, 2194-2195.)[38] Rascal, who was armed with an AR-15 or some other type of assault rifle, stepped out of the vehicle and fatally shot Mr. Cervantez. (11 RT 2109-2115, 2130, 2155-2163, 2173-2174.) Rascal then chased and shot Mr. Romero, causing a superficial wound to Mr. Romero's head. (11 RT 2103, 2110, 2173.)

Shortly before this shooting at McDonald's, J.K.I. members had driven by the B.P. hangout in the alleyway off Atlantic Avenue in Compton and had fired gunshots at B.P. members, including Mr. Sandoval. (11 RT 2102, 2177-2178.) The shooting at McDonald's was carried out in retaliation for this J.K.I. drive-by shooting. (11 RT 2102, 2177-2178.)

Mr. Sandoval confessed his involvement in the shooting at McDonald's. However, he declined to acknowledge Rascal's involvement in the shooting. In this connection, he told the officers to whom he confessed that he was only willing to discuss his activities, not the activities of his fellow gang members. (11 RT 2175-2177; 2 CT 480-481; Supp. V CT 91.)[39]

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[38] Mr. Sandoval and Rascal were in a vehicle Mr. Sandoval had previously stolen. (11 RT 2102-2103, 2148, 2177-2178.)

[39] Before Mr. Sandoval confessed to his involvement in the shooting at McDonald's, police had been unaware he had played any role in that incident. (11 RT 2184.)

b. Daryle Black

Daryle Black grew up in Michigan. (11 RT 2204, 2212, 2294, 2300.) He was the youngest of five siblings. (11 RT 2286.) He joined the Cub Scouts and was involved in youth sports leagues. (11 RT 2286-2287.)

After high school, he enlisted in the Marine Corps. (11 RT 2204, 2210.) While in the Marine Corps, he was respectful, compassionate and viewed by others as a man who led by quiet example. (11 RT 2205-2207, 2216.) He took pride in being a Marine, and was very committed to the military. (11 RT 2241-2242, 2303, 2306-2307.) He was the best man in the wedding of one of his fellow Marines. (11 RT 2218.)

After leaving the Marine Corps, Daryle Black became a deputy sheriff in the Orange County Sheriff's Department. He was well-liked and very devoted to his job. (11 RT 2214-2217.) He transferred to the Long Beach Police Department in 1993. (11 RT 2278.)

Daryle Black was a large, muscular man. He weighed over 300 pounds. (11 RT 2276.) He liked to have steak and eggs for breakfast. (11 RT 2280.) Despite his intimidating size, he was always polite and put people at ease. He even managed to conduct himself in a relatively gentle and respectful manner when subduing unruly arrestees. (11 RT 2222-2225, 2277, 2280.) As a gang detective,

he was very interested in gang culture, and he was a student of gang history. (11 RT 2283, 2307.)

At the time of his death, Daryle Black was 33 years old. (11 RT 2286.) His death has been very hard on his family. (11 RT 2292, 2295, 2298, 2305-2306, 2310, 2312-2313.) His sister, Karen Black, had considered him her best friend, as well as her brother. She underwent two years of counseling in the wake of his death. (11 RT 2298.) His family members miss him and the lengthy phone calls he made to them back in Michigan, particularly the phone calls he made on holidays. (11 RT 2306.)

Over 6,000 police officers and members of the military attended the memorial service for Daryle Black in Long Beach. He was honored with a 21-gun salute. During the memorial service, police officers formed a procession that appeared to be "a couple miles long." The ceremony was very moving. (11 RT 2247-2249, 2291, 2311; People's Exhibits 85, 86, 91, and 92.) The Mayor of Long Beach spoke at the memorial service. (11 RT 2311-2312.)[40]

According to the Deputy Chief of the Long Beach Police Department, the murder of Detective Black had a devastating impact on the morale of the gang unit

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[40] During the original trial, testimony was simply given that "the mayor" spoke at the memorial. (11 RT 2311.) At the retrial, testimony was given that the Mayor of Long Beach spoke at the memorial. (21 RT 4369.)

to which he had belonged. The gang unit "started to turn on itself." (11 RT 2239.) Members of the unit "lost it" and were unable to exhibit the leadership qualities expected of them. (11 RT 2237-2239.) The deputy chief made arrangements to have members of the gang unit undergo counseling and for them to receive time off of work. However, as of the time of the trial, the unit had not "healed." (11 RT 2236-2238, 2239.)

After the memorial service in Long Beach, Daryle Black's family held his funeral service and buried him in Grand Rapids, Michigan. (11 RT 2291, 2295, 2312-2313.)

c. Richard Delfin

Before the shooting, Rick Delfin was active and athletic. (11 RT 2254.) He coached little league baseball and liked to hike. (11 RT 2255-2256.)

Shortly after the shooting, it was uncertain whether Rick Delfin was going to survive. When his wife first saw him in the hospital, he was covered with blood. (11 RT 2258-2259.)

Rick Delfin and his wife have children. The children miss being able to participate in athletic activities with their father, and they have been otherwise traumatized by the harshness of what happened to their father. (11 RT 2262-2263.)

Since the shooting, things have been challenging for the Delfin family. Due to his injuries, it is difficult for Rick Delfin to do some of the simpler day-to-day activities. (11 RT 2259-2261.)

In March of 2001, Rick Delfin received a Medal of Valor and a Purple Heart. (11 RT 2260; People's Exhibit 88.)

2. The Defense Case

The defense presented three categories of penalty phase evidence and unsuccessfully attempted to present a fourth category of such evidence. First, the defense presented testimony regarding Mr. Sandoval's background and family history. Second, the defense adduced evidence regarding the circumstances under which he became involved with the B.P. gang and his family's struggles to keep him away from the gang. Third, the defense presented evidence regarding Mr. Sandoval's remorse and acceptance of responsibility for his crimes. Fourth, the defense attempted to present evidence that a sentence of life in prison without the possibility of parole would have resulted in conditions of confinement in prison for Mr. Sandoval that would have prevented him from posing any risk of future dangerousness. However, after a hearing conducted pursuant to Evidence Code section 402, the trial court imposed limits on the evidence it would allow the defense to adduce concerning this subject, and the defense ultimately did not

present any such evidence.

a. Background and Family

Mr. Sandoval was born in the United States. (12 RT 2505.) On the day he shot and killed Detective Black, he was 18 years old. (12 RT 2353, 2364-2365; 13 RT 2618-2619, 2666, 2669.)[41]

Mr. Sandoval's parents are from Mexico, and some members of his extended family live in Mexico. (12 RT 2383-2385, 2395, 2504.) His mother was 16 years old when she married his father. (12 RT 2505.) When Mr. Sandoval was a very small child, he and his family moved to Mexico, and Mr. Sandoval attended the first grade there. (12 RT 2384, 2505.) Then, he returned to the United States with his immediate family and went to elementary school in Compton. (12 RT 2505.) His family moved around quite a bit, living at various locations in Compton and Paramount. (12 RT 2364-2365, 2505-2506.)

As a young child, Mr. Sandoval was calm, quiet, and well-behaved. (12 RT 2364, 2368, 2481-2482, 2508, 2535.) He was respectful to his mother and helped her with chores around the house. (12 RT 2535.) With his father's

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[41] He was born on August 8, 1981. (2 RT 1; 20 RT 4148.) Although defense counsel noted in an opening statement given at the beginning of the penalty phase that Mr. Sandoval was born in 1981 (12 RT 2353), no evidence regarding his precise date of birth was presented to the jury in the original trial.

encouragement, he became a very good soccer player. He excelled at the goalie position. He is a good athlete. (12 RT 2374-2375, 2449, 2453-2454, 2508; Defense Exhibit J.)

When Mr. Sandoval was approximately nine years old, his family moved into a two-room house located between Compton and Lynwood. A total of eleven people lived in the house, including Mr. Sandoval, his younger brother, his older sister, his parents, his aunt, and his aunt's children. (12 RT 2478-2479.)

The Sandoval family struggled to get by. They could only afford to live in homes in downtrodden, gang-infiltrated areas. They were short on money. (12 RT 2392, 2449, 2540-2541.) Nevertheless, Mr. Sandoval's parents did what they could to provide for Mr. Sandoval and his siblings. His mother always worked long hours as a seamstress. And his father also provided for the family, although he was occasionally out of work. (12 RT 2371-2372, 2377-2378, 2380, 2507.) Mr. Sandoval's parents taught him and his siblings right from wrong. (12 RT 2372-2373.) Together, the Sandoval family celebrated birthdays and holidays. (12 RT 2373.) They occasionally visited family members in Mexico. (12 RT 2374.)

As Mr. Sandoval grew a little older, he and his younger brother, Avel, were in school together. Mr. Sandoval looked out for his younger brother. (12 RT

2446-2447.) He prepared meals for his younger sister. (12 RT 2476.)

During Mr. Sandoval's early teenage years, his parents began fighting. His father began seeing other women and drinking quite a bit. (12 RT 2366, 2386, 2392, 2480-2481, 2527-2528.) When Mr. Sandoval was 14 years old, his sister, Nancy, who was 16, left home, and Mr. Sandoval's parents separated. (12 RT 2366-2368.) At that time, the Sandoval family was living in an apartment on Atlantic Avenue and San Vincente Street in Compton, in the heart of gang territory controlled by B.P. (12 RT 2447-2448, 2508.)[42] One of Mr. Sandoval's aunts testified she was afraid to park her car in the area in which that apartment was located. (12 RT 2392.)

After his parents separated, some of the Sandoval children stayed with Mr. Sandoval's mother, and some stayed with Mr. Sandoval's father. Mr. Sandoval lived with both of his parents at different times. (12 RT 2451-2452, 2485, 2490-2491, 2528.)[43]

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[42] As discussed above, the B.P. hang out was also located in this vicinity, in an alleyway immediately off of Atlantic Avenue. (2 CT 276-277.) The general vicinity is depicted in a map the prosecution introduced into evidence in the guilt phase. (9 RT 1857-1858; People's Exhibit 65.)

[43] The foregoing family history evidence was presented by the testimony of Mr. Sandoval's sisters, Nancy and Areli Sandoval (12 RT 2362, 2475), his brother, Avel Sandoval (12 RT 2484), his aunts, Reynalda Macias and Maria Ramirez (12 RT 2390, 2477), his cousin, Alonso Sandoval (12 RT 2444), his

b. Gang Involvement

Shortly after the Sandoval family moved into the apartment in gang territory, Mr. Sandoval became involved with the B.P. gang. (12 RT 2448.) He began spending time with gang members, and he began wearing baggy, gang clothes. (12 RT 2397, 2448.) He got gang tattoos. (12 RT 2490.) He stopped attending school regularly. (12 RT 2537.)

His parents tried to get him away from the gang. (12 RT 2370, 2375-2376, 2385-2386, 2448-2449, 2489, 2537-2539.) His father frequently told him to stay away from the gang. (12 RT 2375-2376, 2448-2449.) His father yelled at him about wearing gangster clothing and spending time with gangster friends. (12 RT 2490.) His mother threw away his gang clothes on one occasion. (12 RT 2375.) According to Mr. Sandoval's mother, Mr. Sandoval's father did not help very much when Mr. Sandoval had problems. (12 RT 2540.)

In an effort to keep Mr. Sandoval away from the gang, his parents sent him to live with family members in Mexico. (12 RT 2370, 2376, 2450-2451.) He stayed there willingly, with his grandmother, for approximately six-to-nine months. (12 RT 2376, 2384, 2386, 2537-2538, 2541.) He was respectful, caring,

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paternal grandmother, Maria Mendoza Sandoval (12 RT 2383), and his mother, Alma Sandoval. (12 RT 2504.)

and loving to his family members in Mexico. (12 RT 2384-2385, 2393, 2395.) However, when he returned to the Los Angeles area, after promising his parents to leave the gang lifestyle behind, he soon began spending time with the gang members again. (12 RT 2377, 2388, 2450-2451, 2531, 2538.)

After he had fallen back in with the gang, his parents once again tried to break him free of the clutches of the gang, and sent him to stay with his uncle in Chowchilla. (12 RT 2377, 2427-2428, 2432, 2455, 2532.) His uncle owns a dairy farm, and Mr. Sandoval worked on the dairy farm. (12 RT 2430, 2532.) He played soccer and stayed out of trouble while he was in Chowchilla. (12 RT 2430-2431.) His uncle has two children who were quite young when Mr. Sandoval stayed with them. His uncle testified that he will always remember with fondness how Mr. Sandoval played with his young children. (12 RT 2431-2432.) Mr. Sandoval was 16 or 17 years old when he was in Chowchilla. (12 RT 2431.)

However, when Mr. Sandoval left Chowchilla and returned to the Los Angeles area, he once again began spending time with fellow gang members. (12 RT 2377, 2455, 2539-2540.) In 1999, Mr. Sandvoal was shot and hospitalized. (12 RT 2534.)

A Jesuit priest who runs an organization dedicated to offering alternatives and second chances to gang members in the Los Angeles area testified that gangs

exist predominantly in poor and distressed neighborhoods. (12 RT 2458-2459, 2466.) Young kids often join gangs out of despair. Such despair is typically brought on by poverty and difficult family circumstances. (12 RT 2461-2463.) On the one hand, the young kids who join gangs do so without realizing the consequences of becoming a gang member. (12 RT 2463.) On the other hand, "gangs become sort of the urban poor's version of teenage suicide." (12 RT 2461.) Once involved in a gang, it is difficult for a gang member to leave the gang. (12 RT 2464-2465.)

Mr. Sandoval's younger brother, Avel, never became involved with gangs, because Mr. Sandoval told him not to. (12 RT 2486-2487, 2532-2533.)

c. Acceptance of Responsibility and Remorse

At the time of the murder of Detective Black, Mr. Sandoval was dating Monica Rodriguez. A couple days after the incident, Mr. Sandoval and Ms. Rodriguez had a telephone conversation in which they discussed what he had done. Mr. Sandoval was crying during the conversation. (12 RT 2500.)

While Mr. Sandoval was in county jail awaiting trial, he received regular visits from a chaplain of the Archdiocese of Los Angeles. Although the chaplain had been visiting with inmates for nearly ten years, this was the first case in which he testified. According to the chaplain, Mr. Sandoval was in the process, while in

jail, of making a painful transition from being a boy to becoming a man. In his meetings with the chaplain, Mr. Sandoval took responsibility for taking the lives of two people. He expressed sincere remorse for his victims and for the pain he has caused his family. (12 RT 2401, 2409-2412, 2425.)[44]

d. Conditions of Confinement and Future Dangerousness

James Esten was an administrator in the California Department of Corrections and Rehabilitation. He is now retired. (12 RT 2331.) In a hearing conducted outside the presence of the jury, Mr. Esten testified that he interviewed Mr. Sandoval twice and familiarized himself with the facts of this case. He also reviewed records regarding Mr. Sandoval's incarceration in the Los Angeles County Jail, including a report regarding an incident during which Mr. Sandoval was stabbed in the jail. (12 RT 2333, 2341-2342.) Mr. Esten had testified in approximately 55 prior cases concerning the subjects of prison gangs, inmate adjustment to custodial settings, and prospects of inmates' future dangerousness. (12 RT 2332.)[45] He testified that the best means of assessing potential for future

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[44] On cross-examination, the chaplain testified that he is opposed to capital punishment. He stated: "Society ha[s] no right in taking someone else's life." (12 RT 2419-2420.)

[45] In four capital appeals, this court has expressly referenced testimony given by Mr. Esten. (*People v. Martinez* (2010) 47 Cal.4th 911, 962-963; *People v. Jackson* (2009) 45 Cal.4th 662, 675, cert. den. *sub nom. Jackson v. California*

dangerousness is to look at past behavior. Judging by this criterion, Mr. Esten stated there is no indication Mr. Sandoval would pose any problems in the type of security setting in which he would be confined if he were to receive a sentnece of life without parole. (12 RT 2335.)

Further, Mr. Esten testified that correctional officers view themselves as part of the law enforcement community, and for that reason, the fact that Mr. Sandoval had killed a police officer would affect the way correctional officers treated him. (12 RT 2346-2347.)

By way of proffer, defense counsel stated that Mr. Esten would also testify that Mr. Sandoval would be treated as a "snitch" in prison, because he had given up some names during the course of his confession. Because Mr. Sandoval had given up names, gang members in prison would put a "green light" on him, which could result in prisoners attacking him. (12 RT 2340-2341, 2345.)

The trial court ruled that it would not allow the defense to elicit testimony from Mr. Esten in the presence of the jury regarding 1) the prison conditions in which Mr. Sandoval would be confined, 2) the circumstances of the stabbing of Mr. Sandoval in the county jail, 3) the prospect that Mr. Sandoval would be

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(2009) 129 S.Ct. 2829; *People v. Elliot* (2005) 37 Cal.4th 453, 464, cert. den. *sub nom. Elliot v. California* (2006) 549 U.S. 853; *People v. Cornwell* (2005) 37 Cal.4th 50, 65, cert. den. *sub nom. Cornwell v. California* (2006) 546 U.S. 1216.)

treated differently by correctional officials because he had killed a police officer, and 4) the potential of Mr. Sandoval being deemed a "snitch" in prison. (12 RT 2339, 2343-2346, 2349-2352.) The trial court ruled that Mr. Esten could only testify about the subject of future dangerousness, and that in doing so, he would have to avoid reference to the foregoing subjects. (12 RT 2351-2352.)

Given the constraints imposed by the trial court, defense counsel did not present any testimony from Mr. Esten to the jury. (12 RT 2438.)

3. The Prosecution's Rebuttal Case

On October 1, 2002, while jury selection was going forward, a courtroom security officer found a makeshift symbol in a holding cell in which Mr. Sandoval had been confined. The symbol consisted of two pieces of paper rolled up into two lines, situated underneath three rolled up paper balls. (12 RT 2557-2559; People's Exhibit 93.)[46] A detective from the prison gang section of the major crimes bureau in the Los Angeles County Sheriff's Department testified that the makeshift symbol represented an Aztec or Mayan number 13, and that the number 13 signifies allegiance to the Mexican Mafia and the Sureño gang. (12 RT 2563-

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[46] At the time this symbol was found, Mr. Sandoval was classified by Los Angeles County Jail officials as a "K-10" inmate. K-10 inmates are those deemed by jail officials to pose the greatest threat of danger to others. (12 RT 2556, 2559-2561.)

2566.)

On October 11, 2002, while the evidentiary portion of the guilt phase was proceeding, jail officials searched Mr. Sandoval's single-occupant jail cell. They found a styrofoam cup. Etched into the cup were the terms "Soy Menace" and "Comptone." (12 RT 2542-2544.) "Soy Menace" means "I am Menace." "Comptone" is a gang-related reference to the B.P. clique to which Mr. Sandoval belonged.

C. Penalty Phase Retrial

In large part, the evidentiary presentation in the penalty phase retrial consisted of a rehash of the evidence presented in both the guilt phase trial and the original penalty phase trial.[47] However, there were differences in the evidence

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[47] The following witnesses testified before the jury in the guilt phase: Melina Runnels (6 RT 1110), Steven Lasiter (6 RT 1120, 1263; 7 RT 1430, 1484), Angela Estrada (6 RT 1156), Steven Prell (6 RT 1206; 9 RT 1855; 10 RT 1954), Christine Estrada (6 RT 1213), Desirée Rodriguez (7 RT 1275), Lucinda Lara (7 RT 1290), Camile Roe (7 RT 1363), Kristen Trochez (7 RT 1377), Emily Lara (7 RT 1396), Virgil Wade (7 RT 1451), Rosa Gallegos (7 RT 1464), Lucero Rodriguez (7 RT 1470), Pedro Rodriguez (7 RT 1477), Lawrence Dorr (7 RT 1492), Hugo Cortes (7 RT 1502), Abel Morales (7 RT 1515), Felipa Guerrero (7 RT 1524), Maria Cervantes (7 RT 1531), Stanley Jordan (7 RT 1540), Rick Delfin (8 RT 1559), Bryan McMahon (8 RT 1599), Hector Nieves (8 RT 1623), Paul Edwards (8 RT 1630), Dale Higashi (8 RT 1657), Eugene Carpenter, Jr. (8 RT 1710), Sameer Mistry (8 RT 1737), Jimmy Lee Falconer (9 RT 1761), Ignacio Lugo (9 RT 1781), and Richard Valdemar. (9 RT 1863.)

The following witnesses testified before the jury in the original penalty phase: Michael Fields (11 RT 2108), John Kuibus (11 RT 2116), James Carroll

presented:

1. Mr. Sandoval's Date of Birth

Mr. Sandoval's date of birth is August 8, 1981. While no evidence regarding his precise date of birth was introduced during the original trial (*ante*, fn. 41), the parties entered a stipulation regarding his date of birth in the retrial. (20 RT 4148.)

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(11 RT 2125), Veronica Segura (11 RT 2132), Leticia Cervantez (11 RT 2138), Fernando Gonzales (11 RT 2146), Juan Carrillo (11 RT 2150), Stephen Davis (11 RT 2166), Steven Lasiter (11 RT 2175), Steven Prell (11 RT 2194; 12 RT 2542), Ignacio Lugo (11 RT 2196), Daniel Puls (11 RT 2204), Fred Cerra (11 RT 2214), Yul Long (11 RT 2221), Anthony Batts (11 RT 2231), Debbie Delfin (11 RT 2254), Robert Knight (11 RT 2274), Howard Black (11 RT 2286), Karen Black (11 RT 2293), Connell Black (11 RT 2300), Nancy Sandoval (12 RT 2362), Maria Sandoval (12 RT 2383), Reynalda Macias (12 RT 2390), Gonzalo Devivero (12 RT 2401), Francisco Virgin (12 RT 2427), Alonso Sandoval (12 RT 2444), Gregory Boyle (12 RT 2458), Areli Sandoval (12 RT 2475), Maria Ramirez (12 RT 2477), Avel Sandoval (12 RT 2484), Monica Rodriguez (12 RT 2499), Alma Sandoval (12 RT 2504), Michael Kennard (12 RT 2555), and Christopher Brandon. (12 RT 2563.)

In the penalty phase retrial, all but seven of the aforementioned witnesses testified, or had their testimony from the original trial read to the jury in the retrial. The seven who did not testify in the penalty phase retrial are Angela Estrada, Kristen Trochez, Richard Valdemar, Gonzalo Devivero, Monica Rodriguez, Michael Kennard, and Christopher Brandon. The testimony of Felipa Guerrero, Lawrence Dorr, M.D., and Gregory Boyle from the original trial was read to the jury in the penalty phase retrial. (19 RT 3798-3804; 20 RT 4028-4041; 22 RT 4517-4535.) Also in the penalty phase retrial, the defense called three witnesses who had not previously testified in the case: Cruz Perez, Isidro Llamas, and Jose Llamas. (21 RT 4388; 22 RT 4416, 4426.)

2. Mr. Sandoval's Level of Education

Mr. Sandoval dropped out of high school in the tenth grade. He is able to read and write in English with no problem. (21 RT 4279.)

3. Mr. Sandoval's Appearance at the Time of His Arrest and at the Time of the Retrial

At the time of his arrest, Mr. Sandoval's hair was cut short. (17 RT 3523-3524.) During the prosecutor's cross-examination of Mr. Sandoval's uncle, Francisco Virgin, the prosecutor elicited evidence that Mr. Sandoval's head had been shaved when he had gone to stay with Mr. Virgin in Chowchilla, and insinuated that Mr. Sandoval "look[ed] like a gang member" with that hair style. (21 RT 4382-4383.) The prosecutor also elicited testimony from Mr. Sandoval's sister, Nancy Sandoval, that Mr. Sandoval's head had been shaved until approximately two months before the retrial. (22 RT 4501.)[48] Then, during closing argument in the retrial, the prosecutor stated that Mr. Sandoval had appeared before the jury with his hair grown out in an effort to "deceive" the jury. The prosecutor also told the jury Mr. Sandoval's hair would not remain grown out "for 15 minutes after [its] verdict." (23 RT 4605-4606, 4618.)

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[48] Mr. Sandoval's sister noted that Mr. Sandoval has had different hair styles over the course of various time periods. (22 RT 4512-4513.)

4. The Identity of the Shooter in the J.K.I. Shooting Incident at McDonald's

Mr. Sandoval told police that he, rather than Rascal, was the shooter in the J.K.I. shooting incident at the McDonald's restaurant in Lynwood. (17 RT 3528-3531; 18 RT 3545-3546.) However, the prosecutor told the jury Rascal was the shooter. (17 RT 3388-3389; 23 RT 4603-4604.)

5. Mr. Sandoval Was Shot in October of 1999

On October 16, 1999, just six days after the fatal shooting of Jesus Cervantez at McDonald's, Mr. Sandoval was shot in the arm during a drive-by shooting. The parties stipulated to this fact in the retrial. (20 RT 4142-4143.)

6. The Duration of the Rivalry Between B.P. and E.S.P.

The rivalry between B.P. and E.S.P. has been ongoing since at least 1989. (20 RT 4150.)

7. Mr. Sandoval's Tearful Conversation with His Girlfriend

The jury in the penalty phase retrial did not hear the testimony of Mr. Sandoval's girlfriend, Monica Rodriguez, that, during a conversation the two of them had over the phone a couple days after the murder of Detective Black, Mr. Sandoval was crying when he told Ms. Rodriguez what he had done. (12 RT 2500.)

8. Toro Was Asleep at the Time of the Shooting

Toro was asleep inside his home at the time the shooting occurred. (19 RT 3739.)

9. Maria Cervantes and Her Daughter

Maria Cervantes' daughter is named Milegras, which means "very big miracle." (19 RT 3814.) Ms. Cervantes was seven months along in her pregnancy when she was shot. (19 RT 3905.) As of the date of Ms. Cervantes' testimony in the retrial, April 3, 2003, the bullet that struck her was still inside her. (19 RT 3811.)

10. Detective Delfin's Emotional Outburst in the Retrial

During the retrial, Detective Delfin testified that Mr. Sandoval showed no mercy during the shooting. (19 RT 3852-3853.) Then, when the prosecutor asked the detective how the injuries he suffered during the shooting had affected his ability to pursue his career as a gang detective, the detective answered, "I'm no longer able to work the streets. The citizens of Long Beach no longer have an officer who cares as much as I do anymore because this son of a bitch shot me." (19 RT 3835-3836.) The detective was wearing his uniform during his testimony.

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(19 RT 3967.)[49]

11. Eyewitness Characterization of the Manner in Which Detectives Black and Delfin Approached Rascal Just Before the Shooting

Jimmy Lee Falconer, who witnessed the shooting, testified that immediately before the shooting, it appeared that the detectives were preparing to "jack" Rascal. (20 RT 3991.) Mr. Falconer defined the term "jack" as an "unnecessary stop by a police officer of a civilian[.]" He added: "[B]ut it's part of what police do ... in those type[s] of neighborhoods." (20 RT 3997-3998.)

12. Gang-Related Items Found in Jail Cells Occupied by Mr. Sandoval

No evidence was presented in the retrial regarding the makeshift Mexican Mafia symbol found in the holding cell in which Mr. Sandoval had been confined. During the retrial, the trial court refused to allow the defense to elicit evidence that, in 1996, the Mexican Mafia had issued an edict prohibiting Sureño gang

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[49] After the detective's outburst, the trial court said, "Excuse me." The court then asked the jury to exit the courtroom. The court characterized the detective's remark as "dramatic" and "emotional." Defense counsel moved to "dismiss the penalty phase on due process grounds", and alternatively moved for a mistrial, noting that Detective Delfin is a government official. Defense counsel quoted from Justice Brandeis' dissenting opinion in *Olmstead v. United States* (1928) 277 U.S. 428: "If the government becomes a lawbreaker, it breeds contempt for the law." (*Id.* at p. 485.) The court denied the motions. (19 RT 3836-3837.) Later, the court ordered the jury to "disregard the profanity that was used in characterizing the defendant by this witness." (19 RT 3840.)

members from engaging in drive-by shootings. In the wake of this ruling, defense counsel requested the court to exclude the evidence regarding the makeshift symbol found in the holding cell, which, according to the prosecution, showed Mr. Sandoval's continuing allegiance to the Mexican Mafia. (20 RT 4171-4174.) The prosecution did not attempt to present the evidence.

Also, the prosecution did not present evidence in the retrial regarding the styrofoam cup with gang-related etchings that was found in Mr. Sandoval's jail cell. (12 RT 2542-2544.)

13. The Meaning of "Menace"

A gang expert testified that the moniker "Menace" is for a gang member who poses a threat to others. (20 RT 4201.)

14. Gang-Expert Testimony Regarding Mr. Sandoval's Intent

A gang expert testified that when the B.P. members went to Toro's house, their intention was to participate in a "blood bath." He said "they threw caution to the wind," that "they were going to shoot into the house and target everyone," and that Mr. Sandoval's possession of the assault weapon served as "an exclamation point." (20 RT 4201-4202.) He opined that Mr. Sandoval's intended role in the planned shooting at Toro's residence was to do the majority of the shooting. (20 RT 4215-4216.) He maintained this opinion, despite his acknowledgment that, in

the original trial, he had testified Mr. Sandoval's intended role was to provide cover for his fellow gang members, and despite his acknowledgment that he had no idea how the planned shooting at Toro's residence would have been carried out if it had occurred. (20 RT 4216, 4219.)

15. The Nature of a CAR-15

A CAR-15 is more compact than an AR-15, and is therefore easier to carry around. (20 RT 4246.)

16. Presentation to the Jury of Transcripts From Which Information Regarding Mr. Sandoval Shooting Other People with the CAR-15 Was Not Redacted

When the tape-recording of Mr. Sandoval's confession was played to the jury in the retrial, copies of transcripts of the recording were provided to the jurors. As the tape-recording was played, defense counsel noted that the version of the transcript furnished to the jurors had text in it that the court had ordered redacted. The text that should have been redacted consisted the following question and answer:

Detective:	Have you ever shot anyone else with [the CAR-15]?
Mr. Sandoval:	Yes, sir. I have.

(21 RT 4288.)

A copy of the un-redacted transcript reflects this text. (2 CT 468.) After the defense noted the inclusion of this text in the version of the transcript furnished to the jurors, the prosecutor and court noted that, as they were reading along when the tape was played for the jury, they had also realized the text should not have been included. (21 RT 4288.)[50] The court then informed the jurors that they were to disregard that text and that "there is absolutely no evidence the defendant ever shot anyone else with the CAR-15...." (21 RT 4289.) Thereupon, the court had the bailiff collect the un-redacted transcripts from the jurors. (21 RT 4289.) A redacted version of the transcript was later received in evidence. (Supp. V CT 37-92.)

17. Detective Black's Christianity

A friend of Daryle Black's, who served with him in the Marine Corps, described Daryle Black as "a good Christian man." (21 RT 4303.)

18. Mr. Sandoval's Soccer Prowess

Two of the coaches of a soccer team on which Mr. Sandoval played when he was a young teenager testified in the retrial. (22 RT 4416-4434.) They testified that he was an "awesome" soccer player. When he was only 14, he

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[50] The court later commented that it had observed jurors reading their transcripts as the tape-recording was played. (21 RT 4297.)

played on a team comprised of men. (22 RT 4428.) He got along well with his teammates. (22 RT 4417.)

19. The Break-Up of the Sandoval Family

While Mr. Sandoval was on the soccer team, his father began dating Rosario Gomez, who was related to one of the soccer coaches. (22 RT 4424, 4429.) He was "greatly" impacted when his father began dating Ms. Gomez. (22 RT 4429.) Mr. Sandoval's father effectively "left the family" when he began dating Ms. Gomez. (22 RT 4431.)

20. No Evidence of Remorse

As noted at pages 57-58, *ante*, evidence of Mr. Sandoval's remorse and acceptance of responsibility was presented during the original penalty phase. Testimony concerning his remorse was presented by Mr. Sandoval's girlfriend, Monica Rodriguez, and a chaplain, Gonzalo Devivero. However, as noted at footnote 47 and page 64, *ante*, neither of these witnesses testified during the retrial. Thus, no evidence of Mr. Sandoval's remorse was presented in the retrial.

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INTRODUCTION

The issues presented in this brief arise out of eight different phases/aspects of litigation in this case:

- Litigation of Fourth Amendment issues during pretrial proceedings. (Discussion I, pp. 72-116, *infra.*)
- The process of death qualification during jury selection. (Discussion II, pp. 116-129, *infra.*)
- The guilt phase. (Discussions III-XI, pp. 130-262, *infra.*)
- Undertaking a penalty phase retrial after juror deadlock in the original penalty phase. (Discussion XII, pp. 262-269, *infra.*)
- Jury selection in the penalty phase retrial. (Discussion XIII, pp. 269-318, *infra.*)
- The penalty phase retrial. (Discussions XIV-XX, pp. 319-379, *infra.*)
- "Harmless" error review of penalty phase error(s). (Discussion XXI, pp. 380-382, *infra.*)
- The death penalty itself. (Discussion XXII, pp. 382-384, *infra.*)

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DISCUSSION

I.

BECAUSE THE TRIAL COURT FAILED TO CONDUCT AN EVIDENTIARY HEARING TO RESOLVE ISSUES OF FACT RAISED BY MR. SANDOVAL'S SUPPRESSION MOTION, AND BECAUSE THE TRIAL COURT RELIED ON EXTRAJUDICIAL FINDINGS TO DENY THE MOTION, MR. SANDOVAL IS ENTITLED TO A REMAND FOR A FULL AND FAIR HEARING.

At approximately 6:00 a.m. on May 2, 2000, police executed a search warrant at Mr. Sandoval's home. (8 RT 1630, 1652-1653.) Execution of the warrant was fruitful: It resulted in discovery of the murder weapon (8 RT 1636-1637; 1 CT 99), and the arrest of Mr. Sandoval. (8 RT 1631-1632; 1 CT 99.) And, shortly after Mr. Sandoval's arrest, he confessed. (10 RT 1966-1968; People's Exhibits 73 and 73-A; 2 CT 268-322.)

Mr. Sandoval sought to suppress this damning evidence, contending material information had been intentionally or recklessly omitted from the affidavit submitted in support of the request for the search warrant. Mr. Sandoval requested suppression of this evidence in a written motion, and then, after the discovery of new evidence, in a supplemental, written motion. (3 RT 306-311, 314-316, 524-529; 1 CT 97-140, 236-241.) He requested an opportunity to prove

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his allegations at an evidentiary hearing, i.e., a *Franks*[51] hearing. (3 RT 309-311, 314-316; 1 CT 97-98, 103-104, 236, 240-241.) Although Mr. Sandoval proffered evidence regarding the information omitted from the affidavit (3 RT 306-311, 524-529; 1 CT 105-140, 239-241), the trial court denied Mr. Sandoval's motion, as originally crafted and as supplemented, without conducting an evidentiary hearing. (3 RT 317-319, 526-529.)

Significantly, the trial court's ruling — denying the motion and refusing to conduct an evidentiary hearing — was, in part, based on the court's reliance on its own "extrajudicial" fact finding: In a previous evidentiary hearing, concerning a motion to suppress filed by Rascal (Supp. IV CT 20-29), the trial court had made findings of fact and witness credibility determinations. (Aug. RT 87-91.) Mr. Sandoval was not a party to that motion. Yet, in ruling on Mr. Sandoval's suppression motion, the trial court relied on its "extrajudicial"[52] findings and

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[51] *Franks v. Delaware* (1978) 438 U.S. 154.

[52] The term "extrajudicial" is somewhat of a misnomer in this context: "Extrajudicial" is defined as "[t]hat which is done, given, or effected outside the course of regular judicial proceedings." (Black's Law Dict. (5th ed. 1979) p. 526, col. 1.) Although the findings in question were made by the trial court in a judicial proceeding, they were made "outside the course of regular judicial proceedings" to which Mr. Sandoval was a party. Hearsay statements are often called extrajudicial statements (*Correa v. Superior Court* (2002) 27 Cal.4th 444, 459; *People v. Brown* (1994) 8 Cal.4th 746, 749), and prior judicial findings and judgments made in one judicial proceeding are hearsay when offered to prove their truth in a

determinations at the hearing on Rascal's motion. (3 RT 522-524, 526-527.) This reliance on extrajudicial fact finding was improper.

Given the foregoing circumstances, Mr. Sandoval was denied the opportunity to receive full and fair consideration of his motion to suppress. Not only did the trial court err by failing to conduct an evidentiary hearing to resolve the issues of fact raised by Mr. Sandoval's motion, but also the trial court violated Mr. Sandoval's due process rights by predicating its denial of the motion on extrajudicial fact finding. Accordingly, Mr. Sandoval is entitled to a remand to the trial court for a full and fair hearing on his motion to suppress.

A. Standard of Review

The propriety of a trial court's decision to deny a *Franks* hearing is reviewed de novo. (*People v. Panah* (2005) 35 Cal.4th 395, 457, cert. den. *sub nom. Panah v. California* (2006) 546 U.S. 1216; *People v. Benjamin* (1999) 77 Cal.App.4th 264, 271.)

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separate judicial proceeding. (Motomura, *Using Judgments as Evidence* (1986) 70 Minn. L.Rev. 979, 800.) Thus, in this sense, the findings of the trial court in the hearing on Rascal's suppression motion were extrajudicial in the hearing on Mr. Sandoval's suppression motion.

B. Factual Background

Presentation of this claim requires a detailed description of the facts adduced in connection with the separate litigation of the suppression motions filed by Mr. Sandoval and Rascal.

1. Rascal's Arrest

At approximately 2:30 a.m. on April 30, 2000 — three hours after Mr. Sandoval shot the detectives on Lime Avenue — officers found Rascal hiding in the yard at 2051 Lime Avenue and placed him under arrest. (2 RT 125.)

According to police, they interviewed Rascal briefly at the scene. (2 RT 127.) Rascal told the arresting officers that he was on parole, that he had been deported, and that he did not want to go to jail. (2 RT 127-128, 140-141, 147, 149.) He told the officers he had been walking home after visiting a friend. (2 RT 127.) He claimed that he heard numerous gunshots as he was walking, and that he hid after observing a rapid police response. (2 RT 127-128.)

During a briefing regarding the events surrounding the murder of Detective Black, officers learned that Detective Delfin had provided a description of an individual he had seen on the street immediately before the shooting. The physical description of that individual matched Rascal, and the description of the attire worn by that individual matched the clothing Rascal was wearing. (2 RT 128.)

2. *Police Initially Suspected that the Shooting Was Carried Out By Members of the Crips Gang In Retaliation for a Fatal Officer-Involved Shooting of a Crips Member*

Despite the circumstances under which police found Rascal, certain police officers initially suspected Detective Black had been murdered by African-American gang members in retaliation for an officer-involved shooting of an African-American male that had occurred the day before the murder of Detective Black. (2 RT 126-127.)

Accordingly, during the time-frame in which Rascal was being arrested and questioned, Detective Kevin Nelson of the Long Beach Police Department prepared an affidavit in support of a request for a warrant to search the residence of the mother of the African-American male who had been shot and killed the day before. Detective Nelson sought a warrant to search the residence of Joanna Boyce located at 1992 Lime Avenue. Joanna Boyce was the mother of Billy James Johnson. (1 CT 136.) Mr. Johnson was a member of a Crips gang that was active in the area of Lime Avenue. (1 CT 136-137.) On April 28, 2000, the day before the fatal shooting of Detective Black, Mr. Johnson had been involved in a confrontation with officers of the Long Beach Police Department, in which he was shot and killed. (1 CT 136.) Then, on April 29, 2000, at some time before Detective Black was killed, a black male, who identified himself as a friend of Mr.

Johnson's, told a Long Beach police officer that "there's gonna be payback" for the killing of Mr. Johnson. (1 CT 137.)

Because 1) Mr. Johnson had resided at 1992 Lime Avenue with his mother, 2) the fatal shooting of Detective Black occurred in the 1900 block of Lime Avenue, and 3) a friend or associate of Mr. Johnson's had threatened to retaliate against police for the death of Mr. Johnson, Detective Nelson stated in his affidavit that he believed Crips members associated with Mr. Johnson may have made good on their threats by shooting Detective Black. (1 CT 138.) At approximately 5:05 a.m. on April 30, 2000, just about six hours after the murder of Detective Black, Hon. D.B. Anderws issued the warrant requested by Detective Nelson, directing officers to search the residence of Joanna Boyce at 1992 Lime Avenue. (1 CT 103; 120, 137, 140.) Police executed the warrant. (2 RT 152.)

3. Interrogation of Rascal at the Long Beach Police Department Over the Course of Three Days

After the initial police questioning of Rascal at the scene, police took Rascal to the Long Beach Police Station for further questioning. (2 RT 128.) Police questioned Rascal there over the course of the next three days: April 30, 2000, May 1, 2000, and May 2, 2000. (2 RT 173.) Police did not *Mirandize* him until 3:50 p.m. on May, 2, 2000. (2 RT 179.)

a. Sunday — April 30, 2000[53]

Police began interviewing Rascal at the Long Beach Police Department at approximately 4:12 a.m. on April 30, 2000. (2 RT 128.) At that time, Rascal repeated his claim that, at the time of the murder of Detective Black, he had been walking home from a friend's home. He said that when he was near the intersection between 20th Street and Lime Avenue, he had seen four black male gang members who yelled gang-related profanities at him. (2 RT 128-129; 1 CT 110.) He said he ran away from those black gang members and heard numerous gunshots as he was fleeing. (2 RT 130-131; 1 CT 110.) Rascal had been in possession of a .45 caliber handgun, but he discarded it because he did not want police to find him in possession of the gun. (2 RT 132-133; 1 CT 111.) He then hid in the backyard of a Lime Avenue residence until he was arrested. (2 RT 131.)

The early-morning interview of Rascal lasted longer than an hour. Police then briefly re-interviewed Rascal at 7:30 a.m. (2 RT 151.) Thereafter officers went to the crime scene in an attempt to verify certain aspects of the statement Rascal had given them. (2 RT 135, 146.) Based on this follow-up investigation, police came to believe that "he may have seen more" than he was reporting to

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[53] The trial court took judicial notice of the fact that April 30, 2000, was a Sunday. (8 RT 1616.)

them. (2 RT 136.)

After investigating details of statements furnished by Rascal, police began re-interviewing Rascal at approximately 12:30 p.m. (2 RT 136.) Rascal asked: "Should I have a lawyer for this?" (2 RT 138-139.) The homicide detectives who were interviewing him told him "that he didn't need an attorney." (2 RT 141.) According to the detectives, they did not view Rascal as a suspect in the shooting at this time. (2 RT 139.) They told him they "believed he could have seen more than he was relaying to [them]." (2 RT 137; 2 CT 333.) He then stated he had witnessed the shooting. He said the shooter was one of three men. However, he said the shooter was wearing a hooded sweatshirt and that he had been unable to see the shooter's face. (2 RT 137-140.)

Police questioning of Rascal stopped for several hours, and resumed again at approximately 5:00 p.m. (2 RT 155-156.) This interview session went on until approximately 10:30 p.m. (2 RT 169.) During the interview, one of the detectives told Rascal that Detective Delfin had been seriously injured in the shooting and was fighting for his life in the hospital. Rascal began crying. He said he knew Detective Delfin. Although Detective Delfin had previously arrested Rascal, he had treated Rascal with respect. (2 RT 157; 1 CT 111; 2 CT 333.) Rascal said he would tell the police what he knew, but that he was fearful for the safety of

himself and his family. He expressed concern about coming to be known as a "snitch." (2 RT 158; 2 CT 334.)

Rascal said he had spent time with three individuals shortly before the shooting: Mr. Sandoval, a friend of Mr. Sandoval's known as "Tanker," and a young Hispanic friend of Tanker's whose name Rascal did not know. The four of them drove to the location of the shooting in two cars. Rascal and Mr. Sandoval were not in the same vehicle. Rascal said he had been unaware why they went to that location. (2 RT 159-160; 2 CT 337-351, 367.) He said that when they parked on Lime Avenue, Mr. Sandoval stepped out of one of the cars. He was holding an AR-15. (2 CT 347-352.)[54] In order to see what was going on, Rascal stepped out of the vehicle in which he had arrived at Lime Avenue. (2 CT 350.) Rascal saw an undercover police vehicle pull onto Lime Avenue. (2 CT 353-354.) He began walking on the sidewalk, hoping the officers in the undercover vehicle would not notice him, because, as noted above, he was on parole and illegally in the country. (2 CT 350-351, 355.) Mr. Sandoval then began shooting at the undercover police vehicle. Rascal said he heard approximately 14 or 15 gunshots. (2 CT 356, 358-360.)

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[54] Rascal claimed he had not previously seen the AR-15. (2 CT 352.)

Rascal then ran, jumped over a fence into somebody's yard, and hid. (1 CT 113; 2 CT 360.) He had a .45 caliber handgun, but put it down as he was hiding. (1 CT 113; 2 CT 363.) He hid until SWAT officers located him. (2 CT 364-365.) After his arrest, he "directed officers to the location where he had left the [.45 caliber] gun." (1 CT 111.)

Rascal told the detectives who were interviewing him that he and Mr. Sandoval were both B.P. members. (2 CT 337, 367.) He said he had been aware of problems between B.P. and E.S.P., that E.S.P. members resided on Lime Avenue, and that these circumstances may have been the reason why Mr. Sandoval had gone to that location. (2 CT 368.)

Notwithstanding the foregoing circumstances, police testified that they viewed Rascal as a witness rather than a suspect during their questioning of him on April 30, 2000. (2 RT 137, 150, 159-160.)

b. Monday — May 1, 2000

Police questioning of Rascal on May 1, 2000 related principally to police efforts to locate Mr. Sandoval. (2 RT 173.) Rascal provided police with information concerning the location of Mr. Sandoval's mother's home in Los Angeles, and Rascal made phone calls to Mr. Sandoval in an effort to assist police in apprehending Mr. Sandoval. (2 RT 163-164.)

Police testified that, during their questioning of Rascal on May 1, 2000, they still deemed him a witness rather than a suspect. (2 RT 165.)

c. Tuesday — May 2, 2000

Police continued questioning Rascal on May 2, 2000. This questioning occurred after Mr. Sandoval had been arrested and questioned.[55] Police told Rascal they appreciated his cooperation up to that point, but that they had Mr. Sandoval in custody and that information provided to them by Mr. Sandoval differed from what Rascal had told them. They told Rascal they "needed to get the whole truth from him." (2 RT 165-166.) They *Mirandized* Rascal (2 RT 166-168), and he made a statement to them in which they deemed his role to be that of a suspect rather than a witness. (2 RT 168.)[56]

Police testified that they learned an attorney was attempting to see Rascal in the evening on May 2, 2000. (2 RT 175.) However, they did not allow the attorney to see Rascal at that time. (Aug. RT 43-46.)

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[55] The circumstances regarding the arrest of Mr. Sandoval early in the morning on May 2, 2000, which have been discussed in the Statement of Facts, *ante*, are discussed further below.

[56] In that statement, which was recorded, Rascal indicated that he and fellow B.P. gang members had driven over to Toro's residence on Lime Avenue to retaliate for E.S.P.'s drive-by shooting at the B.P. hang out. (2 CT 380-392.)

4. The Warrant to Search Mr. Sandoval's Home

Detective Steven Smith prepared the affidavit in support of the request for a warrant to search Mr. Sandoval's home. (1 CT 106, 108.) Detective Smith submitted the affidavit to Hon. Gary Ferrari on the evening of May 1, 2000. (1 CT 99, 106.) In the affidavit submitted to Judge Ferrari, Detective Smith did not divulge that Long Beach police officers had already sought and obtained, from a different judge, a warrant to search the home of other individuals suspected to have been involved in the murder of Detective Black. (1 CT 103.)

In a section of the affidavit entitled "Statement of Probable Cause," the detective described the following facts regarding the early phases of the police investigation:

Detective Delfin, who was undergoing treatment for his injuries in the Long Beach Memorial Hospital, told a fellow detective that he had been driving southbound on Lime Avenue toward 20th Street, and had then stopped behind the rear of a silver, parked, four-door vehicle. He saw a young Hispanic male with a medium build and "a long style haircut" standing near the open driver's door of the silver vehicle. This individual did not look at Detective Delfin's vehicle. "Rather[,] he was looking at houses to the west." Detective Delfin then saw another Hispanic male exit the silver vehicle and run eastbound across Lime

Avenue. (1 CT 108-109.) Then, gunfire began striking the police vehicle. The shots were fired from a position directly to the west of the police vehicle. (1 CT 110.)[57]

While searching for suspects after the shooting, police found Rascal hiding in the courtyard of the home located at 2051 Lime Avenue. They learned that a warrant for his arrest was outstanding due to a parole violation, and that he had been committed to the California Youth Authority pursuant to a juvenile court finding that he had violated Penal Code section 245, subdivision (a)(1).[58] (1 CT 110.)

Police interviewed Rascal as "a witness to the shooting." Rascal initially told them he had been confronted by a group of black males who chased him. He said that while he was fleeing, he had seen several males, one of whom was firing

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[57] This account attributed to Detective Delfin by Detective Smith differed from Detective Delfin's trial testimony regarding the shooting and the events immediately preceding the shooting: Whereas Detective Smith asserted that Detective Delfin had seen a young Hispanic male with long hair before seeing another Hispanic male cross the street (1 CT 108-109), Detective Delfin testified at trial that he had only seen a bald-headed Hispanic male crossing the street, and had been unaware of the presence of anyone else in the vicinity before the shooting commenced. (8 RT 1567-1568, 1571.)

[58] Pursuant to Penal Code section 245, subdivision (a)(1), it is a felony to commit "an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury...."

shots from a long rifle. (1 CT 110.) He volunteered that he had been in possession of a handgun and that he had discarded it before he was apprehended. Rascal told police that Detective Delfin "could vouch for his veracity." (1 CT 111.)

Detective Smith stated in his affidavit that it became apparent to police that Rascal was not being fully forthright with them. They told Rascal that Detective Delfin had been injured in the shooting. Upon hearing this, Rascal became "visibly shaken." He then told the police that Mr. Sandoval, who was one of his fellow B.P. gang members, was the person responsible for the shooting. (1 CT 111.) Rascal stated that he, Mr. Sandoval, a person known as "Tanker," and a fourth person whose name Rascal did not know, all drove to the area of the shooting in two cars — a red Toyota Corolla and a gold Nissan Maxima. Rascal did not know why they were stopping there. After they stopped, Mr. Sandoval stepped out of the red Toyota. He was holding an AR-15. Rascal then stepped out of the Nissan. He walked to the sidewalk on the east side of Lime Avenue and headed northbound. He saw an unmarked police vehicle turn onto Lime Avenue heading southbound. Mr. Sandoval began shooting at the police vehicle when it came to a stop near the point where Rascal was walking. (1 CT 111-113.) Rascal then took off running and hid until he was later found by police. (1 CT 113.)

Rascal identified a photograph of Mr. Sandoval in a photo line-up and then led police to the location where Mr. Sandoval resided. (1 CT 113-114.)

Detective Smith also noted in his affidavit that a man named Jimmy Falconer had informed police he had been in a vehicle on Lime Avenue at the time of the shooting. As he was preparing to back his vehicle out of a residential driveway, he noticed an unmarked police vehicle driving southbound on Lime Avenue past his location. After the police vehicle passed him, he began backing out of the driveway. As he backed onto the street, he observed a Hispanic male walking from the west side to the east side of Lime Avenue. The police vehicle moved toward the Hispanic male, causing Mr. Falconer to believe the police were going to make contact with the Hispanic male. (1 CT 114.) Just then, Mr. Falconer saw a Hispanic male with a shaved head leaning over the roof of a vehicle parked on the west side of Lime Avenue. (1 CT 114-115.) This Hispanic male was holding a firearm. Two other Hispanic males were standing by him. The individual leaning over the car fired multiple shots at the police vehicle. (1 CT 115.)

After the shooting, Mr. Falconer turned his vehicle around and began driving northbound on Lime Avenue. As he was driving away, a red vehicle that was also heading northbound on Lime Avenue almost collided with his vehicle.

prosecution. (2 RT 124, 153-154.) Rascal and Maria Puente-Porras, Esq.[62] were called to testify by the defense. (2 RT 180-182; Aug. RT 39.)

The testimony of the detectives at the evidentiary hearing has been summarized at pages 75-82, *ante*. The testimony of Rascal and Ms. Puente-Porras at the evidentiary hearing is summarized below:

a. Rascal

Immediately after police found Rascal hiding, a SWAT officer pinned Rascal on the ground, placing his foot on Rascal's neck. The officer handcuffed Rascal and asked, "Where's the gun?" (Aug. RT 3-4.) Then, police performed a gun-shot residue test on his hands. (2 RT 181; Aug. RT 4.) Before taking Rascal from the crime scene to the police department, detectives accused Rascal of being involved in the shooting and questioned him about the shooting. (2 RT 183-184; Aug. RT 81.) The detectives told Rascal a witness had seen him shooting a gun and running. (Aug. RT 5.) Rascal told the detectives he did not want to talk to them and that he wanted a lawyer. One of the detectives, Steven Smith,[63] replied:

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[62] Early on in the case, Ms. Puente-Porass appeared in court as Rascal's counsel. (2 RT 12.) However, she declared a conflict of interest, and another attorney took over as Rascal's counsel. (2 RT 26-27.)

[63] As noted above, Detective Steven Smith is the officer who prepared the affidavit in support of the request for the warrant to search Mr. Sandoval's home. (1 CT 106, 108.)

"You need to worry about other things besides a lawyer. A cop has been killed." (2 RT 183; Aug. RT 6.) Detective Smith looked at Rascal in a manner that signified to Rascal he would be injured if he did not talk to them. Rascal felt he had no choice but to talk to the detectives. (2 RT 183-184.) Police continued questioning Rascal at the scene for approximately 45 minutes without honoring his request for counsel. (2 RT 182; Aug. RT 6.)

Thereafter, police transported Rascal from the crime scene to the police station. While en route, an officer continued to question Rascal. (Aug. RT 9.) The officer asked, "Why did you guys kill the [cop?]" Rascal said he did not know what the officer was talking about. (Aug. RT 10.)

At the police station, officers fingerprinted Rascal and allowed him to make a telephone call. (2 RT 182; Aug. RT 12.) Rascal called Christine Estrada ("Lazy"). He told her detectives had been accusing him of being involved in the murder of a police officer. He asked her to call his family and to make arrangements to get him a lawyer. (2 RT 183; Aug. RT 12.)

After Rascal spoke with Lazy, Detective Smith and another detective resumed their interrogation of Rascal. (2 RT 184.) They told him two witnesses had reported seeing him firing gunshots and running at the scene, and that the two witnesses had provided a description of the clothes Rascal was wearing. The

detectives asked Rascal to tell them what he knew. (2 RT 184-185; Aug. RT 5.) He told them he wanted to talk to a lawyer. He gave them the name of a lawyer — James Hodges. One of the detectives wrote down the lawyer's name, laughed, and asked, "You mean to tell me if we call him he'll represent you[?]" Rascal said, "Yes." He then told them where Mr. Hodges' office was located. (2 RT 185; Aug. RT 8.)[64] However, the detectives ignored Rascal's request and continued questioning him. (2 RT 186; Aug. RT 9.)

Rascal told detectives he was under the influence of "speed." (Aug. RT 10-11.)

Detective Smith told Rascal he believed Rascal's brother had been involved in the murder of Detective Black and that police were out looking for Rascal's brother. Detective Smith said, "Remember, we are mad about what happened. If my deputies end up shooting [your brother] 'cause you don't want to be honest with us, I don't know what to tell you." (Aug. RT 12-13.) Rascal felt he had to talk to the detectives in order to prevent his brother from being shot. (Aug. RT 15.) He talked to them, but he was not truthful with them, because they were forcing him to talk against his will. (Aug. RT 29, 53.)

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[64] Rascal knows Maria Puente-Porras. She is a lawyer who works for Mr. Hodges. (Aug. RT 8-9.)

Later, detectives told Rascal Detective Delfin had been injured in the shooting. They showed him a bloody badge and told him it was Detective Delfin's badge. Rascal "broke down and started crying." (Aug. RT 14.) Rascal had known Detective Delfin for a number of years. (Aug. RT 15, 51.)

Rascal told detectives he had seen Mr. Sandoval shoot at the vehicle Detectives Black and Delfin had been in. However, that was a lie. Rascal had not actually seen the shooting. (Aug. RT 49-50, 59.)

Over the course of the next two days, police did not allow Rascal to sleep, and they did not feed him. (Aug. RT 66.) At one point, police made Rascal call Mr. Sandoval. (Aug. RT 62, 64-66.) On May 2, 2000, police told Rascal that Mr. Sandoval was in custody and that he had confessed. (Aug. RT 66-67.) They told Rascal to give a recorded statement and to "go along" with Mr. Sandoval's story. Rascal signed a *Miranda* form and gave a recorded statement. (Aug. RT 18, 66-68, 81-82.) In the recorded statement, Rascal untruthfully said he had seen Mr. Sandoval shooting at Detectives Black and Delfin. (Aug. RT 24.)

Rascal knew Toro was an E.S.P. member. (Aug. RT 54.) Some time before the murder of Detective Black, Mr. Sandoval had told Rascal that Toro had shot Mr. Sandoval. (Aug. RT 55-56.) However, on the evening in question, Rascal had not gone with Mr. Sandoval to Lime Avenue in order to shoot up Toro's

house. (Aug. RT 56.)

On May 2, 2000, detectives told Rascal that police had shot his brother. (Aug. RT 15-16.)

b. Maria Puente-Porras

Ms. Puente-Porras is an attorney. She works for the Law Office of James Hodges. (Aug. RT 39-40.) In early May of 2000, Rascal's family hired Mr. Hodges to represent Rascal. At Mr. Hodges' request, Ms. Puente-Porras went to the Long Beach Police Station in order to visit Rascal. (Aug. RT 40-42.) She does not recall the precise date on which she attempted to visit Rascal. (Aug. RT 42.)[65] She arrived at the police station at approximately noon. (Aug. RT 41.) She checked in with jail personnel and requested to see Rascal. (Aug. RT 43.) After she waited more than an hour, Detective Dave Jones approached her and told her that Rascal was not requesting to speak with counsel. Ms. Puente-Porras told the detective that she represented Rascal and that she wanted to see him. However, the detective told Ms. Puente-Porras that he would not allow her to see Rascal. (Aug. RT 43-45.) Ms. Puente-Porras and the detective exchanged words. Then,

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[65] Ms. Puente-Porras testified that Rascal's brother, Pipas, was shot on or about May 3, 2000. Ms. Puente-Porras could not recall whether she attempted to visit Rascal before or after Pipas was shot. (Aug. RT 40-43.) Pipas was shot while being arrested. (2 RT 177.)

Ms. Puente-Porras left the police station. (Aug. RT 45.)

Eventually, police allowed Ms. Puente-Porras to see Rascal — either later that evening or the following evening. (Aug. RT 45-46.)

c. The Court's Denial of Rascal's Motion to Suppress

At the conclusion of the hearing on November 16, 2001, the court denied Rascal's motion to suppress. (Aug. RT 87-91.) In so doing, the court made the following factual findings: Police did not deem Rascal a suspect until May 2, 2000. (Aug. RT 87.) Each of the various statements Rascal made to police were different. (Aug. RT 87-88.) When police were questioning Rascal, he did not request counsel. (Aug. RT 90-91.) Rascal's testimony was not credible. (Aug. RT 88.)[66]

7. Mr. Sandoval's Original Motion to Quash and Traverse the Warrant

On April 26, 2002, Mr. Sandoval filed a motion to suppress evidence pursuant to Penal Code section 1538.5. (1 CT 97-140.) In the motion, he sought to quash and/or suppress the warrant to search his home, and he requested an

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[66] One reason specified by the court for finding Rascal not credible was the court's belief "that it is inconceivable" that the experienced detectives involved in Rascal's interrogation would have "sabotage[d] a case as important as the murder of a police officer" by resorting to the types of conduct attributed to them by Rascal. (Aug. RT 90.)

evidentiary hearing. (1 CT 97-104.) Specifically, Mr. Sandoval sought to suppress all statements he had made to police on May 2, 2000, and all evidence recovered pursuant to execution of the search warrant. (1 CT 97.) He contended 1) the affidavit submitted in support of the request for the warrant did not establish probable cause, and 2) the affiant had intentionally and/or recklessly omitted material information from the search warrant affidavit. (1 CT 97-104.)[67]

On September 19, 2002, the trial court conducted a non-evidentiary hearing on the motion. Mr. Sandoval argued that the police had not been candid in their affidavit about Rascal's role in the shooting: They failed to disclose that they had actually deemed Rascal a suspect from the moment they arrested him. They must have deemed him a suspect because they found him hiding at the crime scene, and he had been armed. (3 RT 308, 311.) Further, Mr. Sandoval argued that the police deliberately failed to disclose in the affidavit that Rascal was a suspect in connection with two other pending homicide investigations. (3 RT 309-310.)[68]

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[67] On September 12, 2002, the prosecution file points and authorities in opposition to Mr. Sandoval's motion. (5 CT 1107-1121.) In briefing filed on September 19, 2002, Mr. Sandoval replied to the prosecution's opposition. (1 CT 236.)

[68] Mr. Sandoval presented evidence that Rascal was a suspect in one homicide that occurred in September of 1999, and another that occurred in November of 1999. (3 RT 306-307.) He attached to his moving papers a copy of a police report concerning the November 1999 homicide, in which Rascal was

Additionally, Mr. Sandoval argued in his moving papers that the police failed to disclose to the judge to whom the affidavit was submitted the fact that they had already obtained, from a different judge, a warrant to search the residence of an alternate suspect. (1 CT 103.)

The trial court denied Mr. Sandoval's motion to suppress and denied his request for an evidentiary hearing. (3 RT 306-319; 5 CT 1123.) The court found that 1) the search warrant affidavit established probable cause to search Mr. Sandoval's home,[69] and 2) no *Franks* hearing was necessary because Mr. Sandoval had made an inadequate showing of the need for such a hearing, but had instead merely sought a hearing based on assumptions as to what would be gleaned at a hearing. (3 RT 317-319.)[70]

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listed as the sole suspect. (1 CT 122-131.)

[69] The trial court found probable cause was established by the following circumstances: The statements of Rasal, Detective Delfin, and Jimmy Falconer, which were set forth in the affidavit, all "dove-tailed with one another." (3 RT 317.) Information regarding Rascal's parole status and gang affiliation was disclosed in the affidavit. (3 RT 318.) The fact that a gun was found during the search of Mr. Sandoval's residence corroborated Rascal's credibility. (3 RT 317.)

[70] With respect to the November 1999 homicide in which Rascal was listed as a suspect, the investigating agency on that case was the Los Angeles County Sheriff's Department. (1 CT 122.) Although Mr. Sandoval argued that the officers of the Long Beach Police Department who were interrogating Rascal had undoubtedly run a record check on Rascal, during which they would have ineluctably learned about his status as a suspect in the November 1999 homicide

8. Mr. Sandoval's Renewed Motion

On September 26, 2002, Mr. Sandoval filed a supplemental motion to suppress evidence pursuant to Penal Code section 1538.5. In the supplemental motion, Mr. Sandoval's trial counsel relied on the evidence adduced at the evidentiary hearing on Rascal's motion to suppress (1 CT 237-241),[71] contending that 1) Mr. Sandoval's arrest and the warrant authorizing the search of his home were the product of involuntary statements made by Rascal (1 CT 239), and 2) material information had been deliberately omitted from the affidavit submitted in support of the request for the warrant to search Mr. Sandoval's home. (1 CT 239-241.)

With respect to the contention that Rascal's statements to police had been involuntary, Mr. Sandoval adverted to specific evidence adduced at the hearing on Rascal's suppression motion: 1) police refusing to honor Rascal's request for

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(3 RT 310-311), the court concluded this evidence was insufficient to ascribe knowledge of the November 1999 homicide to the Long Beach Police Department. (3 RT 310.)

[71] Neither Mr. Sandoval nor his trial counsel were present at the evidentiary hearing on Rascal's suppression motion. (1 CT 237.) Mr. Sandoval's counsel stated they had not received any notice of the hearing. (3 RT 524.) However, Mr. Sandoval's lead counsel was present in court during proceedings on November 13, 2001, that immediately preceded the commencement of the evidentiary hearing on Rascal's motion to suppress. (2 RT 122-124.)

counsel, and police turning away a lawyer who attempted to visit Rascal; 2) police accusing Rascal of shooting Detective Black; 3) police subjecting Rascal to a gunshot residue test; 4) police threatening to shoot Rascal's brother unless he identified the person who shot Detective Black; 5) police showing Rascal Detective Delfin's bloody badge; and 6) police subjecting Rascal to otherwise coercive conditions of confinement. (1 CT 239.)

With respect to the contention that material information had been deliberately omitted from the affidavit submitted in support of the request for the warrant to search Mr. Sandoval's home, Mr. Sandoval's counsel made a proffer that, after the court's denial of Mr. Sandoval's original motion to suppress, they had spoken with a sergeant in the Los Angeles County Sheriff's Department, who had informed them that, eight months before the shooting of Detective Black, the Los Angeles County Sheriff's Department had requested assistance from the Long Beach Police Department in seeking to locate Rascal in connection with the aforementioned September 1999 homicide. (1 CT 240-241.) Further, Mr. Sandoval noted that the search warrant affidavit contained no disclosures that 1) Rascal had asked police for a lawyer, 2) police had told him he did not need a lawyer, 3) police turned away Maria Puente-Porras, Esq. when she came to visit Rascal, 4) police threatened to shoot Rascal's brother, 5) police displayed

Detective Delfin's bloody badge to Rascal in an effort to get Rascal to implicate Mr. Sandoval, 6) police did not inform Rascal of his *Miranda* rights until after Rascal implicated Mr. Sandoval, 7) police accused Rascal of shooting Detectives Black and Delfin, and 8) police deprived Rascal of sleep. (3 RT 525-526; 1 CT 239-240.) Finally, Mr. Sandoval reiterated the circumstance that police had failed to disclose to the issuing magistrate that they had obtained a search warrant from a different judge to search the home of an alternative suspect. (3 RT 528-529; 1 CT 240.)

The court denied the supplemental suppression motion on September 26, 2002 — the same day it was filed. (3 RT 527-529; 5 CT 1144.) In denying the motion, the court stated that it had found Rascal's testimony not credible at the evidentiary hearing on Rascal's motion to suppress. (3 RT 522-524, 526-527.)[72] The court also stated that it had found the testimony of attorney Maria Puente-Porras not credible at the hearing on Rascal's suppression motion. (3 RT 524.) The court stated that "there was no evidence that [Rascal] had asked for an attorney." (3 RT 524.) Further, the court asserted that Rascal had not been in

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[72] The court stated: "I don't agree with Mr. Camacho's statements ... during the hearing. [¶] I find to say that he was not credible is to put it mildly to the court. As I listened to his statements, it was clear he was out and out lying. There's no other way to put it. He was not a credible witness. He was clearly not telling the truth." (3 RT 526.)

custody when he was interrogated. (3 RT 526.) The court also questioned whether Mr. Sandoval had any basis for making a claim based upon violations of Rascal's constitutional rights. (3 RT 523-524.)[73] In any event, the court found that the affidavit and search warrant were not "fruit of the poisonous tree...." (3 RT 527.) The court stated that it had already rejected Mr. Sandoval's contention concerning the nondisclosure to the issuing magistrate of the earlier search warrant, and that it was not willing to reconsider its rejection of Mr. Sandoval's contention in that regard. (3 RT 528-529.) Finally, the court found that inclusion in the search warrant affidavit of the information regarding the Long Beach Police Department's role in the investigation of Rascal's involvement in the September 1999 homicide would not have affected the probable cause evaluation. (3 RT 527.) The court refused Mr. Sandoval's request for an evidentiary hearing on the supplemental suppression motion. (3 RT 529.)

C. Governing Legal Principles

Resolution of Mr. Sandoval's claim that he is entitled to a remand for a full and fair evidentiary hearing requires consideration of legal principles governing

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[73] With respect to this subject, the court cited *In re Lance W.* (1985) 37 Cal.3d 873. (3 RT 523.) In *Lance W.*, this court held the vicarious exclusionary rule was abrogated by article I, section 28, subdivision (d) of the California Constitution.

the procedures employed by trial courts presented with challenges to the veracity of search warrant affidavits. Specifically, in this case, the applicable legal principles pertain to 1) the requisites of a full and fair hearing on a Fourth Amendment claim, including the circumstances under which a court must hold an evidentiary hearing, and 2) the impropriety of importation of judicial fact finding from one proceeding into another.

1. The Requirements of a Full and Fair Hearing on a Fourth Amendment Claim

When a defendant in a state court prosecution raises a Fourth Amendment challenge, the federal constitution requires the state court to afford the defendant "an opportunity for full and fair litigation" of the claim. (*Stone v. Powell* (1976) 428 U.S. 465, 494; accord, *Kimmelman v. Morrison* (1986) 477 U.S. 365, 378, fn. 3.) Consistent with this constitutional mandate, Penal Code section 1538.5, subdivision (c)(1) provides: "Whenever a search or seizure motion is made in the superior court ..., the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion."

The Supreme Court of the United States has held that the Fourteenth Amendment requires state courts to exclude evidence seized in violation of the Fourth Amendment. (*Mapp v. Ohio* (1961) 367 U.S. 643.) In order to enforce this

holding, a defendant who asserts his/her Fourth Amendment rights were violated must be afforded a "full and fair opportunity to litigate a Fourth Amendment claim at trial and on direct review." (*Wallace v. Kato* (2007) 549 U.S. 384, 395, fn. 5, italics deleted, internal quotation marks omitted.)

"[E]vidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." (*United States v. Calandra* (1974) 414 U.S. 338, 347.) "This prohibition applies as well to the fruits of the illegally seized evidence." (*Ibid.*; citing *Wong Sun v. United States* (1963) 371 U.S. 471.)

When the Court established the full and fair hearing requirement in *Stone*, it "did not specify a test for determining whether a State has provided an opportunity for full and fair litigation of a claim...." (*Terrovona v. Kincheloe* (9th Cir. 1990) 912 F.2d 1176, 1178.) However, in this regard, the *Stone* Court did cite *Townsend v. Sain* (1963) 372 U.S. 293.[74] (*Stone v. Powell, supra*, 428 U.S. at p. 494, fn. 36.)[75] In *Townsend*, which was a federal habeas case, the Court held a federal

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[74] A different aspect of the *Townsend* opinion was overruled in *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, 5.

[75] Courts and commentators have characterized the *Stone* Court's citation to *Townsend* as cryptic and confusing. (Robbins, *Semiotics, Analogical Legal Reasoning, and the Cf. Citation: Getting Our Signals Uncrossed* (1999) 48 Duke L.J. 1043, 1059-1062.) The citation was preceded by a cf. signal, and lower

habeas court is required to grant a habeas petitioner an evidentiary hearing if:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

(*Townsend v. Sain*, *supra*, 372 U.S. at p. 313.)

At a minimum, *Stone* "guarantees the right to present one's case...." (*Cabrera v. Hinsley* (7th Cir. 2003) 324 F.3d 527, 532, cert. den. (2003) 540 U.S. 873.) Furthermore, the standard "contemplates recognition and at least colorable application of the correct Fourth Amendment constitutional standards." (*Cannon v. Gibson* (10th Cir. 2001) 259 F.3d 1253, 1261, internal quotation marks omitted.)

There is a lack of consensus amongst the courts and commentators as to the significance that ought to be ascribed to the *Townsend* factors in determining whether a defendant presenting a Fourth Amendment challenge has received a full and fair hearing on the claim:

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federal courts have struggled in their efforts "to clarify the significance of the *Townsend* opinion to *Stone*." (*Id.* at pp. 1060-1061; accord, *Brock v. United States* (7th Cir. 2009) 573 F.3d 497, 500, cert. den. (2009) 130 S.Ct. 762.)

Some suggest that the *Townsend* factors are of pivotal significance. (*Terrovona v. Kincheloe*, *supra*, 912 F.2d at p. 1178 ["[A]lthough the *Townsend* test 'must be given great weight in defining what constitutes full and fair consideration under *Stone*,' it need not 'always be applied literally ... as the sole measure of fullness and fairness.'"]; quoting *Mack v. Cupp* (9th Cir. 1977) 564 F.2d 898, 901.)

Others suggest the *Townsend* factors are of limited, if any, relevance. (*Turentine v. Miller* (7th Cir. 1996) 80 F.3d 222, 224, fn. 1 ["*Stone* did not necessarily intend to incorporate the full extent of the *Townsend* Court's definition of full and fair hearing"]; citing *Palmigiano v. Houle* (1st Cir. 1980) 618 F.2d 877, 881, cert. den. (1980) 449 U.S. 901; Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell* (1982) 82 Colum. L.Rev. 1, 15 ["The *Townsend* standards assume that a state evidentiary hearing was held. Consequently, they are irrelevant to the issue of whether the petitioner received a sufficient opportunity to obtain a hearing when none was held."], footnotes omitted.)

A number of courts have found defendants were denied full and fair consideration of their Fourth Amendment claims. (*Herrera v. Lemaster* (10th Cir. 2000) 225 F.3d 1176, 1178 [no full and fair consideration of claim where state

supreme court failed to apply the *Chapman*[76] standard in assessing the prejudicial effect of a violation of the defendant's Fourth Amendment rights]; *United States ex rel. Bostick v. Peters* (7th Cir. 1993) 3 F.3d 1023, 1026-1029 [no full and fair consideration of Fourth Amendment claim where trial court's ruling effectively prohibited evidentiary hearing]; *Agee v. White* (11th Cir. 1987) 809 F.2d 1487, 1490 [refusal to hold evidentiary hearing and lack of appellate consideration of claim on direct review resulted in absence of full and fair consideration of claim]; *Doescher v. Estelle* (5th Cir. 1980) 616 F.2d 205, 207 [remand for full and fair hearing where "state trial court did not fully adjudicate ... claim that ... [search warrant] affidavit ... contained false statements"].)

Outside the federal habeas context, numerous courts have effectively held that defendants were denied full and fair hearings when their requests for *Franks* evidentiary hearings were denied. (*United States v. Harris* (7th Cir. 2006) 464 F.3d 733 [remand for *Franks* hearing where trial court erroneously failed to conduct such a hearing]; *United States v. Johns* (9th Cir. 1988) 851 F.2d 1131, 1133-1134 (*per curiam*) [same]; *United States v. Chesher* (9th Cir. 1982) 678 F.2d 1353, 1360-1364 [same]; *United States v. Davis* (9th Cir. 1981) 663 F.2d 824, 829-831 [remand for *Franks* hearing where affiant omitted disclosure that informant

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[76] *Chapman v. California* (1967) 386 U.S. 18.

was interviewed by an officer other than the affiant].)

Regardless of the lack of uniformity amongst the courts and commentators as to the precise scope of the full and fair hearing requirement established by *Stone*, there is no disagreement as to certain baseline prerequisites for the fair litigation of Fourth Amendment claims, including *Franks* claims. With respect to such a claim in which the defendant contends police submitted a willfully or recklessly misleading affidavit in support of a request for a search warrant, "the Fourth and Fourteenth Amendments entitle a defendant to a veracity hearing if he makes a substantial preliminary showing that an affiant knowingly and intentionally, or with reckless disregard for the truth, included in a warrant affidavit a false statement necessary to the finding of probable cause." (*Colorado v. Nunez* (1984) 465 U.S. 324, 326-327 (conc. opn. of White, J.).) For purposes of making the substantial preliminary showing necessary to warrant a *Franks* hearing, "[c]lear proof is not required — for it is at the evidentiary hearing itself that the defendant, aided by live testimony and cross-examination, must prove actual recklessness or deliberate falsity." (*United States v. Chesher*, *supra*, 678 F.2d at p. 1353; citing *Franks v. Delaware*, *supra*, 438 U.S. at p. 171.)

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate

> falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons.

(*Franks v. Delaware*, *supra*, 438 U.S. at p. 171; *People v. Bradford* (1997) 15 Cal.4th 1229, 1297, cert. den. *sub nom. Bradford v. California* (1998) 523 U.S. 1118.)

> [I]f the defendant makes a prima facie showing that a material fact was omitted knowingly or intelligently by the affiant, he or she may request a hearing on the matter. If the defendant proves his or her claim, the omitted statement will be added to the affidavit and the facts will be retested for probable cause.

(*People v. Meyer* (1986) 183 Cal.App.3d 1150, 1161.)[77]

The same standard applies with respect to omissions that render an affidavit misleading. (*People v. Goldberg* (1984) 161 Cal.App.3d 170, 186.) A defendant is entitled to an evidentiary hearing pursuant to *Franks* if he proffers evidence that the search warrant affidavit in question "may contain deliberately misleading statements and materials omissions, or statements and omissions made in reckless

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[77] There is "an important difference between the 'necessary' inquiries when the challenge is to the omission of an allegedly material fact rather than to the inclusion of an allegedly false material statement. With an omission, the inquiry is whether its inclusion in an affidavit would have led to a *negative* finding by the magistrate on probable cause. If a false statement is in the affidavit, the inquiry is whether its inclusion was necessary for a *positive* finding by the magistrate on probable cause." (*United States v. Castillo* (1st Cir. 2002) 287 F.3d 21, 25, fn. 4.)

disregard for the truth." (*United States v. Westover* (D. Vt. 1993) 812 F.Supp. 38, 40.) "When material information has been intentionally omitted from a warrant affidavit, the proper remedy is to restore the omitted information and reevaluate the affidavit for probable cause." (*People v. Sousa* (1993) 18 Cal.App.4th 549, 562-563; citing *Franks v. Delaware*, *supra*, 438 U.S. at pp. 155-156; *People v. Maestas* (1988) 204 Cal.App.3d 1208, 1216.)

Even "[a] deliberate or reckless omission by a government official who is not the affiant can be the basis for a *Franks* suppression." (*United States v. DeLeon* (9th Cir. 1992) 979 F.2d 761, 764.) This is so, because "[t]he Fourth Amendment places restrictions and qualifications on the actions of the government generally, not merely on affiants." (*Ibid.*) Thus, "the validity of the search is not saved if the governmental officer swearing to the affidavit has incorporated an intentional or reckless falsehood told to him by another governmental agent." (*United States v. Whitley* (7th Cir. 2001) 249 F.3d 614, 621; *United States v. Kunen* (E.D.N.Y. 2004) 323 F.Supp.2d 390, 395, fn.4 ["It is well established that the police cannot insulate a deliberate or reckless falsehood by one ... officer[] from a Franks inquiry by relaying the information through another member of the force who is unaware of the falsehood and serves as the affiant"].)

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"Because it is the magistrate who must determine independently whether there is probable cause, it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment." (*Franks v. Delaware*, *supra*, 438 U.S. at p. 165.)

2. The Prohibition Against Reliance on Extrajudicial Factfinding

"A litigant should not be bound by the court's inclusion in a court order of an *assertion of fact* that such litigant has *not* had the opportunity to contest or dispute." (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1568, italics in the original.) "[N]either a finding of fact made after a contested adversary hearing nor a finding of fact made after any other type of hearing can be indisputably deemed to have been a correct finding." (*Ibid.*) A trial court may in certain circumstances take judicial notice of findings in an earlier judicial proceeding, but it can "'credit' them — i.e., accord them preclusive effect in [the current] proceeding — *only* if the elements of collateral estoppel were satisfied." (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1051, italics added.) Thus, "[w]hile ... a judge, after hearing a factual dispute between litigants A and B, may choose to believe A, and make a finding of fact in A's favor" a judge cannot, in a subsequent judicial proceeding, treat the earlier findings of fact as necessarily "true facts." (*Solinsky*,

supra, 6 Cal.App.4th at p. 1565.)

"[J]udicial findings of fact in a court's order in a previous case are not admissible in another case...." (*United States v. Jones* (11th Cir. 1994) 29 F.3d 1549, 1554.) "As a general rule, a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it." (*M/V American Queen v. San Diego Marine Constr. Corp.* (9th Cir. 1983) 708 F.2d 1483, 1491.) "[T]he use of facts as found in a judicial opinion can unfairly prejudice a party." (*United States v. Sine* (9th Cir. 2007) 493 F.3d 1021, 1034.) "It is even more plain that the introduction of discrete judicial factfindings and analysis underlying the judgment to prove the truth of those findings and that analysis constitutes the use of hearsay." (*Id.*, at p. 1036; *Herrick v. Garvey* (10th Cir. 2002) 298 F.3d 1184, 1191 ["an out-of-court written statement by a judge now offered to prove the truth of the matter asserted" is hearsay].) "[A]t common law a judgment from another case would not be admitted." (*Nipper v. Snipes* (4th Cir. 1993) 7 F.3d 415, 417.) "[A] judgment in another case finding a fact now in issue is ordinarily not admissible." (*Harmer v. State* (1937) 133 Neb. 652, 654

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[276 N.W. 378, 380].)[78]

D. Analysis

Mr. Sandoval did not receive a full and fair hearing on the subject of whether police submitted a willfully or recklessly misleading affidavit to Judge Ferrari. First, the trial court erroneously failed to conduct an evidentiary hearing to resolve facts disputed in Mr. Sandoval's original moving papers and the supplemental briefing he submitted after receiving new evidence. Second, in denying the supplemental motion to suppress, the trial court improperly relied on extrajudicial fact finding.

1. Erroneous Denial of Evidentiary Hearing

In support of his original *Franks* motion, Mr. Sandoval alleged that the police had failed to disclose the following material information in the search warrant affidavit: a) Police originally suspected a member of the Crips gang had shot Detective Black, and they had already obtained, from a different judge, a warrant to search the home of that Crips member — a home that was located on the same street on which Detective Black had been shot. b) From the beginning of the investigation, police deemed Rascal a suspect, and not a mere witness, because

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[78] "[A]llowing courts to rely on the factual findings from previous cases would render the doctrine of res judicata virtually superfluous." (*MVM Inc. v. Rodriguez* (D.P.R. 2008) 568 F.Supp.2d 158, 164.)

he had been found hiding at the scene, and he had been armed. c) Rascal was a suspect in two other pending homicide investigations. d) Rascal was a member of B.P. (3 RT 308-311; CT 102-103.) As noted above, the trial court concluded these allegations did not merit an evidentiary hearing and summarily denied the motion. (3 RT 306-319; 5 CT 1123.)

In his supplemental motion to suppress, Mr. Sandoval presented further allegations regarding nondisclosures: The police failed to disclose the circumstances that rendered Rascal's statements to them involuntary, and they failed to disclose the fact that officers of the Long Beach Police Department had received information from officers of the Los Angeles County Sheriff's Department regarding Rascal's involvement in a 1999 homicide. (3 RT 527; 1 CT 240-241.) The trial court concluded these supplemental allegations did not merit an evidentiary hearing, and denied the supplemental motion. (3 RT 529.)

The foregoing information was sufficient to warrant a *Franks* hearing. Without the information the police had received from Rascal, the police would have had no probable cause for a warrant to search Mr. Sandoval's home. Rascal was the only person who provided information placing Mr. Sandoval at the scene of the shooting. No other witnesses provided information that Mr. Sandoval was there. Accordingly, if the information provided by Rascal had been provided

under circumstances that rendered his statements involuntary and unreliable, probable cause was lacking. (*Franks v. Delaware*, *supra*, 438 U.S. at pp. 164-165.)

Per Rascal's sworn testimony at the evidentiary hearing on his motion to suppress, the information he gave to police was inaccurate. It was extracted from him under circumstances that rendered it unreliable and involuntary. Rascal testified that the police refused to honor his request for counsel (2 RT 182-186; Aug. RT 6-9), that they accused him of killing Detective Black (Aug. RT 10), that he was under the influence of drugs (Aug. RT 10-11), and that police threatened to shoot his brother. (Aug. RT 12-15.) He ultimately just told them what he thought they wanted to hear. (Aug. RT 18, 29, 53, 66-68, 81-82.)

Rascal's testimony in this regard entitled Mr. Sandoval to a *Franks* hearing. In support of his request for a *Franks* hearing, Mr. Sandoval relied on this testimony for his preliminary showing that the police had failed to disclose in their affidavit the relevant circumstances that rendered the information imparted to them by Rascal unreliable and involuntary. (3 RT 525-526; 1 CT 239-241.) Because there is no probable cause without the information imparted by Rascal, and because Rascal's testimony made out a prima facie case that police had willfully omitted neutral information from the search warrant affidavit, the trial

court erred by refusing to conduct a *Franks* hearing. Because no evidentiary hearing was conducted, Mr. Sandoval did not receive full and fair consideration of his Fourth Amendment claim. (Pen. Code, § 1538.5, subd. (c)(1); *Stone v. Powell*, *supra*, 428 U.S. at p. 494.)

2. Improper Adoption of Extrajudicial Fact Finding

In denying Mr. Sandoval's supplemental motion to suppress, the trial court improperly relied on the factual findings it made during the evidentiary hearing on Rascal's motion to suppress. Specifically, the court relied on its determinations at the hearing on Rascal's motion that neither Rascal nor Maria Puente-Porras, Esq. had testified credibly. (3 RT 524-527; Aug. RT 88-90.)[79] These credibility determinations undercut the contentions in Mr. Sandoval's motion that police had extracted involuntary statements from Rascal, and that they had intentionally or recklessly neglected to disclose in their search warrant affidavit the circumstances that rendered Rascal's statements to them involuntary. (3 RT 524-526; 1 CT 239-240.)[80] Mr. Sandoval should not have been bound by critical credibility

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[79] When the court denied Rascal's motion, it did not state that it had found Ms. Puente-Porras' testimony not credible. (Aug. RT 87-91.) However, in denying Mr. Sandoval's motion, the court stated it had found her testimony not credible at the hearing on Rascal's motion. (3 RT 524.)

[80] A criminal defendant has a limited right to contest the voluntariness of statements made to police by a third person. Such a statement may only be

determinations made by the court in a hearing to which he had not been a party. (*Plumley v. Mockett, supra*, 164 Cal.App.4th at p. 1051; *Sosinsky v. Grant, supra*, 6 Cal.App.4th at p. 1568.) The trial court should not have relied on its "extrajudicial" fact finding in lieu of independent fact finding in Mr. Sandoval's case, with an opportunity afforded to Mr. Sandoval to participate in the adversary fact finding process. (*United States v. Sine, supra*, 493 F.3d at pp. 1034-1036; *United States v. Jones, supra*, 29 F.3d at p. 1554; *Harmer v. State, supra*, 276 N.W. at p. 380.) By improperly relying on this extrajudicial fact finding to deny

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challenged if it was obtained under circumstances rendering it so unreliable that its admission would violate the defendant's due process rights. This court has held that the right to exclude such statements is solely a trial right. (*People v. Badgett* (1995) 10 Cal.4th 330, 342-352.) Other courts have given more expansive treatment to the right. (*Clanton v. Cooper* (10th Cir. 1997) 129 F.3d 1147, 1157-1158. [when "evidence is unreliable and its use offends the Constitution, a person may challenge the government's use against him or her of a coerced confession given by another person"]; *LaFrance v. Bohlinger* (1st Cir. 1974) 449 F.2d 29, 35 ["the concept of due process ... protects the accused against pretrial illegality by denying the government the fruits of its exploitation of any deliberate and unnecessary lawlessness"]; see also *Lisenba v. California* (1941) 314 U.S. 219, 236 ["The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false."].)

Regardless of whether Mr. Sandoval had any basis for directly seeking exclusion of evidence derived from any involuntary statements made by Rascal, Mr. Sandoval was entitled to pursue his *Franks* claim on the basis of intentional or reckless police nondisclosure of the circumstances rendering Rascal's statements involuntary. (*State v. Bouffanie* (La. 1978) 364 So.2d 971 [*Franks* hearing was properly held where defendant made substantial showing that confessions of third persons, relied upon to support a search warrant affidavit, were involuntary].)

Mr. Sandoval's motion without an evidentiary hearing in which Mr. Sandvoal was allowed to participate, the court failed to afford Mr. Sandoval a full and fair hearing. (*Stone v. Powell*, *supra*, 428 U.S. at p. 494.)

E. Remedy

When it is determined on appeal that a Fourth Amendment claim has not been adequately and fully litigated, the reviewing court may remand the matter to the trial court for a new hearing. (*People v. Bowers* (2004) 117 Cal.App.4th 1261, 1273.) "The court 'may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.'" (*People v. Cazalda* (2004) 120 Cal.App.4th 858, 865-866; quoting Penal Code section 1260.) Because Mr. Sandoval was not afforded a full and fair hearing, he is entitled to have his case remanded to the trial court for an evidentiary hearing on his *Franks* motion.

II.

THE PROCESS OF SELECTING "DEATH QUALIFIED" JURORS IS UNCONSTITUTIONAL.

The death qualification process pursuant to which the trial court excluded prospective jurors in this case violated Mr. Sandoval's constitutional rights.[81]

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[81] This court has held that the process of juror "death qualification" — i.e., the process of removing from the venire, in capital case jury selection, all

The process violated his jury trial right,[82] his right to due process,[83] his right to

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prospective jurors whose views regarding the death penalty would prevent them from imposing the death penalty or substantially impair their capacity to do so — is not unconstitutional. (*People v. Mills* (2010) 48 Cal.4th 158, 170-172; *People v. Ashmus* (1991) 54 Cal.3d 932, 956-957 ["The exclusion through 'California death qualification' of 'guilt phase includables' does not offend the Sixth Amendment or article I, section 16 [of the California Constitution], as to the guaranty of trial by a jury drawn from a fair cross-section of the community."], cert. den. *sub nom. Ashums v. California* (1992) 506 U.S. 841.) Similarly, the Supreme Court of the United States has held that the death qualification process is not unconstitutional. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176-177.) Nevertheless, because the death penalty jurisprudence of the courts in this nation is not static but evolving (Steiker, *Commentary: Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty* (2002) 77 N.Y.U. L. Rev. 1475, 1490 [noting "recent changes in the Court's death penalty jurisprudence"]; Bienen, *Criminal Law: The Proportionality Review of Capital Cases by the State High Courts After Gregg: Only "The Appearance of Justice"?* (1996) 87 J. Crim. L. & Criminology 130, 132 [noting "tremendous changes in the jurisprudence and politics of capital punishment nationally"]), Mr. Sandoval respectfully presents this claim that application of the death qualification process during jury selection in his case was unconstitutional.

[82] Article III, section 2, clause 3 of the United States Constitution provides for the right to trial by jury in all criminal trials. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed...." Article I, section 16 of the California Constitution provides, in pertinent part: "Trial by jury is an inviolate right and shall be secured to all.... [¶] In criminal actions in which a felony is charged, the jury shall consist of 12 persons."

[83] The Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law...." The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due

equal protection,[84] and it inhibited the exercise of his right to be free from cruel and/or unusual punishment.[85] The selection process employed by the court resulted in impanelment of a jury biased in favor of conviction and imposition of the death penalty. It resulted in impanelment of a jury that was not impartial and that was not suited to serve the role the framers of the Constitution intended juries to fulfil. It resulted in the exclusion of impartial members of the venire. It was arbitrary. And, it was carried out in a manner that prevents application of constitutional safeguards against cruel and/or unusual punishment.

A. Standard of Review

Appellate courts independently review purely constitutional questions. (*Ward v. Illinois* (1977) 431 U.S. 767, 768; *People v. Holloway* (2004) 33 Cal.4th

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process of law." Article I, section 1 of the California Constitution provides that the right to "defend[] life and liberty" is an "inalienable right[]." Article I, sections 7 and 15 of the California Constitution provide that no person may be deprived of life or liberty without due process of law.

[84] The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." Article I, section 7 of the California Constitution establishes a coextensive safeguard.

[85] The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel *and* unusual" punishment. (Italics added.) Article I, section 17 of the California Constitution provides: "Cruel *or* unusual punishment may not be inflicted...." (Italics added.)

96, 120, cert. den. sub nom. *Holloway v. California* (2005) 543 U.S. 1156.)

B. Background

Jury selection in Mr. Sandoval's original trial proceeded in the following manner:

Over the course of eight days, six groups of prospective jurors came to court at separate times. (3 RT 326, 371, 439, 514; 4 RT 679; 5 RT 986; 5 CT 1137-1139, 1141-1144, 1150-1154.)[86] The trial court made introductory remarks to each of the six groups regarding the general nature of the case and the expected duration of the trial. (3 RT 326-332, 371-378, 440-442, 445-449, 514; 4 RT 679-687; 5 RT 987-993.)[87] The court read the indictment to two of the six groups of panelists. (3 RT 332-336, 442-445.)

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[86] Each of the groups consisted of between 60 and 80 prospective jurors. (1 Supp. I CT 41-55.)

[87] During its introductory remarks to the fifth panel of prospective jurors, the trial court stated: "Because the death penalty is a likely or possible verdict in this case, we need to find out your views ... about the death penalty...." Thereupon, defense counsel requested permission to approach the bench. At sidebar, defense counsel remarked: "Likely or possible verdict. If we could clean that up." The trial court agreed. Back before the prospective jurors stated: "In a case where one of the allegations is first degree premeditated murder, and special circumstances are alleged, there are only two possible verdicts. One is the death penalty and one is life without the possibility of parole." The court then explained that there is no penalty phase if the jury does not "come back with a finding of first degree premeditated murder." (4 RT 681.)

Prospective jurors who did not seek to be excused due to hardship were given a 37-page juror questionnaire to fill out. (3 RT 336-338, 378-379, 450; 4 RT 687-688; 5 RT 993; 3 Supp. I CT 648-678.)[88] Those who sought to avoid service due to hardship filled out brief hardship questionnaires and/or orally explained their hardship claims to the court. Numerous prospective jurors were excused based upon hardship. (3 RT 336-366, 378-379, 385-437, 450-485, 515-522; 4 RT 687-688, 729-737; 5 RT 993, 994-998; 1 Supp. I CT 3-4A.)[89]

After the court had entertained a considerable number of hardship claims, and after the attorneys had reviewed a substantial number of completed juror questionnaires, the court began the process of death qualification. (4 RT 605-610.) During this phase of jury selection, the court and the attorneys questioned prospective jurors whose answers on the juror questionnaires did not result in stipulations to excuse them. The court and the attorneys questioned these prospective jurors individually regarding their views concerning the death penalty for the purpose of ascertaining whether their views would substantially impair

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[88] All prospective jurors who did not claim hardship filled out the questionnaire. A copy of the first executed questionnaire included in the appellate record is at pages 642-678 of volume 3 of the first supplemental clerk's transcript.

[89] A blank copy of the hardship questionnaire is contained in the record. (1 Supp. I CT 3-4A.)

their capacity to consider imposition of either the death penalty or imprisonment for life without parole. (4 RT 535-603, 610-673, 688-728, 738-850; 5 RT 911-984, 998-1005.) During the death qualification phase, the trial court applied a standard pursuant to which it removed all prospective jurors who did not unequivocally indicate that they could consider imposing the death penalty. (4 RT 814.)

Then, after much of the death qualification process was completed, but before all prospective jurors were death qualified, the court and the attorneys asked general voir dire questions to groups of prospective jurors. (5 RT 853-890, 894-908, 1006-1011.) Individual death qualification of other prospective jurors proceeded ahead during intervals between sessions of general voir dire. (5 RT 911-984, 998-1005.)

Finally, the attorneys exercised peremptory challenges. (5 RT 902, 908, 1011-1044.) After a twelve-person jury was sworn, jury selection continued with respect to alternate jurors. (5 RT 1044-1057.) Four alternates were selected and sworn. (5 RT 1057-1058.)

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C. *Constitutional Principles Impacted By the Death Qualification Process*

"[T]he process of obtaining a 'death qualified jury' is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction." (*Baze v. Rees* (2008) 553 U.S. 35, 84 (opn. of Stevens, J., concurring in the judgment).)

> Millions of Americans oppose the death penalty. A cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases. An individual's opinion that a life sentence without the possibility of parole is the severest sentence that should be imposed in all but the most heinous cases does not even arguably "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"

(*Uttecht v. Brown* (2007) 551 U.S. 1, 35 (dis. opn. of Stevens, J.); quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 420.)

1. The Sixth Amendment

> At the time of the founding, citizen-jurors who believed the death penalty to be unconstitutional in any particular case or context would not have been subject to a "for cause" challenge on the basis of partiality, for the accused's right to an "impartial jury" was simply a tool to eliminate relational bias and personal interest from the criminal adjudication process. A citizen's view on the constitutionality of a particular law did not constitute a personal

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interest, but instead marked an important component of society's deliberative process.

(Cohen & Smith, *The Death of Death-Qualification* (2008) 59 Case W. Res. 87, 88-89.)

> Modern 'death-qualification' jurisprudence frustrates the Framers' understanding as to the role of the criminal jury. Whereas the jury envisioned by the Framers had the power to rule on the constitutionality of the death penalty — through the force of any ruling applied only to the particular case on which they sat — a prospective juror today cannot even sit on a capital jury unless she promises that she would be able and willing to impose a sentence of death. [¶] The practical effect of "death-qualification" is to expose the capitally accused to increased odds of receiving the death penalty, and to eliminate the voices of citizens who would opt to "check" the government's decision to inflict this penalty. [¶] Worse, perhaps, is that as judges and justices attempt to determine how much opposition to the death penalty warrants a challenge for cause during voir dire, the discretion left to individual judges results in widely different determinations.

(*Id.* at p. 89, fns. omitted.)

> The Framers viewed the jury as a bicameral branch of the judiciary. Juries enabled the people to review the actions of the executive in enforcing the law, the judiciary in applying the law, and the legislature in establishing it. Juries were not more powerful than judges, prosecutors, or the legislature, but they had the authority to veto or abridge the acts of the respective branches of government.

(*Id.* at pp. 113-114, fn. omitted.)[90]

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[90] The Supreme Court of the United States has recently confirmed that the Framers intended criminal juries to have the power to give voice to the people in matters before the judiciary. (*Blakely v. Washington* (2004) 542 U.S. 296, 306

"That the Sixth Amendment might interfere with the government's effort to impose a death sentence is inconvenient, but the historical basis for the Amendment was to interpose the citizens between the State and the accused for just that purpose." (*Id.* at p. 113, fn. omitted.)

> Alexander Hamilton's views on the great protection of the jury trial right were informed by his appearance as ... counsel in the libel case of Harry Croswell, who — the prosecution argued — had libeled Thomas Jefferson by claiming Jefferson had paid Thompson Callender for calling George Washington "a traitor, a robber, and a perjurer" and for calling John Adams, "a hoary-headed incendiary." Hamilton defended Croswell by arguing that juries have the power to determine the law, and that jurors have the duty to follow their convictions.

(*Id.* at pp. 114-115, fns. omitted.)[91]

["Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."].)

[91] In *People v. Croswell* (1804 N.Y. Sup. Ct.) 3 Johns. Cas. 337, Hamilton argued: "All the cases agree that the jury have the power to decide the law as well as the fact; and if the law gives them the power, it gives them the right also. Power and right are convertible terms, when the law authorizes the doing of an act which shall be final, and for the doing of which the agent is not responsible.... It is admitted to be the duty of the court to direct the jury as to the law, and it is advisable for the jury, in most cases, to receive the law from the court; and in all cases, they ought to pay respectful attention to the opinion of the court. But, it is also their duty to exercise their judgments upon the law, as well as the fact; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound, in such cases, by the superior obligations of conscience, to follow their own convictions. It is essential to the security of personal rights and public liberty, that the jury should have and exercise the power to judge both of the law and of the criminal intent." (*Id.* at pp. 345-346.)

2. *The Constitutional Safeguards Against Cruel And/Or Unusual Punishment*

The process of death-qualification inhibits enforcement of the Eighth Amendment's Cruel and Unusual Punishment Clause: The scope of that clause is measured by "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101 (plur. opn. of Warren, C.J.); accord, *Roper v. Simmons* (2005) 543 U.S. 551, 561.) That measure cannot be accurate in a process from which a substantial segment of society is excluded.

> Death-qualification eliminates from juries those citizens who would find a death sentence to be cruel and unusual either generally or in a particular context. As a result, when appellate courts review the frequency with which juries impose a death sentence for a certain class of capital crimes, that measure is necessarily an inaccurate thermometer for determining how much a society has chilled to the idea of executing certain classes of offenders. Death-qualification thus restricts the ability of the people to "check" the power of the judiciary by finding — albeit on a micro-scale — that the punishment of death is cruel and unusual in a particular case for a particular crime.

(Cohen & Smith, *The Death of Death-Qualification*, *supra*, 59 Case W. Res. at pp. 120-121, fns. omitted.)

"If courts are to respect the Framers' intentions with regard to the people serving as a 'check' to the judiciary, then surely the people themselves have a co-extensive right to bring to bear their own independent judgment in individual

cases where the constitutionality of the ultimate punishment is — and must always be — in issue." (*Id.* at p. 121.) "However, as long as the death-qualification of jurors remains the law of the land, the people's judgment, as well as the Framers' vision of a powerful jury serving as a check on the judicial branch, will be discarded." (*Ibid.*)

3. Due Process

The Due Process Clause of the Fourteenth Amendment "guarantees the fundamental elements of fairness in a criminal trial." (*Spencer v. Texas* (1967) 385 U.S. 554, 563.) The individual liberty interests protected by the Due Process Clause are largely enforced by observing the basic procedural safeguards contained in the Bill of Rights. (*Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123, 164 (conc. opn. of Frankfurter, J.).) The Supreme Court of the United States has "emphasized time and again that 'the touchstone of due process is protection of the individual against arbitrary action of government....'" (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 845; quoting *Wolff v. McDonnell* (1974) 418 U.S. 539, 558.)

The procedures by which juries are selected must comport with the essential fairness required by the Due Process Clause of the Fourteenth Amendment. (*Morgan v. Illinois* (1992) 504 U.S. 719, 730-731.)

The death qualification process is fundamentally unfair. It results in the impanelment of "a tribunal 'organized to convict.'" (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521; quoting *Fay v. New York* (1947) 332 U.S. 261, 294; *Baze v. Rees*, *supra*, 553 U.S. at p. 84 (opn. of Stevens, J., concurring in the judgment); Cohen & Smith, *The Death of Death-Qualification*, *supra*, 59 Case W. Res. at p. 89.) This fundamental unfairness violates due process.

4. Equal Protection

"The Equal Protection Clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community. That means that juries must be chosen without systematic and intentional exclusion of any otherwise qualified group of individuals." (*Fay v. New York*, *supra*, 332 U.S. at pp. 296-297 (dis. opn. of Murphy, J.); citing *Smith v. Texas* (1940) 311 U.S. 128.) "Only in that way can the democratic traditions of the jury system be preserved." (*Id.* at p. 297; citing *Glasser v. United States* (1942) 315 U.S. 60, 85.)

As discussed above, the death qualification process results in the exclusion from capital juries of prospective jurors whose views are deemed by the trial court to substantially interfere with their ability to consider imposition of the death penalty. Such individuals are otherwise qualified to serve. Accordingly, their

exclusion violates equal protection.

D. Cognizability of this Issue on Appeal

Counsel for Mr. Sandoval in the trial court did not challenge the constitutionality of the death qualification process. Nevertheless, Mr. Sandoval is entitled to present this constitutional challenge on appeal.

A defendant's failure to object to a ruling or procedure in the trial court does not result in a forfeiture of the defendant's right to pursue the issue on appeal if interposing an objection in the trial court would have been futile. (*People v. Boyette* (2002) 29 Cal.4th 381, 432.) It is futile for a litigant to object to a procedure in the trial court that the trial court is bound to follow under the principle of stare decisis. (*M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, 1177; citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As noted in footnote 81, *ante*, this court has rejected constitutional challenges to the death qualification process. Because the trial court would have been bound by this court's rulings, it would have been futile for defense counsel to have raised the issue in the trial court.

Furthermore, Mr. Sandoval's counsel did raise certain challenges to the jury selection procedures employed by the trial court: During jury selection in the original trial, counsel for Mr. Sandoval contended each prospective juror should

be individually questioned during the death qualification process. (4 RT 600.)

During jury selection in the penalty-phase retrial, counsel for Mr. Sandoval interposed the following objection:

> Your Honor, could I put something on the record? I wanted to make a motion to dismiss for one reason, for due process. The court read all the questionnaires and we have stipulated. [¶] There have been a lot of people this time around who said they just couldn't impose the death penalty, and I think it's around between a quarter and a third of the people are actually saying they just can't impose or they have a problem imposing, and it seems to me [that at] some point, when the support has fallen so low with the public, it just seems a violation of due process to subject Mr. Sandoval to the death penalty when such a significant portion of Long Beach jurors are rejecting it. [¶] So for that reason, we make a motion to dismiss the penalty phase.

(16 RT 3073.)

The court overruled the objection, stating that counsel's argument was not "an appropriate due process argument" and that counsel was raising an issue "for the legislature[,] not for the courts." (16 RT 3073.)

In light of the foregoing, Mr. Sandoval is entitled to appellate consideration of this constitutional challenge to the death qualification process.

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III.

IN VIOLATION OF PENAL CODE SECTION 1093, THE TRIAL COURT FAILED TO READ THE INDICTMENT TO THE JURY, AND FAILED TO INFORM THE JURY OF MR. SANDOVAL'S PLEA OF NOT GUILTY TO THE CHARGES IN THE INDICTMENT.

In Penal Code section 1093, the California legislature has specified the order of proceedings in jury trials. Pursuant to this statute, the first order of business, following impanelment and swearing of the jury, is for the clerk to read the accusatory pleading to the jury and to inform the jury of the defendant's plea to the charges in the accusatory pleading. (Pen. Code, § 1093, subd. (a).) At the outset of the guilt phase in the instant case, the trial court failed to cause the clerk to read the indictment to the jury after the jury was impaneled and sworn. The trial court also failed to inform the jury of Mr. Sandoval's plea to the charges in the indictment.

As noted at p. 119, *ante*, the trial court did read the indictment to two of the six panels of prospective jurors during jury selection. (3 RT 332-336, 442-445.) However, the court did not read the indictment to the other four panels of prospective jurors during jury selection.[92] Of the twelve jurors and four alternates

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[92] In its remarks to three of the four panels to which the trial court did not read the indictment, the court did note that one of the charges in the case was murder with special circumstance allegations. (3 RT 372; 4 RT 680-681; 5 RT

impaneled and sworn, three were selected from a panel to which the court had not read the indictment. (1 Supp. I CT 98-100, 120.)[93] And, after the twelve jurors and four alternates were impaneled and sworn, the court did not cause the indictment to be read to them. Rather, after the twelve jurors were sworn (5 RT 1044), and after the four alternates were sworn (5 RT 1057-1058), the court gave preliminary instructions to the jury (6 RT 1069-1077), and then the parties gave their opening statements. (6 RT 1078-1109.) Thus, the trial proceeded without the reading of the indictment to three of the jurors and alternates.

At no time, did the trial court inform any members of the jury that Mr. Sandoval had pled not guilty to the charges in the indictment. Although the court did note the presumption of innocence in its introductory remarks to some, but not all, of the prospective jurors during jury selection (3 RT 329, 374, 446; 4 RT 684; 5 RT 989-990), and although the court did instruct the jury regarding the presumption of innocence in its final charge during the guilt phase (10 RT 2006), the court did not inform the jury at any time that Mr. Sandoval had pled not guilty

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988.) The court did not mention the other charges in the indictment to these three panels.

[93] A chart specifying the numbers of the selected jurors and alternates is contained in the record. (1 Supp. I CT 120.) Two of the selected jurors and one of the selected alternates had been in the second panel of prospective jurors. (1 Supp. CT 98-100.)

to the charges in the indictment.

Given the circumstances of this case, the trial court's erroneous failure to comply with Penal Code section 1093, subdivision (a) necessitates reversal.

In *People v. Sprague* (1879) 53 Cal. 491, this court rejected an argument that a trial court's failure to comply with Penal Code section 1093 necessitated reversal, because the error did not prejudice the defendant. As this court explained:

> After the jury was empaneled and sworn, the Clerk did not (as directed by sec. 1093 of the Penal Code) read the indictment and state the defendant's plea. It appears from the bill of exceptions, however, that during the empaneling of the jury the substance of the indictment and plea were many times repeated; that in opening the case to the jury the District Attorney stated the substance of the indictment and also [the] defendant's plea thereto; that in the charge of the Court the substance of the indictment and plea were again mentioned; and that the defendant made no objection to proceeding with the trial by reason of the failure of the Clerk to read the indictment or to state the plea, nor in any way referred to the omission until after the verdict had been received and entered on the minutes, and the jury polled at [the] defendant's request.

(*Id.* at p. 494.)

In light of the foregoing, this court felt there was no doubt that the jury was "fully informed from the commencement of the trial of the precise charges against the defendant, and of the issue raised by his plea of 'not guilty.'" (*Id.* at p. 495.) Accordingly, in reliance on Penal Code sections 1258 and 1404, which prohibit

reversal based upon departure from the procedures specified in the Penal Code absent infringement upon a defendant's substantial rights,[94] this court held the trial court's noncompliance with Penal Code section 1093 did not warrant reversal. (*Id.* at pp. 494-495.)

Similarly, in *People v. Twiggs* (1963) 223 Cal.App.2d 455, the court concluded "the failure to read the accusatory pleading and plea of the defendant would not constitute a fatal error ... when it appears from the record of the jury impanelment ... that the jury must have been aware of the accusation and [the] defendant's plea thereto." (*Id.* at p. 464.) In any event, defense counsel in *Twiggs* waived the reading of the information to the jury. (*Id.* at pp. 463-464.)

Unlike the *Sprague* and *Twiggs* cases, where it was clear to the juries that the defendants had entered not guilty pleas to the charges in the accusatory pleadings, it was not made clear to the jury in the instant case that Mr. Sandoval had pled not guilty to any or all of the charges in the indictment. Neither the trial court nor the attorneys suggested Mr. Sandoval had pled not guilty to the charges.

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[94] Penal Code section 1258 provides: "After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties." Penal Code section 1404 provides: "Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

The prosecutor's opening statement consisted principally of a description of the shooting on Lime Avenue and the evidence that Mr. Sandoval was the shooter. The prosecutor made no mention of the fact that Mr. Sandoval had pled not guilty to the charges stemming from the shooting. (6 RT 1078 -1101.) Similarly, in the opening statement given by lead defense counsel, no mention was made of Mr. Sandoval's not guilty plea. Rather, counsel twice informed the jury that Mr. Sandoval had confessed, and stated the evidence would show that his plan had been to shoot Toro, but not anybody else. (6 RT 1102-1109.)

Even during the trial court's final charge to the jury in the guilt phase, when the court did instruct the jury concerning the charged offenses and the elements of those charged offenses, the court did not instruct the jury that Mr. Sandoval had pled not guilty to the charges. (10 RT 2007-2025.) Furthermore, the attorneys made no reference to the fact that Mr. Sandoval had pled not guilty in their closing arguments. The prosecutor's argument focused almost exclusively on the murder charge and the special circumstance allegations. (10 RT 2027-2041, 2054-2064.) Defense counsel's closing argument focused solely on the murder charge, with counsel arguing that Mr. Sandoval was guilty of second degree murder. (10 RT 2045-2053.) Defense counsel offered no argument concerning the other counts.

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In light of these circumstances, the trial court's failure to read the indictment to the jury and to inform the jury that Mr. Sandoval had pled not guilty to the charges in the indictment constitutes reversible error. The case was tried without the jury ever being informed that Mr. Sandoval denied his guilt as to the murder charge in count I and the serious charges in the other counts.

The trial court's complete failure to comply with Penal Code section 1093, subdivision (a) in this case violated Mr. Sandoval's fundamental right under the Sixth and Fourteenth Amendments to have the jury pass on the ultimate question of his guilt or innocence with respect to each of the charged offenses. (*Duncan v. Louisiana* (1968) 391 U.S. 145.) Although it is for the trial judge "to instruct the jury on the law and to insist that the jury follow his [or her] instructions" (*United States v. Gaudin* (1995) 515 U.S. 506, 513), "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." (*Id.* at p. 514.) The jury in this case, uninformed that Mr. Sandoval denied his guilt on the charged offenses, was simply not meaningfully called upon to pass on the ultimate question of guilt or innocence. A jury in a criminal trial must be informed, at least once, that the accused has pled not guilty to the charges.

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IV.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE FIRST-DEGREE MURDER CONVICTION, AND, BASED ON THE RECORD, IT CANNOT BE DETERMINED WHETHER THE JURY'S VERDICT RESTED ON THE UNSUSTAINABLE TRANSFERRED-PREMEDITATION THEORY PRESENTED BY THE PROSECUTOR.

Mr. Sandoval's murder of Detective Black was intentional but unplanned. The killing was not murder of the first degree.

With revenge in mind, Mr. Sandoval and four of his fellow gang members set out to shoot and/or kill Toro. (2 CT 280.) However, as they were commencing the actual execution of their plan at Toro's residence, they were interrupted. Detectives Black and Delfin arrived on the scene in an unmarked police vehicle. (8 RT 1565-1566.) The detectives focused their attention on Rascal, who was walking toward Toro's residence. (8 RT 1567-1568; 9 RT 1763-1764, 1767, 1773; 2 CT 292-295.) Rascal, who was on parole and illegally in the country, was carrying a handgun. (6 RT 1267; 2 CT 283-286, 295-297, 325.) Mr. Sandoval opened fire on the detectives, killing Detective Black. (8 RT 1570-1575, 1718-1732; 9 RT 1764.) Unlike the fate Mr. Sandoval had intended to bestow upon Toro, the killing of Detective Black was unplanned. Mr. Sandoval's state of mind with respect to the former was cold and calculated. His state of mind in connection with the latter was unplanned, rash, and impulsive. Because Mr.

Sandoval's murder of Detective Black was not premeditated and deliberate, it was not first degree murder.

The first degree verdict returned by the jury in spite of the evidentiary insufficiency is likely attributable to the prosecutor's improper argument concerning a theory of culpability that is not applicable in this case: Based upon the trial court's instructions, the jury was presented with two legal theories upon which to predicate a first degree murder conviction: 1) premeditated and deliberate murder, and/or 2) the functionally equivalent theory of murder committed by means of lying in wait. (10 RT 2008-2009; 5 CT 1217-1219.)[95, 96] In argument to

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[95] In *People v. Ruiz* (1988) 44 Cal.3d 589, this court described murder by means of lying in wait as the "functional equivalent" of premeditated and deliberate murder. (*Id.* at p. 614.) However, considerable "confusion" exists in this state's lying-in-wait jurisprudence. (*People v. Poindexter* (2006) 144 Cal.App.4th 572, 586 & fn. 24.) Notwithstanding this confusion, if there is any appreciable distinction between the proof necessary to support a first degree murder conviction on a theory of premeditation and deliberation and the proof necessary to support such a conviction on a theory of lying in wait, it is that the latter is more exacting than the former. (*People v. Stanley* (1995) 10 Cal.4th 764, 795-796.) This state's lying-in-wait jurisprudence is discussed in greater detail at pp. 249-259, *infra*.

[96] The trial court generally defined murder for the jury (10 RT 2007-2008; 5 CT 1215-1216), and instructed the jury that if it found Mr. Sandoval guilty of murder, it was required to determine whether the murder was of the first or second degree. (10 RT 2011; 5 CT 1225.) The court only instructed the jury as to two legal theories pursuant to which it could possibly reach a finding of first degree murder — premeditated and deliberate murder, as defined in CALJIC No. 8.20, and murder by means of lying in wait, as defined in CALJIC No. 8.25. (10 RT

the jury, however, the prosecutor did not confine his case for a first-degree verdict to these two theories. Rather, the prosecutor explicitly urged a transferred premeditation theory. (10 RT 2028, 2057-2059.)[97] Transferred premeditation is not a cognizable theory of culpability in this case. Indeed, the trial court did not instruct the jury concerning transferred premeditation or any other form of transferred intent.

Tellingly, during grand jury proceedings, the prosecution had proceeded on yet another theory: At that stage, the prosecution contended that Mr. Sandoval

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2008-2009; 5 CT 1217-1219.)

[97] The prosecutor argued: "The premeditation and deliberation in terms of this particular defendant started a long time before they ever got to Lime [Avenue]. *The intended target happened to change*, but the premeditation and deliberation and intention to go over there and kill existed long before he got anywhere near Lime [Avenue]." (10 RT 2028, italics added.) Then, in his rebuttal argument, the prosecutor made the following remarks: "What we're talking about [with respect to the requirements of premeditation and deliberation] is *converting from Target A to Target B*." (10 RT 2057, italics added.) In going to Lime [Avenue][,] [l]ook at the willful, premeditated notion that caused him to be there." (10 RT 2058.) "Consider the gang meeting, and what they wrote down, what the gang meeting was about[,] when you consider premeditation and deliberation. [¶] Consider the fact that he had to load a weapon, and that they had a meeting for 15 to 30 minutes before they left Dairy Street to go effectuate a killing. That's premeditation and deliberation. [¶] Those are the things that accompanied this killing. Those processes didn't discard themselves because police officers came down the street. [¶] The fact of the matter is, *the willful, deliberate[,] premeditated aspects of this crime all came into place and are satisfied long before the crime ever occurred*." (10 RT 2059, italics added.)

and his fellow gang members had engaged in a conspiracy to kill Toro, and that the killing of Detective Black had been a natural and probable consequence of that conspiracy. In this regard, the grand jury adviser instructed the grand jury pursuant to CALJIC No. 6.11. (4 CT 1030-1031.) CALJIC No. 6.11 is a model jury instruction that sets forth the natural and probable consequences doctrine. (*People v. Garewal* (1985) 173 Cal.App.3d 285, 299.) The prosecution did not proceed on this conspiracy theory at trial, and the court did not instruct the jury on the natural and probable consequences doctrine.

Because the evidence shows Mr. Sandoval's murder of Detective Black was not premeditated and deliberate, the evidence is insufficient to support a first degree murder conviction. Evidently, the insufficiency of the evidence in this regard led the prosecutor to urge the untenable transferred premeditation theory. However, this theory could not cure the evidentiary insufficiency. Rather, by introducing it, the prosecutor circumvented the evidentiary insufficiency and paved the way for the jury to return a first degree verdict on an extralegal basis.

A. Standard of Review

In reviewing a sufficiency claim, an appellate court inquires "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

B. Governing Constitutional and Legal Principles Concerning the Evidentiary Requirements to Establish Premeditation and Deliberation

1. The Prosecution's Burden of Proof

"[P]roof of a criminal charge beyond a reasonable doubt is constitutionally required." (*In re Winship* (1970) 397 U.S. 358, 362.) "This notion — basic in our law and rightly one of the boasts of a free society — is a requirement and a safeguard of due process of law...." (*Ibid.*, internal quotation marks omitted.) The Supreme Court of the United States has "explicitly h[e]ld that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*Id.*, at p. 364.)

This due process requirement "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 324, fn. 16.) The requirement obtains not only with respect to proof bearing on matters germane to distinguishing between guilt and innocence, but also to matters germane to distinguishing between degrees of guilt. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 697-698 ["the criminal law ... is

concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability"].)

2. Premeditation and Deliberation

Murder is either of the first degree or of the second degree. (Pen. Code, § 189.) A malicious and unjustified killing is presumed to "constitute[] murder of the second, rather than of the first, degree...." (*People v. Anderson* (1968) 70 Cal.2d 15, 25.)

A willful, deliberate, and premeditated killing is murder of the first degree. (Pen. Code, § 189.) "A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080, cert. denied *sub nom. Koontz v. California* (2003) 537 U.S. 1117.) Indeed, in a case in which the prosecution seeks to secure a first degree murder conviction based on a theory that a killing was premeditated and deliberate, premeditation and deliberation are essential elements of the offense. (*People v. Romero* (2008) 44 Cal.4th 386, 400.)

Under California law, the division of murder into two degrees is based upon "a recognition of the infirmity of human nature" and the "difference in the quantum of personal turpitude of the offenders." (*People v. Holt* (1944) 25 Cal.2d 59, 89.) Thus, first degree murder must involve a greater degree of

blameworthiness than second degree murder. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 454.) Indeed, the malicious intent to kill sufficient to support a second degree murder conviction "is not synonymous with 'willful, deliberate, and premeditated' intent." (*Holt, supra*, 25 Cal.2d at p. 70.) To fail to recognize and apply this distinction is to "emascualte[] the difference between murder of the first degree and that of the second degree." (*Id.* at p. 88.)

"By conjoining the words 'willful, deliberate, and premeditated,' in its definition and limitation of the character of killings falling within murder of the first degree the Legislature apparently emphasized its intention to require as an element of such crime substantially more reflection than may be involved in the mere formation of a specific intent to kill...." (*People v. Thomas* (1945) 25 Cal.2d 880, 900.) Penal Code section 189's "express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides (not specifically enumerated in the statute) which are the result of mere unconsidered or rash impulse hastily executed." (*Id.* at pp. 900-901.)

"Premeditation or deliberate purpose may take various forms in addition to poison, lying in wait, and torture." (1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, § 103, p. 719.) "Traditionally, 'premeditated' has been defined as 'on preexisting reflection,' and 'deliberate' as

'resulting from careful thought and weighing of considerations.'" (*Ibid.*) "The terms have been further defined by their antonyms: 'premeditated' is not 'spontaneous' and 'deliberate' is not 'hasty,' 'impetuous,' 'rash,' or 'impulsive.'" (*Ibid.*; accord, *People v. Koontz*, *supra*, 27 Cal.4th at p. 1080.) "[T]here is nothing in the sections of the Penal Code which indicates that the Legislature meant to give to the words 'deliberate' and 'premeditate' any other than their common, well-known dictionary meaning." (*People v. Bender* (1945) 27 Cal.2d 164, 182.)[98]

"[I]f an act is deliberate and premeditated even though it be executed in the very moment it is conceived, with absolutely 'no appreciable' time for consideration[,] ... then it is difficult to see wherein there is any field for the classification of second degree murder." (*Ibid.*) "[I]t shames the law as it violates the truth to say that a man can premeditate the moment he conceives the purpose."

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[98] "'[D]eliberate' means something that is unhurried and arrived at as a result of careful thought and the weighing of considerations, including the reasons for and against a contemplated action.... [I]t means just the opposite of hasty, impetuous or impulsive...." (*People v. Nichols* (1948) 88 Cal.App.2d 221, 228; quoting *People v. Bender*, *supra*, 27 Cal.2d at p. 183.) "'Premeditate' means 'to think on, and to resolve in the mind beforehand; to contrive and design previously.'" (*Ibid.*) The requirements of premeditation and deliberation "not only negative the idea of hurried thoughtless action in the face of an unexpected situation, but must be said to reasonably imply some opportunity for careful thought and for the weighing of various considerations as well as the presence of some plan or design. (*Ibid.*) "This would vary with different individuals and with differing circumstances. It would seem that the age and experience of the defendant should be considered in this connection." (*Ibid.*)

(*People v. Honeycutt* (1946) 29 Cal.2d 52, 60.) For, although "the brain can function rapidly[,]" it cannot at the same time operate in a manner that is "hasty, hurried, and deliberate, or impulsive, unstudied, and premeditated." (*People v. Bender*, *supra*, 27 Cal.2d at p. 185.)

> Given the presumption that an unjustified killing of a human being constitutes murder of the second, rather than of the first, degree, and the clear legislative intention to differentiate between first and second degree murder, [a reviewing court] must determine in any case of circumstantial evidence whether the proof is such as will furnish a *reasonable foundation* for an inference of premeditation and deliberation [citation], or whether it leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation.

(*People v. Anderson*, *supra*, 70 Cal.2d at p. 25, italics in the original, internal quotation marks omitted.)

"To speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, is a contradiction in terms. It deprives the statutory requirement of all meaning and destroys the statutory distinction between first and second degree murder." (*Bullock v. United States* (D.C. Cir. 1941) 122 F.2d 213, 214.) "[W]hen the court, which might properly advise the jury that no particular length of time is necessary, proceeds to define deliberation and premeditation in terms which lay emphasis upon 'no appreciable time', and

'instantaneous', the statutory distinctions are rendered meaningless." (*Jones v. United States* (9th Cir. 1949) 175 F.2d 544, 551.) "From the beginning, th[e] issue of the time required to premeditate and deliberate has plagued any effort to distinguish these elements from the intent to kill. If the thoughts constituting premeditation and deliberation can occur with such 'great rapidity,' what distinguishes them from the intent to kill?" (Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference* (2002) 36 U.S.F. L.Rev. 261, 327 (hereafter "*Returning to a Distinction Without a Difference*").)

Relevant criteria for assessing whether a murder was committed with premeditation and deliberation were set forth by this court in *People v. Anderson*, *supra*, 70 Cal.2d 15:

> The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing — what may be characterized as "planning" activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a "motive" to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of "a pre-existing reflection" and "careful thought and weighing of considerations" rather than "mere unconsidered or rash impulse hastily executed" [citation]; (3) facts about the nature of the killing

> from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a "preconceived design" to take his victim's life in a particular way for a "reason" which the jury can reasonably infer from facts of type (1) or (2).

(*Id.* at pp. 26-27.)

Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of *all three* types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3). (*Id.* at p. 27, italics added.) In articulating these considerations, this court's goal in *Anderson* "was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

"The fact that a slaying was unusually brutal, or involved multiple wounds, cannot alone support a determination of premeditation. Absent other evidence, a brutal manner of killing is as consistent with a sudden, random 'explosion' of violence as with calculated murder." (*People v. Alcala* (1984) 36 Cal.3d 604, 626.) "If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations." (*People v. Anderson*,

supra, 70 Cal.2d at pp. 24-25.)

3. Transferred Premeditation

The courts will apply the doctrine of transferred intent to supply (or deem established) the necessary mental state for a killer's unintended killing of a victim when the killer accidentally kills an unintended victim in the course of an attempt to kill an intended victim. However, this doctrine does not apply when the killer intentionally kills a victim who the killer encountered before the killer was able to attempt to strike a fatal blow at a person the killer had been planning to kill. In other words, if the killer had planned, with premeditation and deliberation, the killing of a particular individual, that mental state does not necessarily transfer to the killer's intentional killing of a victim who interrupts the killer's premeditated and deliberate killing of his intended target.

> Under the classic formulation of California's common law doctrine of transferred intent, a defendant who shoots with the intent to kill a certain person and hits a bystander instead is subject to the same criminal liability that would have been imposed had the fatal blow reached the person for whom intended. [Citation.] In such a factual setting, the defendant is deemed as culpable as if he had accomplished what he set out to do.

(*People v. Bland* (2002) 28 Cal.4th 313, 320-321, internal quotation marks omitted.)

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"The function of the transferred intent doctrine is to insure the adequate punishment of those who accidentally kill innocent bystanders." (*Id.* at p. 321, internal quotation marks omitted.)

"[T]he notion of creating a whole crime by 'transferring' a defendant's intent from the object of his assault to the victim of his criminal act is ... a 'bare-faced' legal fiction." (*People v. Scott* (1996) 14 Cal.4th 544, 550; quoting Prosser, *Transferred Intent* (1967) 45 Tex. L.Rev. 650, 650.) Indeed, "[t]he transferred intent doctrine does not ... denote an actual 'transfer' of 'intent' from the intended victim to the unintended victim." (*Id.* at p. 551.) "Rather, ... it connotes a *policy*— that a defendant who shoots at an intended victim with intent to kill but misses and hits a bystander should be subject to the same criminal liability that would have been imposed had he hit his intended mark." (*Ibid.*, italics in the original.)

"The 'transferred intent' rule ... is a peculiarly mischievous legal fiction." (*People v. Scott*, *supra*, 14 Cal.4th at p. 554 (conc. opn. of Mosk, J.) "In spite of the long labors of courts and commentators, to this very day, there is no agreement about its general rationale. It is nothing more than the name attached to an unexplained mystery." (*Id.* at p. 555, internal quotation marks, brackets, and ellipsis omitted.) "Without such a rationale, its invocation outside the ... [classic]

paradigm would almost necessarily be arbitrary and capricious." (*Ibid.*)[99]

The doctrine of transferred intent does not apply to the mental state of premeditation and deliberation in cases where the killer never strikes a fatal blow or fires a gunshot at his intended victim. This limitation on the transferred intent doctrine is well-illustrated by the Missouri Supreme Court's decision in *State v. Batson* (1936) 339 Mo. 298 [96 S.W.2d 384]:

In *Batson*, the defendant set out to kill a justice of the peace. He went to the office of the justice of the peace and shot him four times in the back, killing him instantly. A constable and a dentist were at the other side of the office. After the defendant shot the justice of the peace, the constable ran toward the defendant. The defendant turned and shot at the constable. However, the constable lunged to the side, and the bullet struck the dentist. The dentist died shortly thereafter. (*Id.* at p. 386.) In a prosecution of the defendant for killing the dentist, but not the justice of the peace (*ibid.*), the court instructed the jurors that if they found the defendant had shot the justice of the peace willfully, deliberately, with premeditation, and with malice aforethought, and if they found that he had killed

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[99] The classic paradigm of the transferred intent rule was set forth by Lord Hale in the 18th century: "[I]f A, by malice aforethought strikes at B, and missing him strikes C, whereof he dies, tho he never bore any malice to C, yet it is murder, and the law transfers the malice to the party slain...." (Hale, *Historia Placitorum Coronae* (1736) p. 466.)

the dentist in the course of that act, then "any such willfulness, deliberation, premeditation and malice" in the killing of the justice of the peace was to "be attributed to him in the killing" of the dentist. (*Id.* at p. 388.) In reversing the defendant's first-degree murder conviction, the Missouri Supreme Court held that the trial court had improperly instructed the jury that any premeditation and deliberation associated with the defendant's killing of the justice of the peace could be transferred to the killing of the dentist. (*Ibid.*) As the court explained: "The law will not attach the [requisite] intent to the act of killing [the dentist] merely because the [defendant] harbored it against another person present ([the justice of the peace]) at whom he was not then shooting, even though he intended by a separate act ... to kill that other person." (*Id.* at p. 391.) "[T]he act with respect to which the felonious intent will be 'transferred' from the object of the accused's design to the victim, is the homicidal act directed at the former and resulting in the death of the latter, and not some antecedent act." (*Id.* at p. 389.)

The Supreme Court of North Carolina rendered a similar holding in *State v. Cole* (1903) 132 N.C. 1069 [44 S.E. 391]. Evidence was presented that the defendant set out to shoot and kill a man on a train. As the defendant was attempting to do so, the victim interceded and attempted to grab the defendant. The defendant then fatally shot the victim. (*Id.* at p. 391.) The North Carolina

Supreme Court presumed that the defendant had formed a premeditated and deliberate intention to kill his intended target. However, the court concluded the evidence was insufficient to support a finding that the defendant acted with premeditation and deliberation when he shot the victim. (*Id.* at p. 394.) When the defendant shot the victim, he was not pointing his gun at his intended target. His intended target was not in his line of fire at that time. The intercession of the victim represented " the intervention of a new element or agency, and brought about an unexpected and, in a legal sense, independent result." (*Ibid.*) The defendant's shooting of the victim was carried out impulsively and without premeditation. Thus, the court explained, "'A man shows his want of premeditation who acts or speaks on the impulse of the moment.'" (*Ibid.*)

In reaching this decision, the court acknowledged the concept of transferred premeditation, but explained its inapplicability in the case presented:

> We assume that it is also well settled that if one, attempting to commit a premeditated and deliberate murder, shall, *while in the act*, and as a result of it, kill another, he will in respect to the person killed be guilty of murder in the first degree; as if one lay poison for A and it is taken by B, from which he dies, it is murder in the first degree; or if one, of malice, either express or implied, but without premeditation, be in the act of killing A, and while in the act and as a result thereof he kill B, it is murder in the second degree. In both these cases, however, *there must be a legal connection or relation between the original purpose and act and the unexplained result.* In a certain sense, of course, every act is related to every other and preceding act

> of a human being; but the law, being based upon principles applicable to the practical transactions of human life, avoids impracticable scholastic refinements and adopts such rules as experience has shown capable of practical application.

(*Id.* at p. 393, italics added.)

The foregoing cases establish the following proposition: "Evidence that the defendant planned for another crime cannot, in itself, establish premeditation and deliberation to kill." (*Returning to a Distinction Without a Difference*, *supra*, 36 U.S.F. L.Rev. at p. 326.)

C. The Effect of the Prosecution's Presentation of an Invalid Theory of Culpability

"[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Green* (1980) 27 Cal.3d 1, 69, disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3; accord, *People v. Perez* (2005) 35 Cal.4th 1219, 1233 ["When one of the theories presented to a jury is legally inadequate, ... reversal is generally required unless 'it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory.'"]; quoting *People v. Guiton* (1993) 4 Cal.4th 1116, 1130; *Martinez v. Garcia* (9th Cir. 2004)

379 F.3d 1034 [federal habeas relief granted with respect to attempted murder conviction where, due to jury instructions and prosecutor's argument, it was impossible for reviewing court to determine if conviction was based upon a permissible premeditation theory or a legally impermissible transferred intent theory], cert. den. (2005) 543 U.S. 1054.)

In *People v. Morgan* (2007) 42 Cal.4th 593, cert. den. *sub nom. Morgan v. California* (2008) 552 U.S. 1286, this court reversed a kidnaping conviction in a case where the trial court gave proper instructions to the jury concerning the kidnaping offense, but the prosecutor presented a legally inadequate theory to the jury, and it was not possible to tell whether the jury had convicted the defendant on the basis of the prosecutor's legally inadequate theory. (*Id.*, at pp. 607-613.)

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law — whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.

(*Griffin v. United States* (1991) 502 U.S. 46, 59.)

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D. Analysis

As to the murder charge in count I, the trial court instructed the jury on two theories of culpability for a finding of first degree murder, *viz.*, 1) deliberate and premeditated murder, and 2) murder by means of lying in wait. (10 RT 2008-2009.) The evidence adduced by the prosecution was insufficient as a matter of law to establish first degree murder pursuant to either of these theories.

1. No Evidence of Premeditation and Deliberation

Mr. Sandoval and his cohorts embarked upon a planned, premeditated, and deliberate effort to kill Toro or to at least to shoot up his residence. (2 CT 281-282, 288-289.) They came quite close to carrying that effort to fruition. However, before they were able to carry out their plan, Detectives Black and Delfin unexpectedly appeared at the scene. (8 RT 1566-1567; 2 CT 293-294, 317-318.) Mr. Sandoval had been standing just outside the passenger side of the Beretta that Pipas had parked across the street from Toro's home on Lime Avenue. (2 CT 281-282, 290-294.) He had the CAR-15. (2 CT 284.) When he saw the police vehicle approximately two house lengths away from his location,[100] he ducked down. (2 CT 293-297, 317-318.) Rascal had crossed the street and was headed toward

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[100] The detectives had just turned off of another street onto Lime Avenue. (8 RT 1566.)

Toro's house. (8 RT 1591; 9 RT 1772; 2 CT 292-293.) The detectives maneuvered their vehicle toward Rascal and focused their attention on him. (8 RT 1571; 9 RT 1763-1764, 1767, 1773.) It appeared that they were going to "jack" him. (9 RT 1764, 1773-1775.) Observing this, Mr. Sandoval stood and opened fire on the police vehicle. He did so in order to prevent police from apprehending Rascal. (2 CT 295-297.) When he fired the shots, he was approximately ten feet away from the detectives' vehicle. (9 RT 1775-1777; 2 CT 297.)

Mr. Sandoval fired a total of 28 shots. (6 RT 1126-1127, 1265; 7 RT 1432-1437; 8 RT 1666, 1669-1670, 1696.) He was stationary as he fired the shots. (8 RT 1670-1671, 1686.) 28 shots can be fired rapidly from the type of firearm Mr. Sandoval used. The prosecution's ballistics expert was able to fire 28 rounds from that type of firearm in under seven seconds. (8 RT 1694-1695, 1701; 20 RT 4263.)

Detective Black died as a result of a single gunshot wound to the head. He suffered no other lethal injuries. (8 RT 1719-1729, 1732.) Detective Delfin believes Detective Black was hit by one of the first shots fired because Detective Black was completely quiet during the shooting. (8 RT 1573.)

The foregoing evidence, "viewed in the light most favorable to the prosecution" (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *People v. Johnson*,

supra, 26 Cal.3d at p. 578), reveals that while Mr. Sandoval killed Detective Black intentionally, he did not do so with premeditation and deliberation. Mr. Sandoval and his fellow B.P. gang members were lying in wait for Toro. They were not lying in wait for the officers. Rather, the officers arrived unexpectedly. From the time Mr. Sandoval noticed the officers and ducked down until the time he opened fire after seeing the officers focus their attention on Rascal, the officers had traveled less than half a city block, i.e., two house lengths. (8 RT 1567; 2 CT 294.) Thus, Mr. Sandoval began shooting before there was any "appreciable time for consideration...." (*People v. Bender*, *supra*, 27 Cal.2d at p. 182.) He did not conceive the purpose to shoot the officers until he saw that the officers were going to apprehend Rascal. Thereupon, he instantaneously began shooting. As this court has observed: "[I]t shames the law as it violates the truth to say that a man can premeditate the moment he conceives the purpose." (*People v. Honeycutt*, *supra*, 29 Cal.2d at p. 60.) To treat Mr. Sandoval's instantaneously conceived notion to shoot and kill the detectives as a mental state of premeditation and deliberation would improperly dispense with the legislatively established distinction between first degree murder and second degree murder. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 25; *Jones v. United States*, *supra*, 175 F.2d at p. 551; *Bullock v. United States*, *supra*, 122 F.2d at p. 1214; *Returning to a*

Distinction Without a Difference, *supra*, 36 U.S.F. L.Rev. at p. 327.)

Although Mr. Sandoval fired numerous shots at the detectives' vehicle, he was able to do so in a matter of seconds: In his confession, he told police he believed the CAR-15 was fully automatic. (2 CT 306.) The prosecution's ballistics expert testified that the gun was semi-automatic. (8 RT 1693.) In any event, the gun has the capacity to fire many rounds "in a very short period of time." (8 RT 1694.) Nevertheless, the prosecutor argued to the jury that the fact that Mr. Sandoval fired 28 shots was, in and of itself, evidence of premeditation and deliberation. (10 RT 2031.) This argument has some superficial appeal. But, in the end, it proves too much: If the firing of multiple shots proves premeditation and deliberation, it does so by demonstrating an evolving mental state — a mental state in which premeditation and deliberation are developed after the firing of a number of shots. Here, however, it cannot be established with any certainty whether the lethal shot that struck Detective Black was the first shot, the seventh shot, or the twenty-eighth shot. Yet, in light of Detective Delfin's testimony that Detective Black was completely quiet during the shooting (8 RT 1573), it is likely that the lethal shot was one of the first shots fired. If that is the case, Detective Black was killed by a gunshot fired before any premeditation and deliberation had blossomed.

None of the *Anderson* factors — 1) planning, 2) motive stemming from prior relationship, and 3) a manner of killing reflecting a preconceived design — are present in this case: Mr. Sandoval did not plan to kill Detective Black; rather, he planned to kill Toro. Mr. Sandoval had no motive to kill Detective Black based upon any prior relationship; he never knew the detective.[101] Mr. Sandoval did not kill Detective Black in a manner that reflected a preconceived design; rather, he impetuously and reflexively opened fire the moment it appeared the detectives were going to apprehend Rascal.

2. The Gang Expert Testimony Did Not Supply Evidence of Premeditation and Deliberation.

The trial court did allow the prosecution to introduce opinion testimony from gang experts that gang members like Mr. Sandoval would have planned for the contingency of police arriving during a gang hit like that which B.P. tried to carry out against Toro. However, this opinion testimony, which was erroneously admitted (see pp. 162-187, *infra*), did not constitute evidence of premeditation and deliberation. Because the jury, as the fact finder, must ultimately resolve factual

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[101] Motive to kill may be said to have arisen concomitantly with Mr. Sandoval's snap decision to shoot at the detectives in order to prevent them from apprehending Rascal. But that is not the type of "motive" to which the *Anderson* court referred. *Anderson* addressed "motive to kill, as gleaned from [the defendant's] prior relationship or conduct with the victim...." (*People v. Wharton* (1991) 53 Cal.3d 522, 546.)

questions, such as an inquiry concerning the particular mental state with which a defendant acted (*Morissette v. United States* (1952) 342 U.S. 246, 274), expert opinion testimony concerning an accused's intent is superfluous, unnecessary, meaningless, and irrelevant. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77, cert. den. *sub nom. Coffman v. California* (2005) 544 U.S. 1063, and *Marlow v. California* (2005) 544 U.S. 1063; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658-659.) In other words, such testimony has no legally recognized evidentiary value.

3. The Jury's Insufficiently Supported Verdict Is Likely Attributable to the Prosecutor's Presentation of an Invalid Transferred Premeditation Theory

As noted in footnote 97, *ante*, the prosecutor urged the jury to find premeditation and deliberation pursuant to a transferred premeditation theory. However, there was no factual or legal basis for application of that or any other variation of the transferred intent doctrine. Indeed, the prosecutor did not request and the trial court did not give any jury instruction on transferred intent.

Nevertheless, the prosecutor argued to the jury that Mr. Sandoval's purported premeditation and deliberation "started a long time before [the B.P. members] ever got to Lime [Avenue]." The prosecutor noted that the "target happened to change," but contended that the purportedly ripened premeditation

and deliberation "convert[ed] from Target A to Target B." (10 RT 2028, 2057.) The theory tendered by the prosecutor was not a valid theory of culpability in this case. As in *State v. Batson*, *supra*, 96 S.W.2d 384, where the Missouri Supreme Court held that the premeditation with which the defendant in that case killed a justice of the peace could not be transferred to his unplanned shooting of a dentist moments later (*id.* at pp. 388-391), the premeditation with which Mr. Sandoval set out to shoot and kill Toro cannot be transferred to his unplanned shooting of Detective Black moments before the shooting of Toro was going to be carried out. Mr. Sandoval did not accidentally kill Detective Black while attempting to fire a gunshot at Toro. And, as in *State v. Cole*, 44 S.E. 391, where the North Carolina Supreme Court held that the premeditation with which a defendant set out to kill his intended target could not supplant the non-premeditated mental state with which the defendant intentionally killed an individual who interrupted the execution of his plan (*id.* at pp. 393-394), Mr. Sandoval's premeditated mental state as to Toro cannot supplant the non-premeditated state he had at the time he intentionally killed Detective Black. Before Mr. Sandoval was able to carry out his intended plan concerning Toro, he committed a distinct and independent crime against Detective Black. Mr. Sandoval formed an intent to kill Detective Black that was separate and apart from his intent to shoot and/or kill Toro. This is not

the type of circumstance in which the common law doctrine of transferred intent is applicable. (*People v. Bland*, *supra*, 28 Cal.4th at pp. 320-321.)

The prosecutor's presentation of this invalid transferred premeditation theory to the jury (10 RT 2028, 2057-2059), without any objection from defense counsel or any correction from the trial court, is the likely explanation for the jury returning a verdict not supported by any competent evidence of premeditation and deliberation. Because it cannot be determined from the record whether the jury rested its first degree murder verdict on this theory, the first degree murder conviction cannot stand. (*People v. Morgan*, *supra*, 42 Cal.4th at pp. 607-613; *People v. Perez*, *supra*, 35 Cal.4th at p. 1233; *People v. Green*, *supra*, 27 Cal.3d at p. 69; *Martinez v. Garcia*, *supra*, 379 F.3d 1034.)

4. Legislative Expansion of the First Degree Felony Murder Rule Would Provide a Basis for Liability for First Degree Murder in Cases Like the Instant Case.

If California's statutory first degree felony murder rule were more expansive than it is, there would have been a lawful basis for finding Mr. Sandoval guilty of first degree murder: The evidence adduced by the prosecution would have supported a conviction for first degree murder under California's felony murder rule, *if* the rule applied to a murder of Victim A committed during the course of a conspiracy to murder or an attempt to murder Victim B. However, California's

first degree felony murder rule does not so provide.[102] Accordingly, the prosecution in this case did not explicitly proceed on a felony murder rule theory, and the trial court did not instruct the jury pursuant to the felony murder rule.

V.

THE TRIAL COURT INVADED THE FACT-FINDING PROVINCE OF THE JURY, ON THE QUESTION OF WHETHER THE MURDER OF DETECTIVE BLACK WAS DELIBERATE AND PREMEDITATED, BY ALLOWING THE PROSECUTION TO PRESENT GANG EXPERT TESTIMONY THAT MR. SANDOVAL AND HIS COHORTS ACCOUNTED FOR THE POSSIBILITY OF POLICE ARRIVING DURING THEIR ASSAULT ON TORO AND PLANNED IN ADVANCE TO "TAKE CARE OF" ANY OFFICERS WHO INTERFERED WITH THE "GANG HIT."

The prosecution attempted to fill the evidentiary gap in its case on the question of deliberation and premeditation with "gang expert" testimony. Over repeated defense objections (9 RT 1811-1814, 1843, 1899-1904), two police officers with experience in gang affairs testified that Mr. Sandoval brought the CAR-15 to Toro's residence pursuant to a "methodical" plan, in which Mr. Sandoval and his cohorts had accounted for the possibility of police showing up during the "gang hit." According to the "gang experts," Mr. Sandoval had planned

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[102] The first degree felony murder rule is set forth in Penal Code section 189. It provides that a killing committed in the perpetration of enumerated felonies constitutes first degree murder. Mr. Sandoval was not involved in the commission of any of these enumerated predicate felonies.

to use the CAR-15 to shoot police if necessary. (9 RT 1811-1814, 1893-1900.) Although the trial court ordered the jury to disregard the testimony of the first gang expert regarding the purported plan to shoot police (9 RT 1814-1815), the court allowed the testimony of the second gang expert regarding this supposed plan to stand. (9 RT 1893-1906.) By allowing this evidence to go to the jury, the trial court invaded the province of the jury on the question of whether Mr. Sandoval's killing of Detective Black was deliberate and premeditated.

A. Standard of Review

A trial court's ruling on the admissibility of the opinion of an expert witness is reviewed for abuse of discretion. (*People v. Hoyos* (2007) 41 Cal.4th 872, 910; *Amtower v. Photon* (2008) 158 Cal.App.4th 1582, 1599; *People v. Clark* (1970) 6 Cal.App.3d 658, 664.)

B. Factual Background

At the beginning of the 14th day of the jury trial — October 15, 2002 — defense counsel noted that the prosecutor had informed the defense about the general content of anticipated testimony of police officers the prosecutor intended to call as gang experts. Defense counsel asked the court to hold a hearing pursuant to Evidence Code section 402 prior to any gang expert testimony in the presence of the jury. (9 RT 1758.) The prosecutor represented that "the gist" of

his first gang expert's testimony was going to be historical information concerning the B.P. and E.S.P. gangs and their rivalry. Based on that representation, the defense did not object to the first gang expert testifying without a hearing pursuant to Evidence Code section 402. (9 RT 1759.)

The first expert, Ignacio Lugo, a "gang investigator" for the Los Angeles County Sheriff's Department (9 RT 1781), gave general testimony regarding typical activities of Hispanic street gang members (9 RT 1786-1795), and specific testimony regarding the B.P. and E.S.P. gangs and their rivalry. (9 RT 1795-1811.) Thereafter, the gang investigator testified that when the five B.P. members involved in this case went after Toro, Mr. Sandoval brought along the "heavy artillery," i.e., the CAR-15, as part of a "methodical" "plan" to not only provide cover for his fellow gang members in their assault against Toro, but also to provide "cover fire against police" if necessary. (9 RT 1811-1814.) After multiple objections from defense counsel to this testimony, which were overruled (9 RT 1811-1814), the court held a sidebar conference at the request of defense counsel and then ordered the jury to disregard "the statement about the police." (9 RT 1814-1815.)[103]

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[103] In the sidebar conference, the prosecutor stated that the gang investigator had "over-stepped what I would expect from him." (9 RT 1815.)

Then, prior to the testimony of the prosecution's second gang expert, the court held an Evidence Code section 402 hearing out of the presence of the jury. During the hearing, Sergeant Richard Valdemar, who supervises the prison gang section of the major crimes bureau in the Los Angeles County Sheriff's Department (9 RT 1828, 1863), testified that a gang member's possession of a CAR-15 in a gang hit like that which B.P. members attempted to effectuate in this case would serve to cover and protect the B.P. members if they became involved in a gun fight with rival gang members and to engage any police who happened upon the scene during the gang hit. (9 RT 1833, 1838.) According to Sgt. Valdemar, when gang members like those involved in this case embark on a gang hit, "they tactically deploy." And, in doing so, they "always" account for the possibility that police may show up. Arming themselves with weapons such as a CAR-15 enables them to "out gun the police." (9 RT 1834-1835.)

Sgt. Valdemar had never spoken with any members of B.P. (9 RT 1841, 1915.) The evidence adduced concerning his interviews of gang members was limited to one case that occurred two or three years before Sgt. Valdemar's testimony. In that case, an unidentified gang member shot a police officer with an AR-15. In the aftermath of that shooting, Sgt. Valdemar talked to gang members who had been involved in the shooting. They indicated that one of the purposes

for the presence of the AR-15 in that case was to account for the possibility of police showing up. (9 RT 1838-1839.)[104]

Defense counsel stipulated to the sergeant's general expertise regarding gangs. (9 RT 1828.) However, defense counsel moved to prohibit the prosecution from presenting the sergeant's testimony to the jury on the grounds of lack of foundation and speculation. (9 RT 1843.) The court overruled the objection, finding Sgt. Valdemar's proffered testimony was "highly probative...." (9 RT 1843.) Although the court acknowledged the sergeant's testimony was generalized, since he had no personal knowledge concerning B.P., the court felt it was for the jury to determine whether his opinion was applicable in this case. (9 RT 1844.)

In the presence of the jury, after discussing the history and culture of Hispanic gangs (9 RT 1868-1875), Sgt. Valdemar testified that, in his opinion, B.P. members "deploy[ed] ... like a military unit" at Toro's residence. Armed with the CAR-15, Mr. Sandoval took a "tactical[]" "position of advantage[,]" enabling him to 1) provide cover for his fellow gang members, 2) open fire on the target if

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[104] The sergeant also adverted to another case in which a female officer of the Los Angeles Police Department "was shot with an AR-15" while responding to a crime scene. (9 RT 1839.) No other details regarding that incident were provided in the sergeant's testimony.

necessary, and/or 3) shoot at anybody, including police, who "interfere[d] with the shooting." (9 RT 1893-1894.)[105] According to the sergeant, the possibility of police arriving on scene during the attempted attack on Toro was one of the reasons why Mr. Sandoval had the CAR-15. (9 RT 1898.) The CAR-15 would "[n]ormally ... out gun the police...." Mr. Sandoval was the "back up man[,]" and "if the police pulled into the kill zone, it would be the back up man's duty to take them on and pin them down or kill them if possible." (9 RT 1899.)

Finally, the following exchange occurred during the prosecutor's direct-examination of Sgt. Valdemar:

> Q: I want [you to] assume for just a minute that the Barrio Pobre gang members that we've been talking about, those five gang members, went over there to kill Toro and their goal was to kill Toro; and that one of the defendants, Miguel Camacho, who is Rascal, is walking up, and he's actually on his way armed with a .45 caliber handgun to knock [on] the house where Toro is; and while that is going on, two gang detectives, Detective Daryle Black and Rick Delfin are driving down the street, and just happen to be going down Lime [Avenue]

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[105] The prosecutor elicited this testimony by asking Sgt. Valdemar to opine on the methodology of the planned assault on Toro, in which Rascal, Pipas, Mr. Bojorquez, and Mr. Del Rio were "in possession of hand guns[,] and Mr. Sandoval "was in possession of a CAR-15...." The prosecutor made this request of the sergeant in a hybrid hypothetical/case-specific question — asking the sergeant to "assume" certain facts, and specifically naming Toro and all five of the B.P. members who were involved. (9 RT 1892-1893.)

right in the middle when this assault was going to take place. [¶] How would you expect the person with the CAR-15 to react when he saw the detectives looking at Rascal, and he believed they were going to stop him or arrest him with a handgun?

A: I would expect that he would take on the police —

Mr. Ringgold: Objection, Your Honor. [¶] May we approach?

The Court: Yes.

(9 RT 1899-1900.)

During the sidebar conference, defense counsel contended that this line of questioning was beyond the sergeant's expertise and invaded the province of the jury by "put[ting] into the jury's mind the intent of the defendant." (9 RT 1901.) Specifically, defense counsel argued the prosecutor was "trying to put into the mind of the jury that the defendant has some premeditation against the police...." (9 RT 1902.) Defense counsel contended there was no foundation for the sergeant to opine on Mr. Sandoval's mental state in this regard. Whether the killing of Detective Black was premeditated and deliberate was a question for the jury, and not a proper subject of opinion testimony by a gang expert. (9 RT 1903.) The court expressed concern, stating, "I don't want [the sergeant] to get into anything that is the jury's province, and that is to the mental state of the defendant." (9 RT

1905.) The court also stated: "I think he's going beyond his expertise as a gang expert." (9 RT 1906.)

When proceedings resumed before the jury, the prosecutor pursued a different line of inquiry with Sgt. Valdemar. (9 RT 1907-1908.) None of Sgt. Valdemar's testimony was stricken, and the court did not make a ruling in the presence of the jury on the defense objection that precipitated the foregoing sidebar conference.

C. Permissible Bounds of Expert Opinion Testimony

"Opinion testimony is generally *inadmissible* at trial." (*People v. Torres* (1995) 33 Cal.App.4th 37, 45, italics in the original; citing Evidence Code sections 800, 801.) However, the opinion testimony of witnesses recognized as experts by the court "may be admitted in circumstances where it will assist the jury to understand the evidence or a concept beyond common experience." (*Torres, supra*, at p. 45.) Thus, expert opinion is admissible if it is "[r]elated to a subject that is sufficiently beyond common experience [and] would assist the trier of fact." (Evidence Code section 801, subdivision (a).)

"A witness is qualified to testify as an expert if the witness has special knowledge, skill, experience, or education pertaining to the matter on which the testimony is offered." (*People v. Mendoza* (2000) 24 Cal.4th 130, 177; citing

Evidence Code section 720.) A showing of such proficiency is a foundational prerequisite to the admissibility of expert testimony. (*People v. Rodriquez* (1969) 274 Cal.App.2d 770, 776.) The requisite expertise is not attained simply by exposure to the subject matter concerning which the testimony is offered. "[M]ere observation ... without inquiry, analysis or experiment, does not invest the [observer] with expertise...." (*People v. Hogan* (1982) 31 Cal.3d 815, 853, disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836.) Thus, when a police officer is offered as an expert witness concerning a particular topic relevant to law enforcement, the officer must have experience consisting of more than general exposure to the topic. (*People v. Chakos* (2007) 158 Cal.App.4th 357, 367-368.) "Mere and unidentified contact with undefined investigations is manifestly not substantial evidence that an officer is in any way" vested with expertise in any particular field. (*Ibid.*) "In evaluating the admissibility of testimony as to technical or other specialized knowledge, the trial court in each instance must examine whether what is proffered as knowledge truly deserves the label, and must ask 'does this particular expert have sufficient specialized knowledge to assist the jurors in this case?'" (*United States v. Webb* (9th Cir. 1997) 115 F.3d 711, 718 (conc. opn. of Jenkins, J.); quoting 3 Weinstein's Evidence (1995) ¶ 702[1], p. 702-9.)

Designation as an expert does not confer upon the witness *carte blanche* to opine on a wide variety of subjects. Rather, "an expert may only be allowed to give opinions in an area for which he is actually qualified." (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1377-1378.)

"Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?" (*People v. Richardson* (2008) 43 Cal.4th 959, 1008, internal quotation marks omitted.) Thus, "any material that forms the basis of an expert's opinion must be reliable." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) "Like a house built on sand, the expert's opinion is no better than the facts on which it is based." (*Ibid.*, internal quotation marks omitted.)

The opinions of expert witnesses are offered on the basis of assumed facts presented in hypothetical questions. "Obviously, there is a difference between testifying about specific persons and about hypothetical persons.... [U]se of hypothetical questions is proper." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3.) "Generally, an expert may render opinion testimony on the basis of facts given in a hypothetical question that asks the expert to assume their truth." (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618, internal quotation marks

omitted.) "Such a hypothetical question must be rooted in facts shown by the evidence, however." (*Ibid.*)

A "trial court is obligated by Evidence Code section 352 'to weigh the probative value of inadmissible evidence relied upon by an expert witness ... against the risk that the jury might improperly consider it as independent proof of the facts recited therein.'" (*People v. Killebrew*, *supra*, 103 Cal.App.4th at p. 659; quoting *People v. Gardeley*, *supra*, 14 Cal.4th at p. 619.)

1. Expert Opinion Testimony Concerning the Mental State and/or Guilt of the Accused

"Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evidence Code section 805.) "The fact that an opinion or inference is unobjectionable merely because it embraces an ultimate issue does not mean, however, that all opinions embracing the ultimate issue are admissible." (1 McCormick on Evidence (6th ed. 2006) § 12, p. 61, fn. 12.) "With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence." (*People v. Melton* (1988) 44 Cal.3d 713, 744.)[106]

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[106] A trial court "must vigilantly guard against any attempt by an expert to opine on the ultimate *legal* issues in th[e] case." (*In re MTBE Products Liability Litigation* (S.D.N.Y. 2009) 643 F.Supp.2d 482, 505, italics in the original.)

> A consistent line of authority in California as well as other jurisdictions holds a witness cannot express an opinion concerning the guilt or innocence of the defendant. [Citations.] ... [T]he reason for employing this rule is not [that] guilt is the "ultimate issue of fact" to be decided by the jury. Opinion testimony often goes to the ultimate issue in the case. [Citation.] Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.

(*People v. Torres*, *supra*, 33 Cal.App.4th at pp. 46-47; accord, *United States v. Spalding* (1935) 293 U.S. 498, 506 ["The experts ought not to have been asked or allowed to state their conclusions on the whole case."]; *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at pp. 77-78.)

> Undoubtedly some highly opinionated statements by the witness amount to nothing more than an expression of his general belief as to how the case should be decided.... All courts exclude such extreme, conclusory expressions. There is no necessity for this kind of evidence; its receipt would suggest that the judge and jury may shift responsibility for the decision to the witness[]. In any event, the opinion is worthless to the trier of fact.

(1 McCormick on Evidence, *supra*, § 12, p. 60, footnote omitted.)

"An expert ... may not testify that an individual had specific knowledge or possessed a specific intent." (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513.) "No witness can state with what purpose another performed an act. What the purpose of an act was is an inference to be drawn from facts, and the witness

may state the facts, but must leave it to the jury to determine, from those facts, what the purpose was." (*State v. Carrington* (1897) 15 Utah 480, 487 [50 P. 526, 528]; *State v. Montgomery* (2008) 163 Wn.2d 577, 591 [183 P.3d 267, 274]; *State v. Lawrence* (2000) 352 N.C. 1, 18 [530 S.E.2d 807, 818] [an expert witness is not better suited than a jury to determine whether a defendant in a murder case acted with deliberation].) Thus, in *United States v. Boyd* (D.C. Cir. 1995) 55 F.3d 667, the court held that a prosecutor may not "simply recite a list of 'hypothetical' facts that exactly mirror the case at hand and then ask an expert to given an opinion as to whether such facts prove an intention" comprising the mens rea of the charged offense. (*Id.* at p. 672.)[107] And, in *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, the Court of Appeal, in refuting a defendant's claim that the prosecutor had adduced "gang expert testimony about his knowledge and intent[,]" stressed that the trial court had "cautioned the prosecutor not to ask questions of [the expert] to

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[107] Federal Rules of Evidence, rule 704, subdivision (b) provides: "No expert witness testifying with respect to the mental state of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are mattes for the trier of fact alone." Congress intended this provision to apply "'to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven ... e.g., premeditation in a homicide case, or lack of predisposition in entrapment'" (*United States v. Windfelder* (7th Cir. 1986) 790 F.2d 576, 580, ellipsis in the original.)

elicit his opinion of [the defendant's] knowledge and intent[]" (*id.* at p. 1549), and that the expert's "testimony did not embrace [the defendant's] particular knowledge or his intent, specific or otherwise." (*Id.* at p. 1551.)[108]

"[I]ntent always remains an issue of fact...." (*People v. Colantuono* (1994) 7 Cal.4th 206, 221.) "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." (*Morissette v. United States*, *supra*, 342 U.S. at p. 274.) "[S]o long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury." (*Ibid.*, internal quotation marks omitted; *Goldman v. United States* (1918) 245 U.S. 474, 477 [noting "the province of the jury [to] determin[e] questions of credibility and weight of evidence"]; *People v. Clay* (1964) 227 Cal.App.2d 87, 98 ["It is the court and not the witness which must declare what the law is...."]; Evidence Code section 312, subdivision (a) ["All questions of fact are to be decided by the jury."].) Thus, an "expert cannot give an opinion on whether the defendant actually formed the mental state for the crime charged, such as malice aforethought, premeditation and

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[108] Coincidentally, the gang expert in the *Gonzalez* case was Sgt. Valdemar (*Gonzalez*, *supra*, 126 Cal.App.4th at p. 1546), who, as noted above, was the principal gang expert involved in the instant case.

deliberation, purpose to kill, knowledge that death would result or extreme recklessness. Those questions are left for the finder of fact to determine." (Reece, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide* (1991) 38 UCLA L. Rev. 699, 736.)

The foregoing principles are aptly summed up in the following remarks of the Supreme Court of Washington: "Testimony that tells the jury which result to reach is likely not helpful to the jury..., is probably outside the witness's area of expertise..., and is likely to be unfairly prejudicial...." (*State v. Montgomery*, *supra*, 183 P.3d at p. 274, fn. 5.)

2. Expert Opinion Testimony in Gang Cases

In criminal cases involving gang members, qualified experts may properly testify about "the culture and habits of criminal street gangs...." (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 617.) "The use of expert testimony in the area of gang sociology and psychology is well established." (*People v. Lindberg* (2008) 45 Cal.4th 1, 46, internal quotation marks omitted.) However, "police officers who testify as experts on gangs" are not permitted to "state any opinions they may have about gangs and gang activities." (*People v. Killebrew*, *supra*, 103 Cal.App.4th at p. 654.) Such experts may not testify, with respect to a charged gang-related offense, "that a specific individual had specific knowledge or

possessed a specific intent." (*Id.* at p. 658 ; *People v. Ward* (2005) 36 Cal.4th 186, 209-210 [while gang experts may testify concerning the "'culture and habits of criminal street gangs'", they may "not render an impermissible opinion as to [a] defendant's actual intent"], cert. den. *sub nom. Ward v. California* (2006) 547 U.S. 1043.)

In *People v. Killebrew*, *supra*, 103 Cal.App.4th 644, the defendant was convicted of conspiring to possess a loaded handgun while active as a participant in a criminal street gang. During trial, "a police officer testified as an expert on gangs to establish not only Killebrew's membership in a criminal street gang, but his *subjective knowledge and intent to possess the handgun*." (*Id.* at p. 647, italics added.) The expert testified when gang members travel together in a vehicle and "one gang member in [the] car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*Id.* at p. 652.) Because this opinion testimony was tailored to the specific facts of the case (*id.* at p. 652, fn. 7), the expert rendered an opinion as to "the subjective *knowledge and intent* of each occupant" of vehicle. (*Id.* at p. 658, italics in the original.) And because the charged offense required proof that the defendant knowingly agreed

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with others to possess the firearm,[109] the Court of Appeal concluded the admission of the expert's testimony, which was "the only evidence" on this subject, was improper. It was "the type of opinion that did nothing more than inform the jury how [the expert] believed the case should be decided." (*Id.* at pp. 658-659) Further, the "topic" the expert addressed was "not one for which expert testimony is necessary." (*Id.* at p. 658) The expert "simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved for the trier of fact." The expert's "beliefs were irrelevant." (*Ibid.*)

"*Killebrew* prohibits an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial." (*People v. Gonzalez*, *supra*, 126 Cal.App.4th at p. 1551.) A gang expert cannot offer testimony that is "tantamount to expressing an opinion as to [the] defendant's guilt." (*People v. Ward*, *supra*, 36 Cal.4th at p. 210; *People v. Torres*, *supra*, 33 Cal.App.4th at pp. 46-48.)

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[109] As noted, the charge in *Killebrew* was conspiracy to possess a loaded firearm while active as a participant in a criminal street gang. (*People v. Killebrew*, *supra*, 103 Cal.App.4th at p. 647.) That charge was brought pursuant to Penal Code sections 182 and 12031, subdivision (a)(2)(C). The charge required proof of knowledge of the presence of the firearm. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332; CALCRIM No. 2530; see also *Baender v. Barnett* (1921) 255 U.S. 224.) The charge also required proof of an agreement, as the essence of any conspiracy is a criminal agreement. (*Iannelli v. United States* (1975) 420 U.S. 770, 777.)

"'[T]he expert testimony of a law enforcement officer ... often carries an aura of special reliability and trustworthiness.'" (*United States v. Gutierrez* (9th Cir. 1993) 995 F.2d 169, 172; quoting *United States v. Espinosa* (9th Cir. 1987) 827 F.2d 604, 613.) This circumstance "ought to caution [the] use" of expert testimony of police officers presented "by the prosecution in criminal cases...." (*United States v. Young* (2d Cir. 1984) 745 F.2d 733, 766 (conc. opn. of Newman, J.); *Clark v. Arizona* (2006) 548 U.S. 735, 776 [recognizing the risk of jurors believing expert opinions to "show more than they do"]; *Hernandez v. McGrath* (E.D. Cal. 2009) 595 F.Supp.2d 1111, 1128-1132 [improperly admitted expert opinion testimony concerning defendant's motive for shooting victim was prejudicial error where it was the prosecution's only evidence of deliberation and premeditation].)

Expert testimony regarding the typical mental states with which certain crimes are committed is akin to criminal profile evidence. (*United States v. Webb*, *supra*, 115 F.3d at p. 719 (conc. opn. of Jenkins, J.).) "[T]estimony of criminal profiles is highly undesirable as substantive evidence because it is of low probativity and inherently prejudicial." (*United States v. Gillespi* (9th Cir. 1988) 852 F.2d 475, 480; *People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006.)

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> Generally, the admission of this evidence is nothing more than the introduction of the investigative techniques of law enforcement officers. Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officers investigating criminal activity.... [P]rofile evidence is nothing more than the opinion of those officers conducting the investigation. Although this information is valuable in helping ... agents to identify potential [criminals], we denounce the use of this type of evidence as substantive evidence of a defendant's innocence or guilt.

(*United States v. Hernandez-Cuartas* (11th Cir. 1983) 717 F.2d 552, 555; accord *United States v. Lui* (9th Cir. 1991) 941 F.2d 844, 847-848.)

D. Admission of Evidence that Invades the Fact-Finding Province of the Jury With Respect to the Intent Element of a Charged Offense Violates the Constitutional Rights of the Accused.

"[E]very defendant has the right to be tried based on evidence tying him to the specific crime charged, and not general facts accumulated by law enforcement regarding a particular criminal profile." (*People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1072.) "Introduction of the latter evidence improperly invites a finding of guilt by association and undermines the defendant's right to a fair trial. (*Ibid.*) "The right to have factual questions decided by the jury is crucial to the right to trial by jury." (*State v. Montgomery, supra*, 183 P.3d at p. 273.)[110]

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[110] Members of the Constitutional Convention universally esteemed the jury trial right, with supporters of the "the plan of the convention" regarding it as "a valuable safeguard to liberty," and opponents of the plan considering it "the very palladium of free government." (The Federalist No. 83 (Alexander Hamilton).)

The foregoing authorities demonstrate that the erroneous admission of expert testimony concerning an accused's mental state violates the accused's due process right to a fair trial and the right to trial by jury.

E. Analysis

By admitting Sgt. Valdemar's testimony that Mr. Sandoval planned in advance to shoot any police officers who interrupted B.P.'s assault on Toro (9 RT 1893-1894, 1898-1900), which corroborated the testimony of Investigator Lugo that the trial court had ordered the jury to disregard (9 RT 1811-1815), the trial court abused its discretion and violated Mr. Sandoval's constitutional rights. Because the prosecution's evidence that Mr. Sandoval acted with premeditation and deliberation in shooting Detective Black was weak, and because Sgt. Valdemar's erroneously admitted testimony pertained to that purported mental state, the trial court's error was prejudicial.

1. Error

The trial court erred by admitting Sgt. Valdemar's opinion testimony that the B.P. members' planned assault on Toro involved planning for the possibility of police interrupting the attack. The sergeant testified that Mr. Sandoval brought the

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According to Hamilton, "all [were] satisfied of the utility of the institution, and of its friendly aspect to liberty." (*Ibid.*)

CAR-15 along as part of a plan for the contingency of police arriving on the scene, and that in the event police arrived, it would have been Mr. Sandoval's "duty to taken them on and pin them down or kill them if possible." (9 RT 1899-1900.) However, the sergeant was no more qualified than the jury to determine whether Mr. Sandoval took part in a premeditated plan to "take on" any police who interrupted B.P.'s attack on Toro. (*People v. Torres*, *supra*, 33 Cal.App.4th at pp. 46-47; 1 McCormick on Evidence, *supra*, § 12, p. 60.) And, the sergeant's testimony constituted an impermissible opinion on the pivotal mental state of premeditation. (*People v. Ward*, *supra*, 36 Cal.4th at p. 209; *People v. Killebrew*, *supra*, 103 Cal.App.4th at pp. 658-659.) Furthermore, the sergeant's testimony constituted an impermissible opinion as to Mr. Sandoval's guilt on the first degree murder charge. (*Morissette v. United States*, *supra*, 342 U.S. at p. 274; *State v. Montgomery*, *supra*, 183 P.3d at pp. 273-274; 1 McCormick on Evidence, *supra*, § 12, p. 60.)

Because an expert witness cannot "render an ... opinion as to [a] defendant's actual intent" (*People v. Ward*, *supra*, 36 Cal.4th at p. 209), *ipso facto*, no foundation was established for the gang expert testimony in this case that Mr. Sandoval brought the CAR-15 to Toro's residence as part of a plan to "take on" any police officers who might show up during the retaliatory strike against Toro.

(9 RT 1893-1894, 1898-1900.) The only purported foundation proffered for the sergeant's testimony in this regard was his interview of gang members regarding a single gang-related shooting of a police officer with an AR-15. The gang members involved in that single incident reported to the sergeant that the AR-15 had been brought along in order to account for the possibility of police showing up during the course of a gang hit. (9 RT 1838-1839.)[111] The information the sergeant received regarding this single incident did not vest the sergeant with expertise to venture an opinion as to the mental state of all gang members who take powerful weapons to gang hits. (See *People v. Hogan*, *supra*, 31 Cal.3d at p. 853; *People v. Chakos*, *supra*, 158 Cal.App.4th at p. 368 ["Mere and unidentified 'contact' with undefined 'investigation'" does not "show an expertiese...."].) Furthermore, the sergeant had never spoken with a member of the B.P. gang. (9 RT 1841, 1915.)

When an expert opines regarding the "*typical*" mental states of criminals interviewed by the expert, and the expert's opinion testimony implies that the

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[111] Mr. Sandoval had no opportunity to confront and cross-examine the declarants who gave this hearsay account to the sergeant. The reliability of this hearsay evidence is unknown. Hence, the value of any opinion Sgt. Valdemar formed on the basis of this information is unknown. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618 ["Like a house built on sand, the expert's opinion is no better than the facts on which it is base."].)

defendant on trial acted with that typical mental state, then the defendant's supposedly "guilty knowledge [is made to] flow[] by inference from the guilty knowledge of nameless others." (*United States v. Webb*, *supra*, 115 F.3d at p. 719 (conc. opn. of Jenkins, J.), italics in the original.) Such generalized testimony regarding the mental state of a gang member is impermissible. (*People v. Gonzalez*, *supra*, 126 Cal.App.4th at p. 1551; *People v. Killebrew*, *supra*, 103 Cal.App.4th at pp. 658-659.) It deprives the accused of his or her "right to be tried based on the evidence against him or her...." (*United States v. Hernandez-Cuartas*, *supra*, 717 F.2d at p. 555.)

The trial court realized Sgt. Valdemar's testimony was impermissible when it stated in a side-bar conference, after the testimony had come in, that it did not want the sergeant to get into matters within the jury's province, such as Mr. Sandoval's "mental state," and that the sergeant's testimony had gone beyond his expertise...." (9 RT 1905-1906.) However, as noted above, the trial court allowed the testimony to stand and did not make a ruling in the presence of the jury on the defense objection to the testimony. By allowing this testimony to go to the jury, the court erred. (*People v. Gonzalez*, *supra*, 126 Cal.App.4th at p. 1551; *People v. Killebrew*, *supra*, 103 Cal.App.4th at pp. 658-659.) The error was of constitutional magnitude because it rendered Mr. Sandoval's trial fundamentally

unfair and effectively shifted responsibility for resolving the factual question regarding Mr. Sandoval's mental state from the jury to Sgt. Valdemar. (*People v. Castaneda*, *supra*, 55 Cal.App.4th at p. 1072; *State v. Montgomery*, *supra*, 183 P.3d at p. 273.)

2. Prejudice

Although the trial court instructed the jury to disregard Investigator Lugo's testimony that Mr. Sandoval had the CAR-15 as part of a "methodical" "plan" to provide "cover fire against police" if necessary (9 RT 1814-1815), Sgt. Valdemar's testimony that Mr. Sandoval had the powerful weapon as part of a plan to "take on" any police who may arrive (9 RT 1893-1894, 1899-1900) was allowed to stand. Thus, from the perspective of the jurors, the trial court tacitly approved their consideration of Sgt. Valdemar's testimony in this regard. During closing argument, the prosecutor specifically adverted to Sgt. Valdemar's testimony. In reliance on that testimony, the prosecutor urged the jury to conclude that Hispanic street gang members "always consider law enforcement's potential presence at their shootings." (10 RT 2054-2055.) In further reliance on Sgt. Valdemar's testimony, the prosecutor argued that Hispanic street gang members "bring long arms in order to fend off police and apprehension of their fellow gangsters." (10 RT 2055.) Then, the prosecutor expressly urged the jury to

consider the testimony of Investigator Lugo and Sgt. Valdemar regarding the "thought processes" of gang members when "consider[ing] whether there's premeditation and deliberation." (10 RT 2059.)

Because the error was error of constitutional magnitude, reversal is compelled unless the State is able to demonstrate that the first degree murder "verdict rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Even if the error is not deemed to be of constitutional magnitude, Mr. Sandoval is entitled to reversal of the first degree murder verdict, because "it is reasonably probable that" the jury would have found Mr. Sandoval guilty of second degree murder rather than first degree murder "in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836, cert. den. *sub nom. Watson v. Teets* (1957) 355 U.S. 846.)

Numerous factors compel this conclusion: First, there is the risk that jurors will believe expert opinions "show more than they do." (*Clark v. Arizona*, *supra*, 548 U.S. at p. 776.) Second, "the expert testimony of a law enforcement officer ... often carries an aura of special reliability and trustworthiness." (*United States v. Gutierrez*, *supra*, 995 F.2d at p. 172.) This is so even when the expert testimony consists of the officer's "irrelevant" opinion as to the accused's intent. (*People v.*

Killebrew, *supra*, 103 Cal.App.4th at p. 658.) Third, none of the *Anderson* factors are present in the instant case. (*Ante*, p. 158.) Fourth, as summarized above, the prosecutor expressly urged the jury to consider the impermissible expert testimony in assessing premeditation and deliberation. (10 RT 2054-2055, 2059.) Fifth, as to the attempted murder count charge in count II, the jurors were struggling with the issue of premeditation, as reflected by a note they sent to the trial court. (10 RT 2082; 5 CT 1179.) Sixth, as discussed below, the trial court erroneously failed to instruct the jury that it could only rely on circumstantial evidence to conclude Mr. Sandoval acted with premeditation and deliberation if that was the only reasonable conclusion supported by the circumstantial evidence. (*Infra*, pp. 222-239.) Because Mr. Sandoval did not testify, and because he did not state during his confession that he acted with premeditation and deliberation, the extent of the evidence regarding his mental state was necessarily circumstantial. The jury should have been instructed that Sgt. Valdemar's testimony regarding Mr. Sandoval's purported mental state was merely circumstantial evidence. Accordingly, there is no basis for concluding with any degree of reasonable probability that the jury would have returned a first degree murder verdict without the impermissible expert testimony.

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VI.

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED MR. SANDOVAL'S DUE PROCESS RIGHTS BY ADMITTING INFLAMMATORY, NON-TESTIMONIAL HEARSAY NOTES WRITTEN BY RASCAL — NOTES CONTAINING ASSERTIONS THAT B.P. MEMBERS WERE NOT KILLING ENOUGH PEOPLE.

In the days before Detective Black was killed, Rascal made plans for a B.P. meeting. As he was doing so, he wrote notes. (7 RT 1303, 1398-1399, 1403; People's Exhibit 26.) In his notes, he listed the names of B.P. members, wrote out complaints that B.P. members did not have enough guns and were not adequately attending to gang affairs, scrawled a remark that there "not enough dead [mother fuckers]," and wrote that certain B.P. members needed "get [their] ride on," i.e., "earn" their keep. (9 RT 1791, 1889; People's Exhibit 26.)

The B.P. meeting Rascal had planned took place at Lazy's home in Long Beach in the early afternoon on April 29, 2000. (6 RT 1158, 1222, 1236, 1250-1251; 7 RT 1305-1315; 9 RT 1858.) *After* the meeting, several B.P. members, including Mr. Sandoval, gathered together in an alleyway in Compton where they frequently met. (7 RT 1318-1319; 9 RT 1858-1861; 10 RT 1969-1970; 2 CT 276-278; People's Exhibits 66 & 67.) While they were in the alleyway, members of the E.S.P. gang drove by and fired gunshots at the B.P. members. (10 RT 1969-

1970; 2 CT 278.) Shortly thereafter, B.P. members decided to retaliate against E.S.P. by going after Toro, a known leader of the E.S.P gang. (2 CT 281, 287-289.)

During Mr. Sandoval's trial, the trial court allowed the prosecutor to introduce Rascal's notes into evidence, over repeated defense objections. (6 RT 1080-1090, 1141-1154; 7 RT 1299-1300, 1303, 1339-1340, 1350-1356, 1385-1386, 1391-1392, 1394, 1403-1404, 1413-1417; 9 RT 1786-1794, 1888-1891; 10 RT 1975-1976, 1987-1988, 2028; People's Exhibit 26.) The court admitted the inflammatory notes, including Rascal's comment about "not enough dead [mother fuckers]," pursuant to the coconspirator exception to the hearsay rule. The court found Rascal and Mr. Sandoval were members of an uncharged conspiracy to kill Toro. (7 RT 1416-1417; 10 RT 1987-1988.) The prosecutor argued to the jury that Rascal's written comment reflected the mental state that was adopted by Mr. Sandoval when he shot Detective Black. (10 RT 2028.)

Rascal's notes were hearsay. The trial court abused its discretion by admitting the notes. The prosecution adduced no evidence that the contents of the notes were ever imparted to anyone at the B.P. meeting or anyone at any other time. Nobody who participated in the B.P. meeting testified in Mr. Sandoval's

trial.[112] Furthermore, Rascal's notes were written and the B.P. meeting occurred *before* certain B.P. members conspired/agreed to kill Toro in retaliation for the drive-by shooting carried out by E.S.P. against B.P. Thus, Rascal's notes did not constitute statements made in furtherance of and during the course of a conspiracy.

The trial court's admission of Rascal's notes was error of constitutional magnitude. Mr. Sandoval had no opportunity to confront and cross-examine Rascal regarding the notes, because Rascal did not testify in Mr. Sandoval's trial. Although the introduction into evidence of Rascal's notes did not violate Mr. Sandoval's Confrontation Clause rights because the notes were non-testimonial, the admission of the notes violated Mr. Sandoval's due process rights.

A. Standard of Review

The admission of hearsay evidence over objection is typically reviewed for an abuse of discretion. (*People v. Martinez* (2000) 22 Cal.4th 106, 120.) When

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[112] Although several female acquaintances of the B.P. members testified that they saw the B.P. members gathering for the meeting, none of them participated in the meeting or heard what was said during the meeting. (6 RT 1158, 1172-1173, 1198, 1224, 1251-1252; 7 RT 1307-1317, 1377-1378, 1399.) Even female members of the B.P. gang were not allowed to participate in meetings of this nature. (6 RT 1253.) No male B.P. members testified in Mr. Sandoval's trial. Nevertheless, the prosecutor argued to the jury, without any evidentiary foundation, and over defense objection, that, at the meeting, B.P. members "were talking about not putting in enough work and not killing enough people." (10 RT 2028.)

the admission of such evidence implicates constitutional rights, the trial court's rulings are reviewed independently. (*People v. Seijas* (2005) 36 Cal.4th 291, 204.)

B. Factual Background

During the prosecutor's opening statement in the guilt phase, the prosecutor told the jury he would present evidence regarding messages purportedly conveyed by B.P. leaders to other members of the B.P. gang in the course of the B.P. meeting that took place at Lazy's home on April 29, 2000, several hours before Mr. Sandoval shot and killed Detective Black. The messages were that B.P. members were allowing people to infringe on their territory, they "weren't committing enough crimes[,] and, most specifically, they weren't killing enough people." (6 RT 1080.) Defense counsel requested a sidebar conference, objected on relevance grounds to the prosecutor's reference to the statement about "not killing enough people[,]"[113] and asked the court to admonish the jury to disregard that remark. (6 RT 1081, 1085-1086.)[114] The prosecutor contended the statement

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[113] Defense counsel asserted the statement about "not killing enough people" was merely an irrelevant reference to "other crimes[,]" or a note reflecting the author's contemplation about "commit[ting] more crimes." (6 RT 1086.)

[114] Defense counsel stated they had received no discovery regarding a "discussion about not killing enough people." The prosecutor rejoined that discovery regarding the statement had been provided to counsel. Defense counsel asked the prosecutor to direct them to the discovery regarding that statement. (6 RT 1086.)

"[g]oes strictly to premeditation for the crime." The trial court agreed, characterizing the statement as "highly probative[.]" (6 RT 1086.) The trial court declined to admonish the jury to disregard the statement. (6 RT 1085.)

The statement about "not killing enough people" was contained in notes Rascal had written in preparation for the B.P. meeting. Rascal had actually written that there were "not enough dead mother fuckers."[115] A gang expert later testified that Rascal's note concerning this subject reflected a concern that B.P. gang members were not killing enough rival gang members. (6 RT 1144; 9 RT 1889; People's Exhibit 26.)

Resuming with his opening statement, the prosecutor commented that Rascal's notes contained a list of B.P. members, including Mr. Sandoval and the other gang members who were with him when the shooting occurred. (6 RT 1087-1088.) The prosecutor also remarked that Rascal's notes admonished fellow B.P. members: "Get your ride on, you bitch ass fools." According to the prosecutor, this meant B.P. members were being directed to "take care of" rival gang members, including E.S.P. gang members generally, and Toro specifically. (6 RT

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[115] In Rascal's notes, the vulgarity was misspelled "muthaphuckers." (6 RT 1148; People's Exhibit 26.)

1089.)[116] Then, the prosecutor said Rascal's notes reflected B.P. leaders were upset about B.P. members allowing rival gang members to write graffiti in their territory and wanted them to "take care of that[.]" Defense counsel interposed a hearsay objection, which the trial court overruled. (6 RT 1089.) The prosecutor repeated that Rascal's notes stated there were "not enough dead mother fuckers," and commented: "I think the message is real clear they're pissed off because they are not getting enough work in their hood, and they are not killing enough people, and specifically, Toro is gonna be the target." (6 RT 1089-1090.) Defense counsel objected on relevance grounds. The court overruled the objection and told defense counsel not to repeat the objection. (6 RT 1090.)

During a subsequent recess, defense counsel stated "the 'not killing enough people' [statement] is very disturbing to the defense." Noting that the statement

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[116] Although Rascal's notes made no reference to E.S.P. or Toro (People's Exhibit 26), a videotape to which the prosecutor referred (6 RT 1081, 1086-1087), depicted Rascal making threatening writings concerning E.S.P. and Toro. (9 RT 1882-1887; People's Exhibit 68.) Prior to trial, the defense had objected to the admissibility of the videotape, which contained footage of events *subsequent* to the murder of Detective Black. (3 RT 494-498, 507; 1 CT 234-235.) The trial court had not ruled on the admissibility of the videotape by the time of the prosecutor's opening statement, but allowed the prosecutor to refer to it over defense objection. (6 RT 1081-1085.) Eventually, the trial court overruled defense objections to the videotape (9 RT 1749-1758), and allowed the prosecution to play the tape for the jury. (9 RT 1882-1887.) A gang expert testified the video depicted Rascal threatening to kill Toro. (9 RT 1887.)

was written on a piece of paper eventually recovered by police and that no showing had been made that Mr. Sandoval had participated in writing it or agreeing with its contents, defense counsel objected to the note on the grounds it was inadmissible hearsay, unduly prejudicial, and its admission would violate Mr. Sandoval's due process rights. (6 RT 1141-1142.) The prosecutor stated Rascal had written the notes, and the prosecution's gang experts would interpret the notes. (6 RT 1143-1144.) Furthermore, the prosecutor said "the subject matter of [the B.P.] meeting, ... [was] also the subject matter which was mentioned" in Rascal's notes. (6 RT 1144.)[117, 118] According to the prosecutor, "by ... shooting a police officer," Mr. Sandoval "adopt[ed] exactly the state of mind which is stated" in Rascal's notes. (6 RT 1153-1154.) Defense counsel again moved to exclude the "inflammatory" evidence in the notes about "not killing enough people," and specifically objected to the use of that statement to prove Mr. Sandoval's mental

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[117] Defense counsel did not point out the absence of evidence that the contents of Rascal's notes were ever imparted to anybody. Nobody who participated in the B.P. meeting testified in Mr. Sandoval's trial. Hence, there was no evidence as to what was stated at the meeting. There was certainly no evidence that Rascal's notes were read to those who attended the meeting.

[118] The prosecutor reiterated that the notes had been provided to defense counsel. (6 RT 1145.) Defense counsel said they had no information that Rascal was the author of the notes until the prosecutor made that assertion during his opening remarks. (6 RT 1147.)

state. (6 RT 1148-1149, 1153.) The court overruled the objection, stating:

> [T]he document which contains the notation, ["]not killing enough people,["] I presume a foundation is going to be laid by a gang expert indicating that this is material from the defendant's admitted gang members, either written by one of them or him. I have no idea who the author is and who the People are going to say authored it[.] [T]his was all present at the location where the defendant and his other gang members met and participated prior to the shooting that resulted in the death of the victim in count one. [¶] ... So I would imagine that it's going to be authenticated by a gang expert who is going to explain what those materials mean. [¶] Therefore, it is highly probative and much more probative than prejudicial.

(6 RT 1150-1151.)

Lucinda Lara, who had lived at Lazy's residence and dated Mr. Sandoval's codefendant, Mr. Bojorquez (7 RT 1299-1300, 1339-1340, 1350), identified a folder containing the notes Rascal had written. (7 RT 1303, 1350-1356.) Ms. Lara's step-sister, Kristen Trochez, also identified the notes. (7 RT 1385-1386, 1391-1392.) Ms. Trochez, who had acquired the notes from Ms. Lara, eventually gave the notes to police approximately one and a half years after the shooting. (7 RT 1391, 1394.)

Lucinda Lara's sister, Emily Lara, testified she had overheard Rascal talking to people for several days, setting up the B.P. meeting at Lazy's home. (7 RT 1403.) The following exchange then took place during the prosecutor's direct examination of Emily Lara:

The Prosecutor: Well, did you hear when Rascal was making the phone calls telling these folks they had to show up for the meeting? [¶] Did you hear him telling them what the meeting was about?

Defense Counsel: Objection; leading.

The Court: Excuse me?

Defense Counsel: Leading.

The Court: Overruled.

Defense Counsel: It does call for hearsay.

The Prosecutor: It would be an admission by a coconspirator.

The Court: Overruled.

The Prosecutor: Did you hear him discussing what the meeting was about.

The Witness: Yes. Like, they're slacking off. And, you know, they have to have this meeting and talk about what they're messing up on and stuff like that.

The Prosecutor: Did they talk about people they were letting in the hood like taggers and stuff?

The Witness: Yes

(7 RT 1403-1404.)

Shortly thereafter, in proceedings conducted outside the presence of the jury, defense counsel argued that statements made by Rascal regarding the

planning for the meeting were not properly admissible as coconspirator statements because they pertained to an uncharged conspiracy targeting E.S.P. and Toro. The prosecutor countered that a conspiracy need not be charged in order for the prosecution to proceed on a conspiracy theory. However, defense counsel rejoined that the prosecution was not proceeding on a conspiracy theory with respect to the charged offenses, and that because Mr. Sandoval and his fellow B.P. members had no idea police were going to show up during their attempted assault on Toro, Rascal's statements regarding the planning for the meeting were inadmissible. In turn, the prosecutor contended Mr. Sandoval's conduct during the shooting showed "total compliance" with the dictates purportedly conveyed at the B.P. meeting. (7 RT 1413-1315.) The trial court ruled that Rascal's statements were admissible as statements of a coconspirator because the prosecution was proceeding on theories predicated on conspiracy and aider and abettor liability. (7 RT 1416.) According to the court, the shooting of Detective Black was an inherent part of that conspiracy, because it was carried out in an effort to avoid arrest. (7 RT 1417.)

When the prosecutor presented gang expert testimony regarding Rascal's notes, the defense again objected on grounds of relevance, hearsay, and lack of

foundation, and the court again overruled the defense objection.[119] The gang experts testified that Rascal's notes were meant to signify to other B.P. gang members that they had not been adequately defending their territory, that they needed to start controlling criminal activity on behalf of B.P. in B.P. territory, and that they needed to start "killing people or [B.P.] rivals." (9 RT 1786-1794, 1888-1891.)

Just before the parties' guilt phase closing arguments, the trial court overruled a final defense objection to the admissibility of Rascal's notes. (10 RT 1975-1976, 1987-1988.)

During his closing argument in the guilt phase, the prosecutor argued, over defense objection, that Mr. Sandoval's premeditation began at the gang meeting at Lazy's home when B.P. members were talking about "not killing enough people." (10 RT 2028.)

C. Legal Principles Concerning the Admission of Evidence Pursuant to the Exception to the Hearsay Rule for Coconspirator Statements

Evidence Code section 1223 provides:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

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[119] However, the court did grant the defense request for a "continuing objection" to the contents of the notes. (9 RT 1788-1790.)

(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;

(b) The statement was made prior to or during the time that the party was participating in that conspiracy; and

(c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

A statement made by a person *before* he or she becomes a member of a conspiracy cannot be admitted under the coconspirator exception to the hearsay rule. (*People v. Jurado* (2006) 38 Cal.4th 72, 117-118.) This self-evident proposition derives from the foundational requirement that statements may only be admitted pursuant to the coconspirator exception if they are "made during and in furtherance of a 'continuing' conspiracy...." (*People v. Leach* (1975) 15 Cal.3d 419, 423; *Krulewitch v. United States* (1949) 336 U.S. 440, 442-443; *Fiswick v. United States* (1946) 329 U.S. 211, 216-217.)[120]

"[S]tatements which merely narrate past events are not to be deemed as made in furtherance of a conspiracy...." (*People v. Saling* (1972) 7 Cal.3d 844,

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[120] Subdivision (a) of Evidence Code section 1223, which sets forth one of the conjunctively prescribed foundational prerequisites to the admissibility of a coconspirator statement, requires the statement to have been made "by the delcarant *while* participating in [the] conspiracy...." (Italics added.)

852, fn. 8; *United States v. Fielding* (9th Cir. 1981) 645 F.2d 719, 727; *Van Riper v. United States* (2d Cir. 1926) 13 F.2d 961, 967.) "[A] statement is not in furtherance of the conspiracy unless it advances the ultimate objects of the conspiracy." (*United States v. Cornett* (5th Cir. 1999) 195 F.3d 776, 782.) "Mere idle chatter ... among coconspirators[] is not admissible...." (*Ibid.*, internal quotation marks omitted.) "[A] coconspirator's statement satisfies the 'in furtherance' requirement when the statement is part of the information flow between conspirators intended to help each perform his role." (*United States v. Doerr* (7th Cir. 1989) 886 F.2d 944, 951, internal quotation marks omitted.) "A statement that simply informs a listener of the declarant's criminal activities is not made in furtherance of the conspiracy; instead, the statement must somehow advance the objectives of the conspiracy." (*United States v. Mitchell* (8th Cir. 1994) 31 F.3d 628, 632.)

"Whether a statement was in furtherance of a conspiracy turns on the context in which it was made and the intent of the declarant in making it." (*United States v. Warman* (6th Cir. 2009) 578 F.3d 320, 338.) In order to determine whether statements made are in furtherance of a conspiracy, it is necessary to analyze "the totality of the facts and circumstances in the case." (*People v. Hardy* (1992) 2 Cal.4th 86, 146.)

When "the existence of a conspiracy is urged not for the purpose of imposing substantive liability but merely as a vehicle for using otherwise inadmissible hearsay evidence against the defendant[,]" there is "no basis for 'further breach of the general rule against the admission of hearsay evidence[.]'" (*People v. Leach*, *supra*, 15 Cal.3d at p. 435; quoting *People v. Saling*, *supra*, 7 Cal.3d at p. 853.)

Even if proffered hearsay evidence satisfies the foundational requirements of an exception to the hearsay rule, the evidence is not admissible unless it is relevant. (*People v. Allen* (1976) 65 Cal.App.3d 426, 433.) To be relevant, evidence must have a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evidence Code section 210.) In order for a statement[121] made by one person to prove that another person adopted the mindset reflected by the statement, the statement must have been communicated in some way to the person who purportedly adopted the mindset reflected by the statement. (See *People v. Lebell* (1979) 89 Cal.App.3d 772, 779-780.)

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[121] "For purposes of the hearsay rule, a 'statement' is defined as 'oral or written verbal expression' or 'nonverbal conduct ... intended ... as a substitute for oral or written verbal expression.'" (*People v. Lewis* (2008) 43 Cal.4th 415, 497, ellipses in the original.)

In a case where "the admissibility of evidence depends on the existence of a preliminary fact, [such as the foundational prerequisites for the application of a hearsay exception,] the burden is upon the proponent thereof to establish such existence[,] and ... it is incumbent on the trial court to see such evidence is disregarded where the jury could not reasonably find that the preliminary fact exists." (*Id.* at p. 779; *United States v. Cornett*, *supra*, 195 F.3d at p. 782.)

Because only testimonial hearsay is governed by the Confrontation Clause, (*Whorton v. Bockting* (2007) 549 U.S. 406, 420; *Davis v. Washington* (2006) 547 U.S. 813, 821-822),[122] constitutional regulation of nontestimonial hearsay derives from the Due Process Clause. Indeed, in *United States v. Hall* (9th Cir. 2005) 419 F.3d 980, cert. den. (2005) 546 U.S. 1080, the Ninth Circuit held, in a context where Confrontation Clause rights under *Crawford v. Washington*, *supra*, 541 U.S. 36, do not apply, the accused "nevertheless enjoys a due process right to confront witnesses against him." (*Hall*, *supra*, 419 F.3d at pp. 985-986; citing *Morrissey v. Brewer* (1972) 408 U.S. 471, 482.)

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[122] In *Crawford v. Washington* (2004) 541 U.S. 36, the Court held the *primary* concern of the Confrontation Clause is testimonial hearsay. "In *Davis* and *Bockting*, the Court reformulated this holding to say that the *sole* concern of the Confrontation Clause is testimonial hearsay." (Kirkpatrick, *Nontestimonial Hearsay After Crawford, Davis and Bockting* (2007) 19 Regent U. L.Rev. 367, 384, italics in the original, footnotes omitted.)

"[T]he Due Process Clause imposes a reliability requirement on evidence." (Chase, *Is Crawford a "Get Out of Jail Free" Card for Batterers and Abusers? An Argument for a Narrow Definition of "Testimonial"* (2005) 84 Or. L.Rev. 1093, 1107; citing *Manson v. Brathwaite* (1977) 432 U.S. 98, 114 [concluding that "reliability is the linchpin" for assessing the admissibility of evidence in this context].)

D. Analysis

Rascal's handwritten note about "not killing enough people," was hearsay. It was "offered to prove the truth of the matter stated." (Evidence Code section 1200.) Specifically, the prosecutor offered the written remark to prove Mr. Sandoval's mental state at the time of the shooting of Detective Black. (6 RT 1086; 10 RT 2028.) The prosecutor represented to the court that the subject matter set forth in Rascal's notes was the same subject addressed at the B.P. meeting that took place at Lazy' home several hours before the shooting. (6 RT 1144.)[123] And, according to the prosecutor, when Mr. Sandoval shot the detective, he "adopt[ed] exactly the state of mind ... stated" in Rascal's notes. (6 RT 1153-1154.) Furthermore, a gang expert called by the prosecutor testified that the note reflected

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[123] As noted above, the prosecutor made this representation despite the fact that no evidence was adduced regarding what was actually discussed during the B.P. meeting.

Rascal's concern that B.P. members were not killing enough rival gang members. (9 RT 1889.)

Rascal's notes were just that — Rascal's notes. The prosecution adduced no evidence that the contents of Rascal's notes were ever communicated to anybody. No evidence was presented that Rascal or any other B.P. member read or otherwise communicated the contents of Rascal's notes to other B.P. members at the B.P. meeting at Lazy's home. The notes may have constituted nothing more than Rascal putting to paper thoughts rattling around in his head. There was no evidence to the contrary. Thus, there was no evidence that the notes constituted statements made in furtherance of a conspiracy. (Evid. Code, § 1223, subd. (a); *United States v. Cornett*, *supra*, 195 F.3d at p. 782 ["[A] statement is not in furtherance of the conspiracy unless it advances the ultimate objects of the conspiracy."]; *United States v. Doerr*, *supra*, 886 F.2d at p. 951 [the statement must be shown to be "part of the information flow between conspirators intended to help each perform his role"].)

The statement in the notes about "not enough dead mother fuckers" cannot be deemed a statement made during and in furtherance of any conspiracy: In furtherance of what conspiratorial agreement was the statement/note written? It was not written during or in furtherance of the conspiracy to kill Toro, because

that conspiracy had not yet come into existence. (*People v. Jurardo*, *supra*, 38 Cal.4th at pp. 117-118 [statement made prior to formation of conspiracy is not a coconspirator statement].) Rascal wrote his notes *before* the event that triggered the B.P. conspiracy/agreement to kill Toro. The B.P. meeting also occurred before that triggering event. The triggering event was the E.S.P. drive-by shooting, which occurred *after* the B.P. meeting. Thus, Rascal's notes were not written during the course of the conspiracy. The B.P. meeting did not occur during the course of the conspiracy. *A fortiori*, whatever statements may have been made at the B.P. meeting did not occur during the course of the conspiracy.

Admission of the notes, without any testimony from Rascal or any of the participants in the B.P. meeting violated Mr. Sandoval's "due process right to confront witnesses against him." (*United States v. Hall*, *supra*, 419 F.3d at pp. 985-986.) Without any testimony from the author of the notes, the notes were bereft of any reliable meaning. Rascal's note regarding "not enough dead people" could have simply consisted of Rascal narrating or memorializing his dissatisfaction with a past circumstance, i.e., that, in his view, B.P. had not previously killed enough people. Such statements are inadmissible and irrelevant. (*People v. Saling*, *supra*, 7 Cal.3d at p. 852, fn. 8.) Because Mr. Sandoval had no opportunity to confront Rascal regarding the meaning of the note, he was denied

the opportunity to expose the actual meaning of the note.

The inflammatory and prejudicial nature of Rascal's note about there not being "enough dead mother fuckers" is self-evident. Whether the erroneous admission of this portion of Rascal's notes and the remainder of the notes is deemed constitutional error or mere state law error, the error necessitates reversal. The prosecutor relied on this inadmissible evidence in his argument to the jury concerning Mr. Sandoval's mental state at the time Mr. Sandoval shot Detective Black. The prosecutor stressed the note during his opening statement (6 RT 1080, 1087-1090), and contended during closing argument that the note showed Mr. Sandoval shot the detective with premeditation. (10 RT 2028.) A prosecutor's specific emphasis on erroneously admitted evidence during opening statement and closing argument militates against a finding by a reviewing court that the error did not substantially influence the jury. (*Arnold v. Runnels* (9th Cir. 2005) 421 F.3d 859, 869 ["prosecutor's emphasis on" erroneously admitted evidence "both in his opening statement and his closing argument" contributed to finding of prejudicial error]; *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131 [prosecutor's reliance on erroneously admitted evidence concerning premeditation in opening statement and closing argument precluded finding of harmlessness]; *United States v. Hernandez* (5th Cir. 1985) 750 F.2d 1256 [finding prejudicial error where

prosecutor "emphasized" and "embellish[ed]" upon erroneously admitted hearsay evidence in closing argument]; *Khoa Dang Nguyen v. McGrath*, (N.D. Cal. 2004) 323 F.Supp.2d 1007, 1018 ["The Ninth Circuit has found that errors did have a substantial and injurious effect or influence on a jury's verdict where the prosecutor emphasized the evidence."].)

Whether viewed independently, or in combination with the other errors germane to the premeditation issue in this case, the trial court's erroneous admission of Rascal's inflammatory notes cannot be deemed harmless under *Watson* or *Chapman*.

VII.

THE TRIAL COURT ABUSED ITS DISCRETION AND RENDERED MR. SANDOVAL'S TRIAL UNFAIR BY ALLOWING THE PROSECUTION TO ADDUCE EVIDENCE THAT A WITNESS CALLED BY THE PROSECUTION HAD BEEN THREATENED BY AN UNIDENTIFIED THIRD PARTY, DESPITE THE FACT THAT NO EVIDENCE WAS PRESENTED THAT MR. SANDOVAL KNEW ABOUT THE THREAT.

The trial court abused its discretion by admitting evidence and innuendo that unidentified B.P. members had threatened witness Angela Estrada. Although there was no evidence that Mr. Sandoval had anything to do with the purported threat(s), the trial court overruled defense objections to the evidence and allowed the prosecution to present the evidence to the jury. (6 RT 1159-1162, 1183-1187,

1206-1207.) The error was prejudicial and rendered Mr. Sandoval's trial unfair.

A. Standard of Review

Appellate courts apply the abuse of discretion standard to review trial court rulings concerning the admissibility of evidence. (*People v. Curl* (2009) 46 Cal.4th 339, 359, cert. den. *sub nom. Curl v. California* (2010) 130 S.Ct. 1881.)

B. Factual Background

Angela Estrada was the third witness called to testify in the guilt phase. At the time of her testimony, she was 24 years old. She was a B.P. member. She joined B.P. at the age of 12. (6 RT 1157.) On the day that Detective Black was killed, Ms. Estrada was living with her sister and others at the Dairy Street residence where the B.P. meeting organized by Rascal had taken place. (6 RT 1158, 1172, 1195-1196.) During her testimony, Ms. Estrada identified photographs of various B.P. members (6 RT 1157, 1162-1172, 1178-1179), described the observations she made at the B.P. meeting at the Dairy Street residence (6 RT 1172-1176, 1196-1198), and answered questions regarding information she had divulged in various police interviews. (6 RT 1175-1178, 1185-1187, 1189-1190, 1199-1201, 1203.)

In the course of the prosecutor's direct examination of Ms. Estrada, the following exchange took place:

Q: Well, just a few minutes ago, I talked to you in the D.A.'s office[?]

A: ... Right. Yes.

Q: And what did you say about wanting to be here?

A: I don't want to be here.

Q: Did you say something about being threatened?

Defense Counsel: Objection. [¶] May we approach the bench, your honor?

The Court: Overruled.

Q: Is there a particular reason you don't want to be here?

A: Because I have nothing to do with this, you know. I don't know. I don't — I'm not involved with this, so I don't feel like I should be here.

Q: For a person [who] has an association with a criminal street gang and knows its gang members, is it a good idea or a bad idea to get up on the stand and tell what you know about criminal conduct by gang members?

Defense counsel: Objection; assumes facts not in evidence.

The Court: Overruled. [¶] It's a question.

A: I don't understand the question.

Q: Sure. [¶] I'll rephrase it. [¶] You say you don't want to be here?

The Court: The record should reflect the witness is laughing. [¶] Go ahead.

Q: Have you been threatened with regard to coming in here and telling this jury the truth about what

you know?

The Court: I'm going to admonish the jury right now. [¶] Any questions dealing with threats does [*sic.*] not infer [*sic.*] or assume that those threats are connected with the defendant in any way, but threats in general may have occurred by people on their own who have no ties or relationship with the defendant, and you're not to assume otherwise. [¶] Please go ahead.

. . .

Q: Do you remember the question?

A: Yes. [¶] Have I been threatened?

Q: Yes.

A: Not in particular. [¶] But in general, yes.

Q: What do you mean? [¶] What does that mean?

A: I've just been told, you know, just to watch what I say.

Q: Well, what does that mean?

A: I don't know.

Q: Was the person with a message that you got a message from someone in Barrio Pobre?

A: No.

Q: Did you tell Detective Prell and I when we spoke to you that it was someone in Barrio Pobre?

A: Look, I don't know what you're trying to get at[,] but —

The Court: Ma'am, just answer the question.

A: No, it wasn't.

Q: Did you tell Detective Prell and I, and then Detective Robbins and I, that you were threatened by someone in Barrio Pobre?

A: Someone told me, you know, we ... saw the paperwork, and you said this and you said that. [¶] That's all that was said.

(6 RT 1159-1162.)

Later, during the prosecutor's direct examination of Angela Estrada, the following exchange occurred:

Q: You made a comment early on when we started talking about not being happy to be here and you said something about paperwork. [¶] What paperwork?

A: Paperwork is what you guys got in front of you.

Q: You're talking about police reports?

A: Police reports, you know. [¶] Yes.

Q: So why is that important?

A: Why is paperwork important? [¶] It's your guys' ... paperwork. I don't know.

Q: Well, you said you didn't want to testify, and you didn't want to be here. And you made reference to part of the reason is because someone threatened you, and they had paperwork. [¶] What did that mean when you said that?

A: Obviously, everything that I say, you know, obviously it's getting documented. And I mean, I know you're trying to — you're trying to make it seem like, if I know what happened or whatever, you know. But that's not the case here.

Q: Did you understand my question?

A: Yes.

Q: And so why was it —

A: Paperwork. [¶] It's like me leaving here and, you know, it being documented that I was here, and this is what I said. That's paperwork.

Q: If there were paperwork indicating that you had testified [about] being a past member of Barrio Pobre, and you had testified against another member of B.P., would that be looked on favorably or unfavorably by people in the neighborhood?

A: Unfavorably.

. . .

Q: Did you tell Detective Prell and I, ["]I [have] already been threatened after this incident happened["]?

A: Yes.

Q: Did you tell Detective Prell, ["]Some guy came to my house for another guy and told me not to get involved[.]["]?

A: Nobody came to my house. [¶] Someone told me. Someone gave me the message.

(6 RT 1183-1187.)

At the conclusion of Ms. Estrada's testimony, the prosecutor called Detective Prell to the stand. The detective testified that Ms. Estrada had told the prosecutor and the detective that she had been threatened. According to the detective, she had indicated that the threat had been conveyed by a third party to a friend of Ms. Estrada's and that Ms. Estrada's friend had, in turn, informed Ms. Estrada of the threat. (6 RT 1206-1207.)

C. Case Law Concerning the Admissibility of Threat Evidence

Under California case law and the case law of other jurisdictions, evidence of a defendant's post-arrest threats against prosecution witnesses is "relevant to show consciousness of guilt." (*People v. Pinholster* (1992) 1 Cal.4th 865, 945, cert. den. *sub nom. Pinholster v. California* (1992) 506 U.S. 921; *Ortiz-Sandoval v. Gomez* (9th Cir. 1996) 81 F.3d 891, 897; *Bassett v. State* (Ind. 2008) 895 N.E.2d 1201, 1211, cert. den. *sub nom. Bassett v. Indiana* (2009) 129 S.Ct. 1920; *Ebron v. United States* (D.C. 2003) 838 A.2d 1140, 1148, cert. den. (2004) 543 U.S. 939.) However, evidence concerning threats made against a witness cannot be introduced in evidence without a showing that the defendant had some connection to the threats, i.e., that the defendant knew about the threats and authorized the threats. (*People v. Gray* (2005) 37 Cal.4th 168, 220, cert. den. *sub nom. Gray v. California* (2006) 549 U.S. 827; *People v. Williams* (1997) 16 Cal.4th 153, 200,

cert. den. *sub nom. Williams v. California* (1998) 522 U.S. 1150; see *People v. Hannon* (1977) 19 Cal.3d 588, 597-603; *People v. Terry* (1962) 57 Cal.2d 538, 566, cert. den. *sub nom. Terry v. California* (1963) 375 U.S. 960; *People v. Weiss* (1958) 50 Cal.2d 535, 551-554; *People v. Perez* (1959) 169 Cal.App.2d 473, 477 ["if the attempt is made by a third person outside of the defendant's presence, it must appear that the third person is acting on behalf of the defendant in so doing, or is authorized by him to do so"]; *People v. Gilliland* (1940) 39 Cal.App.2d 250, 255-257.)[124]

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[124] In certain cases, California courts have stated, in dicta, that admissibility of threat evidence is not preconditioned on a foundational showing of a connection between the defendant and the threat(s). In *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, the court commented: "It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible." (*Id.* at p. 1588.) However, in that case, the threats were allegedly made by the defendant's brother, and "there was circumstantial evidence introduced at trial [that the defendant had] at least authorized his brother's intimidation of the witnesses." (*Id.* at p. 1590.) Thus, the court's comment regarding the purported lack of need for a connection between the threats and the defendant "was unnecessary to the court's decision and, therefore, dicta." (*People v. Sisuphan* (2010) 181 Cal.App.4th 800, 811.) In *People v. Burgener* (2003) 29 Cal.4th 833, cert. den. *sub nom. Burgener v. California* (2003) 540 U.S. 855, this court cited to *Gutierrez* in support of the propositions that "it is not necessary to show the witness's fear of retaliation is 'directly linked' to the defendant for the threat to be admissible[,]" and that "[i]t is not necessarily the source of the threat — but its existence — that is relevant to the witness's credibility." (*Id.* at pp. 869-870.) However, in *Burgener*, evidence was introduced "identif[ying] [the] defendant as the source of the threats...." (*Id.* at p. 869.) Hence, the propositions this court drew from *Gutierrez* were dicta in *Burgener*.

The general rule has been stated as follows:

> Since threats tend to show guilty knowledge or an admission of guilt on the part of the defendant, a proper foundation must be laid showing the threats were made either by the defendant or with his or her knowledge or authorization.

(*Cox v. State* (Ind. Ct. App. 1981) 422 N.E.2d 357, 361-362; Annot., *Admissibility in Criminal Case, on Issue of Defendant's Guilt, of Evidence that Third Person Has Attempted to Influence a Witness Not to Testify or to Testify Falsely* (1977) 79 A.L.R.3d 1156, 1159-1160, 1183-1186, §§ 2[a], 10[b] [collecting cases].)

Other jurisdictions uniformly adhere to this rule. (*Ebron v. United States*, *supra*, 838 A.2d at p. 1149; *Johnson v. State* (2002) 255 Ga. App. 721, 722 [566 S.E.2d 440, 442]; *United States v. Thomas* (7th Cir. 1996) 86 F.3d 647, 654, cert. den. *sub nom. Story v. United States* (1996) 519 U.S. 967; *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 970, cert. den. (1989) 410 U.S. 1011; *United States v. Rios* (10th Cir. 1979) 611 F.2d 1335, 1349; *State v. Hicks* (Mo. App. 1976) 535 S.W.2d 308, 312; *People v. Walton* (1969) 17 Mich. App. 687, 689 [170 N.W.2d 315, 317].)

In *People v. Weiss*, *supra*, 50 Cal.2d 535, this court explained:

> If the attempt is made by a third person, not in the presence of the defendant or shown to have been authorized by him, it should at once be suspect as a mere purporting attempt to suppress evidence and in truth an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut satisfactorily because he does not know the true identity of the pretender.

(*Id.* at p. 554.)

A "'threat by a third person against a ... witness is relevant only if the defendant is linked in some way to the *making* of the threat.'" (*Cox v. State*, *supra*, 422 N.E.2d at p. 362, italics in the original; quoting 1 Wharton's Criminal Evidence (13th ed. C. Torcia 1972) § 217.)[125] "Thus, evidence of threats made by *unidentified* third persons usually lacks a sufficient connection to the defendant to render them admissible. Barring such a showing, the highly prejudicial nature of such testimony requires its exclusion." (*Ibid.*, italics in the original, footnote omitted.) This foundation is necessary because "a criminal defendant is the primary individual who could benefit from the bribing or absence of a witness who might testify against him," and "the inference is strong that he has procured these acts when evidence of them is introduced at his trial." (*Keyser v. State* (Ind. Ct. App. 1974) 312 N.E.2d 922, 924.)

"[T]hreat evidence has extremely limited probative value towards credibility, unless the evidence bears directly on a specific issue regarding the threatened witness." (*United States v. Thomas*, *supra*, 86 F.3d at p. 654.) "It has been held to be an abuse of discretion for the trial court to admit such evidence solely for the purpose of reflecting on the general credibility and bias of the

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[125] "Evidence should ... be excluded if it involves threats by third parties that the prosecution cannot show the defendant knew about or authorized." (1 Whatorn's Criminal Evidence (15th ed. 1997) § 4:13, p. 327.)

witness." (*Ebron v. United States*, *supra*, 838 A.2d at p. 1148.)

In *Dudley v. Duckworth*, *supra*, 854 F.2d 967, the Seventh Circuit granted federal habeas relief to a state prisoner who had been convicted following a trial in which the prosecutor elicited testimony from a witness on direct examination regarding threats against the witness made by unknown individuals. (*Id.* at pp. 969-974.) After the witness stated he was nervous and did not feel up to testifying, the prosecutor asked why he felt that way. The witness stated he and his mother had received threatening phone calls the previous evening from an unknown individual. (*Id.* at p. 973.) Defense counsel requested a sidebar conference and moved for a mistrial. The prosecutor justified the questioning by asserting a need to inquire concerning the demeanor of the witness. The trial court allowed the testimony to stand. (*Id.* at pp. 973-974.) The Seventh Circuit concluded the admission of the threat evidence violated the defendant's right under the Fourteenth Amendment to a fundamentally fair trial. (*Id.* at pp. 970-972.)[126] The evidence deprived the defendant of his right to present his "defense to a jury free from 'evidential harpoons.'" (*Id.* at p. 972.) The court explained the "threat testimony could only reflect adversely on the [defendant] even though the

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[126] "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." (*California v. Trombetta* (1984) 467 U.S. 479, 485; accord, *Crane v. Kentucky* (1986) 476 U.S. 683, 690.)

threats were not traced to him ..., except by innuendo." (*Id.* at p. 971.) Thus, the court granted relief, despite the fact that the evidence of the defendant's guilt was "impressive." (*Id.* at p. 972.)

D. The Inflammatory and Prejudicial Effect of Threat Evidence

"[T]hreats ... constitute a striking example of evidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than established propositions in the case." (*United States v. Guerrero* (3d Cir. 1986) 803 F.2d 783, 785, internal quotation marks omitted.) "Such evidence becomes so prejudicial to a defendant that no jury could be expected to apply it solely to the question of the credibility of the witness before it and not to the substantial prejudice of the defendant." (*Dudley v. Duckworth*, *supra*, 854 F.2d at p. 970 internal quotation marks omitted.) Thus, "evidence of threats against a witness is recognized as having a great potential for prejudice to the accused." (*Ebron v. United States*, *supra*, 838 A.2d at p. 1148.)

"While threats made by third parties may have some probative value in repairing a credibility problem with a witness, such evidence may be extremely prejudicial in that the jury may wrongly assume that the defendant made the threats *or that associates of the defendant did so at the defendant's behest.*" (*State v. Clifton* (Minn. 2005) 701 N.W.2d 793, 797, italics added, internal quotation

marks omitted.)

"This type of evidence is so prejudicial that no jury can be expected to apply it solely to the question of the credibility of the witness, and not to the guilt of the defendant, and therefore, a trial court's admonishment to the jury or curative instruction will not serve to remove the resulting prejudice." (*Scifres-Martin v. State* (Ind. Ct. App. 1994) 635 N.E.2d 218, 220; *Dudley v. Duckworth*, *supra*, 854 F.2d at p. 970 ["instruction to the jury to disregard it was not sufficient to expiate its effect"].)

E. Analysis

By allowing the prosecution to present the threat/intimidation evidence in this case, without any nexus being established between Mr. Sandoval and the purported threats, and without any instruction limiting the purposes for which the evidence could be considered, other than that the jury was not to presume the threat was attributable to Mr. Sandoval (6 RT 1160-1161), the trial court abused its discretion and rendered Mr. Sandoval's trial fundamentally unfair.[127] Even though the prosecutor did not attempt to directly link the threat to Mr. Sandoval, the prosecutor's questioning insinuated that the threat was conveyed to Angela Estrada by a member of the street gang to which Mr. Sandoval belonged:

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[127] As in *Dudley v. Duckworth*, *supra*, 854 F.2d at pp. 970-972, the erroneous admission of the threat evidence in the instant case violated Mr. Sandoval's basic right under the Fourteenth Amendment to a fair trial.

Although Ms. Estrada denied the threat was made by a B.P. member the first two times the prosecutor asked if the threat came from B.P. (6 RT 1161-1162), the prosecutor persisted, asking whether she had previously told him and detectives that the threat had been made by "someone in Barrio Pobre." (6 RT 1161.) Ms. Estrada answered: "Someone told me, you know. They didn't tell me directly. Someone had said, you know, we ... saw the paperwork[.] And you said this and you said that. [¶] That's all that was said." (6 RT 1162.) Because the foregoing exchange suggests the threat was made by a B.P. member, the jury would have naturally assumed the threat was made by "associates" of Mr. Sandoval's and that it was done at his behest. (*State v. Clifton*, *supra*, 701 N.W.2d at p. 797.)[128]

"[O]nce there is a finding of a denial of a fair trial, it is difficult to envision how such an error could be considered 'harmless.'" (*Lesko v. Owens*, 881 F.2d 44,

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[128] Although Ms. Estrada never directly stated that a B.P. member had threatened her, the prosecutor's "line of questioning that repeatedly incorporate[d] inadmissible evidence" to that effect was "just as improper as the direct admission of such evidence." (*United States v. Sine* (9th Cir. 2007) 493 F.3d 1021, 1031; see *Douglas v. Alabama* (1965) 380 U.S. 415, 419 ["[a]lthough the Solicitor's reading of [the witness's] alleged statement, and [the witness's] refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that [the witness] in fact made the statement"].) "[I]ncorporating inadmissible evidence into questioning can constitute prosecutorial misconduct." (*Sine*, *supra*, 493 F.3d at p. 1032, fn. 8.) "It is improper under the guise of artful ... examination, to tell the jury the substance of inadmissible evidence." (*United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1222, internal quotation marks omitted.)

49 n. 7 (3d Cir. 1989), cert. den. (1990) 493 U.S. 1036.) Thus, based upon the prejudicial violation of Mr. Sandoval's basic right to a fair trial occasioned by the court's erroneous admission of evidence that a witness called by the prosecution had been threatened by an unidentified third person associated with Mr. Sandoval's gang, Mr. Sandoval is entitled to relief. (*People v. Perez*, *supra*, 169 Cal.App.2d at pp. 476-479; *People v. Gilliland*, *supra*, 39 Cal.App.2d at pp. 255-257, 264-265; *Ebron v. United States*, *supra*, 838 A.2d at pp. 1146-1151; *Dudley v. Duckworth*, *supra*, 854 F.2d at pp. 969-974; *Cox v. State*, *supra*, 422 N.E.2d at pp. 360-363; *Keyser v. State*, *supra*, 312 N.E.2d at pp. 567-570.) The trial court's admonition to the jury was inadequate to expiate the unfairly prejudicial effect of the evidence. (*Dudley*, *supra*, 854 at p. 970; *Cox*, *supra*, 422 N.E.2d at p. 362; *Keyser*, *supra*, 312 N.E.2d at p. 924.) The trial court merely admonished the jury that the prosecutor's questioning did not imply the threat to Ms. Estrada was connected to Mr. Sandoval and that the jury was not to assume otherwise. (6 RT 1160-1161.) This instruction preceded the evidence and innuendo presented by the prosecutor that the threat came from B.P. Such evidence and innuendo squarely contradicted the court's admonition and undermined any efficacy the admonition may have had.

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VIII.

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY REJECTING MR. SANDOVAL'S REQUEST TO INSTRUCT THE JURY PURSUANT TO CALJIC NO. 2.01 AND/OR CALJIC NO. 2.02.

In addition to the insufficiency of the State's evidence on the issue of premeditation and deliberation (*ante*, pp. 136-162), the impropriety of the trial court's admission of "expert" opinion testimony on that issue (*ante*, pp. 162-187), and the prosecutor's reliance on erroneously admitted hearsay evidence in connection with that issue (*ante*, pp. 188-207), the trial court erroneously rejected a defense request for jury instructions concerning limitations on the extent to which circumstantial evidence can be relied upon to support a finding of deliberation and premeditation. (10 RT 1925-1931.) Independently, and in conjunction with the other errors discussed herein, the trial court's instructional omission in this regard constituted prejudicial error. This error necessitates reversal of the first degree murder conviction.

A. Factual Background

During the guilt phase jury instruction conference, the parties discussed jury instructions concerning circumstantial evidence as to Mr. Sandoval's mental state in connection with the murder charge. (10 RT 1925-1931.) The defense asked the

trial court to instruct the jury pursuant to CALJIC No. 2.01[129] and CALJIC No. 2.02.[130] (10 RT 1925-1926, 1931.) The prosecutor objected to the court delivering

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[129] CALJIC No. 2.01 provides: "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt. [¶] If on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (Brackets in the original, except bracketed paragraph-break symbols.)

[130] CALJIC No. 2.02 provides: "The [specific intent] [or] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not [find the defendant guilty of the crime charged [in Count[s] _____, _____, _____ and _____], [or] [the crime[s] of _____, _____, _____, which [is a] [are] lesser crime[s]],] [or] [find the allegation _____ to be true,] unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required [specific intent] [or] [and] [mental state] but (2) cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to [any] [specific intent] [or] [mental state] permits two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (Brackets in the original,

either instruction to the jury, contending the case "does not rest on circumstantial evidence," because Mr. Sandoval's confession purportedly "acknowledge[d]" the crime itself and the state of mind for the crime. (10 RT 1925-1926.) Defense counsel argued that the prosecution's expert opinion testimony had been offered as circumstantial evidence on the issue of deliberation and premeditation, and that the presence or absence of deliberation and premeditation was "the main issue of the case." (10 RT 1926-1927, 1929-1931.) The trial court disagreed with the defense, proclaiming: "This is not a circumstantial evidence case by any stretch of the imagination." (10 RT 1927.) The court asserted that the expert opinion testimony pertained only to gang methodology and did not constitute circumstantial evidence on the question of deliberation and premeditation. (10 RT 1929-1930.)[131] Further, the court noted that neither CALJIC No. 2.01 nor CALJIC No. 2.02 need be given in a case in which "the prosecution does not substantially

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except bracketed paragraph-break symbol.)

[131] However, as discussed above, the two gang experts called by the prosecution testified that Mr. Sandoval had taken the CAR-15 to Lime Avenue as part of a "methodical" plan not only to provide cover for his fellow gang members in their planned assault on Toro, but also to "take on" any police officers who might happen upon scene and interfere with the planned gang hit. (9 RT 1811-1814, 1893-1894, 1898-1900.) The court ordered the jury to disregard the testimony on this subject offered by one of the gang experts (9 RT 1814-1815), but allowed the testimony of the other expert to stand. (9 RT 1893-1894, 1898-1906.)

rely on circumstantial evidence to prove guilt...." (10 RT 1926-1927.) The court refused to instruct the jury pursuant to either CALJIC No. 2.01 or CALJIC No. 2.02. (10 RT 1931.)

Defense counsel 1) pointed out that all guilt phase issues other than Mr. Sandoval's mental state had been conceded in the defense opening statement, 2) stressed that Mr. Sandoval's mental state was going to be the only issue in the guilt phase closing argument presented by the defense, and 3) asserted that the court's refusal to give either of the requested instructions violated Mr. Sandoval's due process rights by limiting counsel's "ability to argue mental state...." (10 RT 1931.)

Ample circumstantial evidence germane to Mr. Sandoval's mental state was presented to the jury during the guilt phase:

Rascal wrote notes about B.P. members not killing enough people. (RT 1398, 1403; 9 RT 1889; People's Exhibit 26.) The prosecutor insinuated that the content of those notes was imparted to B.P. members at Lazy's home during the B.P. meeting several hours prior to the homicide (6 RT 1144; 10 RT 2028), despite the fact that there was no testimony about what had been stated during the meeting. Based upon this circumstantial evidence, the prosecutor formulated an argument that, when Mr. Sandoval shot the detectives, he had adopted the mental

state reflected in Rascal's notes, that the seeds of premeditation and deliberation had been planted at the B.P. meeting (10 RT 2028), and that although the intended target of the B.P. assault at Lime Avenue "quickly" changed from Toro to the detectives, the premeditation and deliberation had persisted in Mr. Sandoval's mind. (10 RT 2028, 2032.)

The prosecutor posed a hypothetical question to gang expert Richard Valdemar. The prosecutor asked the gang expert to assume the established facts leading up to the incident on Lime Avenue — the B.P. meeting at Lazy's home, the subsequent E.S.P. drive-by shooting at the B.P. alleyway hangout in Compton, and the attempt by five B.P. members to retaliate by arming themselves and heading over to Toro's residence. (9 RT 1891-1893.) The prosecutor then asked the expert to give his opinion as to "how the assault would be carried out" and what the B.P. "objective" was. (9 RT 1892-1893.) The expert testified that Mr. Sandoval and his fellow B.P. gang members "deploy[ed] in a group, like a military unit" at Lime Avenue. With the CAR-15, Mr. Sandoval took "a position of advantage" where he could either "cover" his fellow gang members as they attempted to get Toro out of his home or "shoot at" any police who interrupted the planned gang hit. (9 RT 1893-1894.) Relying on the inferences drawn by the expert about the presumed method and objective of Mr. Sandoval and his cohorts,

the prosecutor argued to the jury that, in gang hits like the one planned against Toro in this case, gang members "always consider law enforcement's potential presence...." (10 RT 2055.)

Finally, the prosecutor presented evidence that the murder weapon was a semi-automatic gun. (8 RT 1693.) Mr. Sandoval fired 28 shots. (6 RT 1126-1127, 1265; 7 RT 1432-1437; 8 RT 1666, 1669-1670.) Therefore, he pulled the trigger 28 times. (8 RT 1660, 1669-1670.) The prosecutor relied upon this evidence concerning the gun as circumstantial evidence of Mr. Sandoval's mental state at the time of the shooting, arguing to the jury that the 28 shots revealed malice, premeditation, and deliberation. (10 RT 2031.)

B. Standard of Review

"The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law...." (*People v. Posey* (2004) 32 Cal.4th 193, 218, cert. den. *sub nom. Posey v. California* (2004) 542 U.S. 909; *United States v. Smith* (9th Cir. 2009) 561 F.3d 934, 938 (*en banc*), cert. den. (2009) 130 S.Ct. 445.) Specifically, a claim that a trial court failed to instruct on applicable principles of law is reviewed de novo. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, disapproved on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

C. *Legal Authority Regarding a Trial Court's Obligation to Instruct the Jury Concerning Circumstantial Evidence Relating to the Mental State of Premeditation and Deliberation*

1. *Premeditation and Deliberation Can Seldom, If Ever, Be Proven Without Circumstantial Evidence.*

"In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." (Penal Code section 20.) "The proof of criminal intent ... may be either direct or circumstantial." (1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements § 3, p. 201.) "However, while the defendant may testify to his or her own lack of criminal intent [citation], it is rare that direct evidence of criminal intent is available to the prosecution." (*Ibid.*) Rather, "[t]he intent or intention is manifested by the circumstances connected with the offense." (Penal Code section 21, subdivision (a).)

Premeditation and deliberation are mental states. (*People v. Coddington* (2000) 23 Cal.4th 529, 583, disapproved on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) "Evidence of a defendant's state of mind is almost inevitably circumstantial...." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208; accord, *People v. Matson* (1974) 13 Cal.3d 35, 41 ["intent must usually be inferred from all of the facts and circumstances disclosed by the evidence, rarely being directly provable"]; *People v. Pre* (2004) 117 Cal.App.4th

413, 420 ["Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense."]; *State v. Leake* (Minn. 2005) 699 N.W.2d 312, 319 ["Premeditation is a state of mind and, thus, generally proven through circumstantial evidence."]; *State v. Thompson* (2003) 204 Ariz. 471, 479 [65 P.3d 420, 428] ["Premeditation can, of course, be proven by circumstantial evidence; like knowledge or intention, it rarely can be proven by any other means."]; *McFarland v. State* (1999) 337 Ark. 386, 393 [989 S.W.2d 899, 903] ["Because intent can rarely be proved by direct evidence, a jury may infer premeditation and deliberation from circumstantial evidence...."]; *Johnson v. Singletary* (M.D. Fla. 1995) 883 F.Supp. 1535, 1539 ["a defendant's premeditated intent is seldom subject to direct proof"]; *State v. Kirch* (Minn. 1982) 322 N.W.2d 770, 773 ["It is well-established that, because premeditation is a product of the mind, it is incapable of direct proof."]; *Briano v. State* (1978) 94 Nev. 422, 425 [581 P.2d 5, 7] ["Evidence of premeditation and deliberation is seldom direct."]; Hobson, *Reforming California's Homicide Law* (1996) 23 Pepp. L. Rev. 495, 517 ["Outside of circumstantial means of proving premeditation, it is extremely difficult to set guidelines for how much reflection is enough to demonstrate premeditation because neither courts nor jurors can read a defendant's mind."].)

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2. The Trial Court Must Instruct the Jury that Circumstantial Evidence Can Only Support a Conviction or Particular Degree of Guilt If the Inferences Reasonably Drawn from the Evidence Rule Out Innocence or a Lesser Degree of Guilt.

"The law has long recognized that particular care must be taken when relying on circumstantial evidence." (*People v. Lenix* (2008) 44 Cal.4th 602, 627, cert. den. *sub nom. Lenix v. California* (2009) 129 S.Ct. 1009.) To justify a conviction on circumstantial evidence, "'the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.'" (*People v. Bender*, *supra*, 27 Cal.2d at p. 175.) This rule is "a most important rule governing the use of circumstantial evidence." (*Ibid.*) "In unequivocal language it should be declared to the jury in every criminal case wherein circumstantial evidence is received." (*Ibid.*) "In a criminal case where circumstantial evidence is substantially relied upon for proof of guilt it is obvious that 'instructions on the general principles of law pertinent to such cases' necessarily include adequate instructions on the rules governing the application of such evidence." (*Ibid.*)

> The rationale behind the rule is that, unlike direct evidence, circumstantial evidence does not directly prove the fact in question. Instead, circumstantial evidence may support a logical conclusion that the disputed fact is true. But information may often be open to more than one reasonable deduction. Thus, care must be taken not to accept one reasonable interpretation to the exclusion of other

reasonable ones.

(*People v. Lenix*, *supra*, 44 Cal.4th at p. 627.)[132]

"The trial court must instruct on general legal principles closely related to the case." (*People v. DePriest* (2007) 42 Cal.4th 1, 50; citing *People v. Breverman* (1998) 19 Cal.4th 142, 154.) "This obligation includes the duty to instruct on the effect to be given circumstantial evidence ... when circumstantial evidence is substantially relied on for proof of guilt." (*People v. Wiley* (1976) 18 Cal.3d 162, 174; citing *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49.)

A defendant has "a right to an instruction on circumstantial evidence based upon [his] own theory of the case...." (*People v. Hatchett* (1944) 63 Cal.App.2d 144, 153.)

In certain circumstances, a trial court's refusal to instruct a jury pursuant to CALJIC No. 2.02 will not be error if the court does instruct the jury pursuant to CALJIC No. 2.01, which is "the more inclusive instruction on sufficiency of circumstantial evidence." (*People v. Marshall* (1996) 13 Cal.4th 799, 849.) CALJIC No. 2.02 "is designed for use *instead of* CALJIC [No.] 2.01 in a specific

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[132] "Circumstantial evidence involves a two-step process: presentation of the evidence followed by a determination of what reasonable inference or inferences may be drawn from it. By contrast, direct evidence stands on its own. It is evidence that does not require an inference." (*People v. Anderson* (2007) 152 Cal.App.4th 919, 931.)

intent or mental state case in which the *only element of the offense* which rests substantially or entirely on circumstantial evidence is the element of specific intent or the mental state." (*People v. Bloyd* (1987) 43 Cal.3d 333, 352, italics in the original.)

"The 'mental state' contained in CALJIC No. 2.02 refers to a specific mental state, analogous to a specific intent, which is an element of the criminal offense such as premeditation." (*People v. Swanson* (1983) 142 Cal.App.3d 104, 110; citing *People v. Wiley*, *supra*, 18 Cal.3d at p. 174.) With regard to circumstantial evidence, CALJIC No. 2.02 instructs jurors "'to reject unreasonable interpretations of the evidence and to give the defendant the benefit of any reasonable doubt.'" (*People v. Hines* (1997) 15 Cal.4th 997, 1050-1051; quoting *People v. Jennings* (1991) 53 Cal.3d 334, 386.)

> Cautioning the use of circumstantial evidence in criminal cases is a centuries-old idea. The seventeenth-century English courts allowed for the use of circumstantial evidence only when necessary, viewing it with great caution, yet recognizing its possible sufficiency to convict. Eighteenth century jurisprudence reflected a reverse in the value attributable to direct and circumstantial evidence. Determining that "circumstances cannot lie," courts took the view that although circumstantial evidence should be viewed with caution, it may have greater probative value than direct evidence, for people may lie, but circumstances cannot. Still, limitations on the use of circumstantial evidence persisted. In the nineteenth century, William Wills, a revered nineteenth century jurist, noted that "in order to justify the inference of legal guilt from circumstantial evidence, the existence of

> the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt." Thus, rules developed to safeguard the accused from unjust conviction caused by the misapplication of circumstantial evidence.

(Comment, *"For It Must Seem Their Guilt": Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard* (2007) 53 Loy. L. Rev. 217, 223-224, footnotes and internal brackets omitted.)

> [C]ircumstantial evidence is as nothing unless the inferences to be drawn from the circumstances are logically compelling. The danger, therefore, with the use of circumstantial evidence is that of logical gaps — that is, subjective inferential links based on probabilities of low grade or insufficient degree — which, if undetected, elevate coincidence and, therefore, suspicion into permissible inference.

(*People v. Cleague* (1968) 22 N.Y.2d 363, 367 [239 N.E.2d 617, 619, 292 N.Y.S.2d 861, 865.].)

In *People v. Dick* (1867) 32 Cal. 213, the defendant was convicted by jury of first degree murder and sentenced to death. (*Id.* at p. 214.) Although the evidence against the defendant was circumstantial, the trial court had refused to instruct the jury that the circumstantial evidence could not support a guilty verdict unless it "'exclude[d] to a moral certainty every other hypothesis but the single one of guilt....'" (*Id.* at pp. 215-216.) Based upon this "fatal error[,]" this court reversed the judgment of conviction. (*Ibid.*; accord *People v. McClain* (1931) 115

Cal.App. 505, 510-512 [trial court's failure to instruct that circumstantial evidence must be inconsistent with innocence was prejudicial error].)

The leading nineteenth century case concerning circumstantial evidence is *Commonwealth v. Webster* (1850) 59 Mass. (5 Cush.) 295. (Rosenberg & Rosenberg, *"Perhaps What Ye Say Is Based Only on Conjecture" — Circumstantial Evidence, Then and Now* (1995) 31 Hous. L.Rev. 1371, 1391 (hereafter Rosenberg & Rosenberg.) In that case, the court explained that, when circumstantial evidence is relied upon, "great care and caution ought to be used in drawing inferences from proved facts." (*Webster*, *supra*, 59 Mass. at p. 312.) "[T]he circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty, that the accused ... committed the crime charged." (*Id.* at p. 319.) "It is essential ... that the circumstances ... exclude every other hypothesis." (*Ibid.*) "Courts throughout the United States, both federal and state, adopted *Webster's* view, requiring that the jury be instructed that circumstantial evidence must exclude reasonable possibilities of innocence." (Rosenberg & Rosenberg, *supra*, 31 Hous. L.Rev. at p. 1392.)

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D. Constitutional Ramifications[133]

"Incorrect or inconsistent instructions on the element of specific intent require a reversal unless the error is deemed harmless beyond a reasonable doubt." (*People v. Lizarraga* (1990) 219 Cal.App.3d 476, 482; citing *People v. Lee* (1987) 43 Cal.3d 666, 676.) In *Lizarraga*, the Court of Appeal reversed a conviction due to the trial court's failure to accurately instruct the jury pursuant to the principles underlying CALJIC No. 2.02. (*Lizarraga*, *supra*, 219 Cal.App.3d at pp. 481-482.)

"While a jury is free to choose among reasonable constructions of the evidence, a verdict cannot be affirmed if it is based on circumstantial evidence that is as consistent with innocence as with guilt." (*United States v. Davis* (5th Cir. 2000) 226 F.3d 346, 354.)

> Neither the statement in an instruction that the guilt of the defendant must be established beyond a reasonable doubt, nor the statement that as between two opposing reasonable inferences the one which is consistent with innocence must be preferred to the one tending to show guilt, satisfies the right of the defendant to have the jury instructed that where circumstantial evidence is relied upon by the People it must be irreconcilable with the theory of innocence in order to furnish a sound basis for conviction.

(*People v. Bender*, *supra*, 27 Cal.2d at pp. 175-176; quoting *People v. Hatchett*,

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[133] As noted above, defense counsel objected on due process grounds to the trial court's refusal to instruct the jury concerning the limitations on reliance upon circumstantial evidence. (10 RT 1931.)

supra, 63 Cal.App.2d at p. 155; but see *People v. Rogers* (2006) 39 Cal.4th 826, 886 ["Insofar as the federal Constitution itself does not require courts to instruct on the evaluation of circumstantial evidence where, as here, the jury was properly instructed on reasonable doubt [citations], defendant's claim necessarily rests on the asserted arbitrary denial of a state-created liberty interest."].)

E. Analysis

The only defense that Mr. Sandoval mounted during the guilt phase was that his intentional shooting of Detective Black was not first degree murder because it was not carried out with premeditation and deliberation. Indeed, this was the only line of defense urged by Mr. Sandoval's trial counsel during argument to the jury in the guilt phase. (10 RT 2045-2050.)

The trial court prejudicially erred by failing to instruct the jury that the circumstantial evidence bearing on Mr. Sandoval's mental state could only support a first degree verdict if the *only* rational interpretation of that evidence was that Mr. Sandoval had acted with premeditation and deliberation.

1. Error

There is no direct evidence in the record as to whether Mr. Sandoval acted with premeditation and deliberation. He did not testify, and he did not state during his confession that he had acted with premeditation and deliberation. (At the time

of his confession, he was an 18-year-old street gang member who had dropped out of high school. He would not have been competent to assess whether his own mental state had involved premeditation and deliberation.) Thus, as in nearly all cases involving factual issues concerning intent, the evidence germane to the issue was circumstantial. (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1208 ["Evidence of a defendant's state of mind is almost inevitably circumstantial...."].) Indeed, some courts have gone so far as to say that premeditation is a mental state "incapable of direct proof." (*State v. Kirch*, *supra*, 322 N.W.2d at p. 773.) The circumstantial evidence relied upon by the prosecutor concerning Mr. Sandoval's mental state in this case has been summarized above in detail.

Because the evidence on the issue of premeditation and deliberation was circumstantial, the trial court erred in failing to instruct the jury pursuant to *either* CALJIC No. 2.01 or CALJIC No. 2.02. (*People v. Wiley*, *supra*, 18 Cal.3d at p. 174; *People v. Yrigoyen supra*, 45 Cal.2d at p. 49; *People v. Bender*, *supra*, 27 Cal.2d at p. 175; *People v. Dick*, *supra*, 32 Cal. at pp. 215-216; *People v. McClain*, *supra*, 115 Cal.App. at pp. 510-512.)

2. Prejudice

Whether reviewed under the *Chapman* standard or the *Watson* standard, the trial court's erroneous failure to instruct the jury concerning principles applicable

to circumstantial evidence cannot be deemed harmless. The road to the jury's first degree murder verdict in this case was paved with multiple errors and irregularities. Not only did the trial court improperly allow the prosecution to present gang expert testimony concerning Mr. Sandoval's purported mental state, but also the prosecutor urged an untenable transferred premeditation theory during closing argument. Furthermore, the evidence regarding Mr. Sandoval's mental state, which principally, if not exclusively, consisted of circumstantial evidence, revealed that Mr. Sandoval rashly and impulsively shot at police during the course of rapidly evolving and unplanned events. To say the least, the evidence was not irreconcilable with the defense position that Mr. Sandoval acted without premeditation and deliberation. In this context, the trial court's failure to instruct the jury concerning the limitations on circumstantial evidence, which would only have inured to Mr. Sandoval's benefit, cannot rationally be characterized as non-prejudicial. Significantly, during deliberations, the jury sent out a note indicating that it was struggling with the premeditation issue. (10 RT 2082; 5 CT 1179.) Thus, no reviewing court can say with any measure of confidence that the jury in this case would not been unaffected by appropriate circumstantial evidence instructions from the trial court. Indeed, such instructions would have bolstered defense counsel's argument that a second degree verdict, rather than a first degree

verdict, was warranted in this case.

IX.

THE SPECIAL CIRCUMSTANCE FINDINGS MUST BE SET ASIDE DUE TO THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY CONCERNING CIRCUMSTANTIAL EVIDENCE PERTAINING TO THE SPECIAL CIRCUMSTANCES.

For many of the same reasons that the trial court's failure to instruct the jury pursuant to CALJIC No. 2.01 and/or CALJIC No. 2.02 was prejudicially erroneous, the court's failure to instruct the jury pursuant to CALJIC No. 8.83 and/or CALJIC No. 8.83.1 was prejudicially erroneous with respect to the special circumstances found true by the jury.

A. Jury Instructions Concerning Evaluation of Circumstantial Evidence Germane to Special Circumstance Allegations

CALJIC Nos. 8.83 and 8.83.1 are model instructions specifically tailored to the manner in which jurors are to use circumstantial evidence in determining the truth of special circumstance allegations. CALCRIM Nos. 704 and 705 are a substantively similar pair of model instructions. Like CALJIC No 2.01, CALJIC No. 8.83 and CALCRIM No. 704 pertain to circumstantial evidence generally. And, like CALJIC No. 2.02, CALJIC No. 8.83.1 and CALCRIM No. 705 specifically pertain to circumstantial evidence relating to mental state.

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Trial courts have a sua sponte obligation to instruct juries on how to evaluate circumstantial evidence in cases involving circumstantial evidence. (*People v. Bloyd*, *supra*, 43 Cal.3d at p. 351; *People v. Yrigoyen*. *supra*, 45 Cal.2d at p. 49; *People v. Bender*, *supra*, 27 Cal.2d at pp. 175-176; Bench Notes to CALCRIM Nos. 704 & 705.)

The need to instruct a jury pursuant to CALJIC Nos. 8.83 and/or 8.83.1 can be obviated if the jury has already been instructed pursuant to CALJIC Nos. 2.01 and/or 2.02. This is so, because these are essentially "duplicative" pairs of jury instructions that "discuss[] the sufficiency of circumstantial evidence...." (*People v. Hines*, *supra*, 15 Cal.4th at p. 1051; accord, *People v. Lewis* (2001) 25 Cal.4th 610, 653.)

B. The Trial Court Erred By Failing to Instruct the Jury Sua Sponte that Circumstantial Evidence Could Not Support True Findings on the Special Circumstance Allegations Unless the Circumstantial Evidence Was Irreconcilable With the Possibility that the Special Circumstance Allegations Were Untrue.

In the instant case, despite the fact that circumstantial evidence was presented with respect to each of the four special circumstance allegations, the trial court did not instruct the jury that such evidence could not support true findings on the special circumstance allegations unless the evidence was irreconcilable with the possibility that the special circumstance allegations were

untrue. (See *Bender*, *supra*, 27 Cal.2d at pp. 175-176.) Because of this prejudicial instructional omission, the special circumstance findings must be set aside.

Defense counsel did not request instructions patterned after CALJIC Nos. 8.83 and/or 8.83.1. However, in light of the trial court's refusal to instruct the jury pursuant to CALJIC Nos. 2.01 and/or 2.02 (10 RT 1926-1931), any such request would have been futile.[134] In any event, as noted above, the trial court had an duty to instruct the jury on how to evaluate the circumstantial evidence relating to the special circumstance allegations. For the same reasons that the trial court's failure to instruct the jury pursuant to CALJIC Nos. 2.01 and/or 2.02 constituted state law error and federal constitutional error, the trial court's failure to instruct the jury pursuant to CALJIC Nos. 8.83 and/or 8.83.1 constituted both state law error and federal constitutional error.

The jury found four special circumstance allegations true — 1) the murder was committed to prevent an arrest,[135] 2) the defendant knew the victim was an on-duty police officer,[136] 3) the murder was committed by means of lying in wait,[137]

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[134] As noted above, the trial court proclaimed: "This is not a circumstantial evidence case by any stretch of the imagination." (10 RT 1927.)

[135] Penal Code section 190.2, subdivision (a)(5).

[136] Penal Code section 190.2, subdivision (a)(7).

[137] Penal Code section 190.2, subdivision (a)(15).

and 4) the murder was carried out to further the activities of a criminal street gang.[138] (10 RT 2088-2089; 5 CT 1277-1280, 1284-1285.) Circumstantial evidence was presented during the trial and necessarily relied upon by the jury with respect to each of these special circumstance allegations:

1. Murder to Prevent Arrest

The prosecution did present direct evidence that Mr. Sandoval killed Detective Black in order to prevent Rascal from being arrested. Indeed, the prosecution played for the jury the audio tape of Mr. Sandoval's recorded confession. (10 RT 1967-1968; People's Exhibit 73.) During that confession, Mr. Sandoval stated he had shot the detective in order to prevent Rascal from being arrested. (2 CT 295-297.) A defendant's confession to murder is direct evidence. (*People v. Dunkle* (2005) 36 Cal.4th 861, 928, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; but see footnote 139, *infra.*)

However, circumstantial evidence bearing on this subject was also adduced during the trial: First, Detective Delfin testified that as he and Detective Black approached Rascal immediately before the shooting, he (Detective Deflin) did not recognize Rascal (8 RT 1591), he suspected Rascal might be carrying a gun (8 RT 1568), and he simply planned to go "talk" to Rascal to "[s]ee what[] [was] up[.]"

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[138] Penal Code section 190.2, subdivision (a)(22).

(8 RT 1570.) Jurors could have inferred from the circumstances described by the detective's testimony in this regard that it would have appeared to Mr. Sandoval that the detectives were simply going to "talk" to Rascal rather than place him under arrest. Second, according to one of the detectives present during Mr. Sandoval's confession, Mr. Sandoval gave police two "untrue" accounts of the shooting before giving a "factual" account in the third go-round. (10 RT 1964.) Jurors could have inferred from the circumstance that Mr. Sandoval had given two false accounts to police that his third version of events was not accurate in all of its details.

2. Murder of a Victim Known to Be an On-Duty Police Officer

Penal Code section 190.2, subdivision (a)(7) requires proof that the defendant knew or reasonably should have known that the officer was "engaged in the performance of his or her duties" at the time of the homicide. Although Mr. Sandoval confessed he knew before he opened fire that the occupants of the vehicle upon which he opened fire were police officers (2 CT 316-320), he did not state he knew they were on duty. Whether he knew they were on duty could only be inferred from circumstantial evidence. How could Mr. Sandoval have known if the detectives were in the middle of their shift or if they had just gotten off duty and were on their way to get coffee? Only by drawing inferences from

circumstantial evidence can one endeavor to get inside Mr. Sandoval's mind to answer that question.

3. Lying in Wait

Near the end of the guilt phase, defense counsel argued the prosecution had failed to adduce sufficient evidence to warrant a lying-in-wait jury instruction. (10 RT 1933-1934.) In response, the prosecutor made the following comments, which reveal the prosecution's lying-in-wait theory was based on inferences drawn from circumstantial evidence:

> The defendant[,] in his own statement[,] says he observes the police car when it's approximately two houses to the north of his [location], as it's traveling south. When he observes the police officers, he conceals himself behind the vehicle that he arrived in in order that he not be seen by the police officers that approach him. [¶] He continues to watch and wait in that concealed position to see what it is the police officers are going to do. As the police officers continue down the street, according to the defendant's own statement, he observes the police officers watching Rascal. [¶] He says he watches this go on, and only at that point in time, when he becomes convinced the police officers are in fact going to stop Rascal; find the .45 caliber handgun that he knows is on Rascal's person, and arrest him, does he decide that he should take action. [¶] In taking action, he indicates he comes out from his point of concealment; directs his CAR-15 at unsuspecting police officers that he says never looked back, never saw him and never knew what hit them. [¶] So I think the period of watching and waiting for an opportune time to act is not only present here, but it's also the fact that he's considering, deliberating, deciding what to do, how to do it, how to take them by surprise, if necessary, and when the circumstances unfold, and it becomes apparent to this defendant that they are going to in fact contact and arrest his

homeboy, he decides to act.

(10 RT 1934-1935.)

Obviously, the prosecutor did not know whether, at the time Mr. Sandoval was crouched down behind the car, thoughts passed through his mind about waiting for an opportune time to act and taking the officers by surprise. No one other than Mr. Sandoval was privy to the thoughts he entertained in those fleeting moments. In trying to glean Mr. Sandoval's mental state, the prosecutor looked for clues in the circumstantial evidence, including statements Mr. Sandoval made.[139]

> [T]he lying-in-wait special circumstance[] ... requires proof of an intentional murder committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.

(*People v. Lewis*, *supra*, 43 Cal.4th at p. 508, internal quotation marks omitted.)

For one to assess whether Mr. Sandoval had a mental state in the moments leading up to the shooting that entailed waiting for an opportune time to act and planning of a surprise attack, one must engage in a process of inference pursuant

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[139] "It is obvious that the classification of circumstantial and testimonial evidence is not mutually exclusive; i.e., testimony may be direct evidence of one fact, but circumstantial evidence of another." (1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 2, p. 322.)

to which conclusions are drawn from evidence of the circumstances involved in the shooting.

4. Murder in Furtherance of Criminal Street Gang Activities

The gang-killing special circumstance requires proof of a killing by "an active participant in a criminal street gang" and proof that the killing was "carried out to further the activities of the criminal street gang." (Pen. Code, § 190.2, subd. (a)(22); CALCRIM No. 736; CALJIC No. 8.81.22.) Proof of active gang participation requires a showing of "involvement with a criminal street gang that is more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 747.) The prosecutor asked the jury in closing argument to infer Mr. Sandoval was an active B.P. participant from circumstantial evidence such as videotaped footage of B.P. activities and the manner in which the crime was carried out. (10 RT 2038.) Proof that a crime was carried out to "further the activities" of a gang requires a showing that the crime advanced or promoted gang activities. Indeed, the definition of "further" is: "To help forward, assist...; to promote...." "[T]o advance, make progress." (VI Oxford English Dictionary (2d ed. 1989) p. 285.) Assessing whether Mr. Sandoval's act of fatally shooting Detective Black "furthered," rather than hindered, B.P.'s activities involves more of a judgment call than an evaluation of evidence. But to the extent it involves an evaluation of

evidence, the evidence germane to that determination is necessarily circumstantial. No direct evidence was adduced that Mr. Sandoval's shooting of Detective Black advance or promoted B.P.'s activities. During the penalty phase retrial, the defense proffered evidence that the Mexican Mafia, which ultimately controls gangs such as B.P. (9 RT 1873-1874), had issued an edict prohibiting Hispanic street gang members from engaging in drive-by shootings. The prosecutor confirmed that the edict had been issued. (20 RT 4171-4172.) When the prosecutor resisted defense efforts to present this evidence to the jury, defense counsel contended that the Mexican Mafia would not "sanction" a murder like that involved in this case. The prosecutor objected to any evidence that the Mexican Mafia was "angry because [Mr. Sandoval] shot a cop and brought attention to them." (20 RT 4172.) Thus, Mr. Sandoval's shooting of Detective Black may not have been "further[ed] the activities" of B.P. Rather, it may have been contrary to the gang's goals.

C. The Error Was Prejudicial.

Reasonable inferences can be drawn that 1) it did not appear to Mr. Sandoval that the detectives were going to arrest Rascal, as opposed to merely making contact with him; 2) Mr. Sandoval did not know whether the detectives were "engaged in the performance of [their] duties" at the relevant time; 3) Mr.

Sandoval did not watch the detectives for a substantial period of time, while waiting for an opportune time to act; and 4) Mr. Sandoval's fatal shooting of Detective Black did not "further the activities" of B.P. Because these are reasonable inferences from the available circumstantial evidence, Mr. Sandoval would have benefitted from a jury instruction that the jury could not find the alleged special circumstances true "based on circumstantial evidence unless the proved circumstance[s] [were] not only (1) consistent with the theory that [the] special circumstance[s] [were] true, but (2) [could not] be reconciled with any other rational conclusion." (CALJIC No. 8.83; CALJIC No. 8.83.1.) Had the jury been so instructed, it is at least reasonably probable that the jury would have found some or all of the special circumstance allegations in this case not true. Thus, the erroneous instructional omission cannot be deemed harmless. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) *A fortiori*, the error cannot be deemed harmless under the more exacting *Chapman* harmless error standard.

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X.

UNLESS THE STATUTORY LANGUAGE OF THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS INTERPRETED SO AS TO DISPENSE WITH THE CONSTITUTIONALLY REQUIRED NARROWING FUNCTION OF SPECIAL CIRCUMSTANCES, THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S LYING-IN-WAIT SPECIAL CIRCUMSTANCE FINDING.

Pursuant to Penal Code section 190.2, subdivision (a)(15), the death penalty may be imposed upon a defendant who "intentionally killed the victim *by means of* lying in wait." (Italics added.) A former version of the statute required proof of an intentional killing "*while*" lying in wait. But, effective March 8, 2000 — just one month prior to the homicide in this case — Proposition 18 (Stats. 1998, ch. 629, § 2) modified the language of Penal Code section 190.2, subdivision (a)(15) by replacing the word "while" with the term "by means of."

In this case, although the trial court could have instructed the jury based upon the statutory change brought about by Proposition 18, the court did not do so. Rather, the court gave the jury an instruction concerning the lying-in-wait special circumstance that used the word "while" instead of the term "by means of." Pursuant to CALJIC No. 8.81.15, the court instructed the jury as follows:

> To find that the special circumstance referred to in these instructions as murder while lying in wait is true, each one of the following acts must be proved: One, the defendant intentionally killed the victim; and two, the murder was committed while the defendant was lying in

> wait. The term [']while lying in wait[']] within the meaning of the law of special circumstance[s] is defined as a waiting and watching for an opportune time to act together with a concealment by ambush or by some other secret design to take the other person by ... surprise. The lying in wait need not continue for any particular period of time provided that it's [*sic.*] duration is such as to show a state of mind equivalent to premeditation or deliberation. Thus[,] for a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same period or in an uninterrupted attack commencing no later than the moment of concealment ends. If there's a clear interruption separating the period of lying in wait from the period during which the killing takes place so that there's neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved.

(10 RT 2012-2013; 5 CT 1231.)[140]

This court has stated that "[t]he requirements of lying in wait for first degree murder under Penal Code section 189 are 'slightly different' from the lying-in-wait special circumstance under Penal Code section 190.2, subdivision (a)(15)" and that "the special circumstance ... contains the more stringent requirements." (*People v. Moon* (2005) 37 Cal.4th 1, 22; quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 388; quoting *People v. Ceja* (1993) 4 Cal.4th 1134, 1140, fn. 12.)

In a concurring opinion in *People v. Ceja*, *supra*, 4 Cal.4th 1134, Justice Kennard observed: "Unlike first degree murder perpetrated by lying in wait, the

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[140] This definition of lying in wait derives from *People v. Morales* (1988) 48 Cal.3d 527, 557.

lying-in-wait special circumstance must provide a meaningful basis for distinguishing capital and noncapital cases, so that the death penalty will not be imposed in an arbitrary or irrational manner." (*Id.* at p. 1147; citing *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) Special circumstances must serve "the critical narrowing function" of "separat[ing] defendants whose acts warrant the death penalty from those defendants who are 'merely' guilty of first degree murder." (*Ibid.*)[141] Thus, Penal Code section 190.2, subdivision (a)(15) is only constitutional if interpreted and applied to require proof above and beyond the proof required for lying-in-wait first degree murder.

In *Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, cert. den. (2000) 528 U.S. 1159, the Ninth Circuit observed:

> [T]he California legislature and courts have created a thin but meaningfully distinguishable line between first degree murder lying in wait and special circumstances lying in wait. [Citation.] First degree murder is statutorily defined as 'murder which is perpetrated

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[141] "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1023, internal quotation marks and brackets omitted; *Godfrey v. Georgia* (1980) 446 U.S. 420, 427 (plur. opn. of Stewart, J.); *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) An aggravating circumstance must be found to be present. The aggravating circumstance "must apply to only to a subclass of defendants convicted of murder[,]" and it "may not be unconstitutionally vague." (*Tuilaepa v. California* (1994) 512 U.S. 967, 972.)

> by means of ... lying in wait.' [Citation.] Special circumstance murder is statutorily defined as murder where the 'defendant intentionally killed the victim while lying in wait. [Citation.] The distinction is found in the terms 'while' and 'by means of.'"

(*Id.* at pp. 907-908, ellipsis in the original.)[142]

As discussed at pages 136-162, *ante*, the evidence in this case was legally insufficient to support the first degree murder conviction due to the lack of any competent evidence that Mr. Sandoval acted with deliberation and premeditation. *A fortiori*, the evidence was legally insufficient to support the lying-in-wait special circumstance finding, because the evidentiary showing necessary to support such a finding, under the pre-Proposition 18 theory pursuant to which the trial court instructed the jury, is more stringent than that necessary to support a lying-in-wait

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[142] Good reason exists to question whether Proposition 18 left intact any distinction between the proof requirements for the lying-in-wait special circumstance and lying-in-wait first degree murder. (*People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 307 ["Proposition 18, adopted by the voters on March 7, 2000, changed the word 'while' in the lying-in-wait special circumstance to 'by means of' so that it would conform with the lying-in-wait language defining first degree murder to essentially eliminate the immediacy requirement that case law had placed on the special circumstance."]; *id.* at p. 312 (dis. opn. of, McDonald, Acting P.J.) ["In my view the adoption of Proposition 18, which eliminated the temporal distinction between lying in wait as a means of establishing premeditation for first degree murder ... and lying in wait as a special circumstance permitting imposition of the death penalty ..., brought to fruition the concern Justice Kennard expressed in her concurring opinion in *People v. Ceja*[, *supra*,] 4 Cal.4th ... [at pp.] 1146-1147...."], footnote and parallel citations omitted.)

first degree murder verdict (*People v. Moon*, *supra*, 37 Cal.4th at p. 22; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 388; *People v. Ceja*, *supra*, 4 Cal.4th at p. 1140, fn. 12), and the evidentiary showing necessary to support a lying-in-wait first degree murder verdict is either equivalent to or more stringent than the evidentiary showing necessary to support a first degree murder verdict on a theory of premeditation and deliberation. (*People v. Ruiz*, *supra*, 44 Cal.3d at p. 614.)[143]

Even if this court does not agree with Mr. Sandoval that the evidence was insufficient to support the first degree murder conviction, the evidence was nevertheless insufficient to support the lying-in-wait special circumstance: Although Mr. Sandoval was lying in wait for Toro, he did not lie in wait for the detectives in front of Toro's home on Lime Avenue. To the contrary, the detectives' arrival on the scene was an unexpected, surprise occurrence.

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[143] With respect to lying-in-wait first degree murder, the trial court instructed the jury as follows: "Murder which is immediately preceded by lying in wait is murder of the first degree. The term [']lying in wait['] is defined as waiting and watching for an opportune time to act together with a concealment by ambush or by other secret design to take the other person by surprise. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." (10 RT 2009; 5 CT 1219.) In the verdict form it executed concerning the murder charge in count I, the jury specifically found the murder of Detective Black was deliberate and premeditated. (5 CT 1267.) However, the jury gave no indication as to whether the first degree murder verdict was based on a finding that Mr. Sandoval had committed the murder by means of lying in wait.

Obviously, a group of criminal street gang members would not set up to carry out a gang hit at a time and location where they believed police would be at the scene. When Mr. Sandoval first noticed the detectives, they had turned onto Lime Avenue and were at a point about two house lengths away from where Mr. Sandoval was standing. (2 CT 293-294, 317-318.)[144] He ducked down, he saw the detectives focus their attention on Rascal, he stood up, and he opened fire. (2 CT 295-297.) This all occurred in the period of time it took the detectives two drive approximately two house lengths.

This evidence cannot support a lying-in-wait special circumstance finding, because 1) the fatal shooting did not occur while Mr. Sandoval was lying in wait for the detectives, as opposed to Toro, and 2) the shooting was not preceded by the requisite substantial period of watching and waiting.

In *People v. Lewis*, supra, 43 Cal.4th 415, this court explained that the lying-in-wait special circumstance theory, pursuant to which the jury in the instant case was instructed, "requires proof of an intentional murder, committed under

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[144] Grand Jury Exhibits 9, 10, and 11 are diagrams of the 1900 block of Lime Avenue, where the shooting occurred. (3 CT 644-647, 679-680.) People's Exhibit 36 is an aerial photograph of the vicinity. (7 RT 1458.) These exhibits depict the limited number of homes on the block and the short distance the detectives traveled from the point where Mr. Sandoval saw them after they turned onto Lime Avenue and the point where Mr. Sandoval opened fire on them.

circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*Id.* at p. 508, internal quotation marks omitted.) This court then proceeded in *Lewis* to set aside multiple lying-in-wait special circumstance findings on two different grounds: insufficient evidence of a substantial period of watching and waiting as to one victim (*id.* at pp. 507-509), and insufficient evidence of murder while lying in wait as to three other victims. (*Id.* at pp. 511-515.)

With respect to the special circumstance finding set aside due to lack of evidence of watchful waiting, this court recounted the following pertinent evidence: The defendant and friends of the defendant had been in two vehicles, driving together in tandem. The vehicle in which the defendant was not riding collided with a truck driven by the victim. (*Id.* at pp. 433, 464, 508.) After the collision, the defendant approached the victim's truck and either "shot him in order to take the truck[,]" or fatally shot the victim after getting into an altercation with him and deciding to take his truck. (*Ibid.*) This did not constitute sufficient evidence the necessary "substantial period of watching and waiting to support the lying-in-wait special circumstance." (*Id.* at p. 508.)

With respect to the special circumstance findings set aside due to lack of evidence of homicides committed "while" lying in wait, this court noted that the defendant and his cohorts had "accomplished the forcible kidnapping of [three] victim[s] while lying in wait, but then drove the still living victims around in their cars for periods of one to three hours, while [using ATM cards to] withdraw[] money from the victims' bank accounts, before killing them." (*Id.* at p. 514.) "By the time of the killings, the concealment, the watchful waiting, and the surprise attack[s] all had taken place at least one and up to three hours earlier." (*Ibid.*)

In *People v. Carter* (2005) 36 Cal.4th 1215, this court again set aside a lying-in-wait special circumstance finding. Although the Attorney General contended the evidence adduced at trial reasonably supported an inference that the defendant had broken into the victim's home and waited there to take her by surprise when she subsequently arrived (*id.* at p. 1261), this court concluded that inference was speculative. There was no actual evidence that the defendant had watched and waited for the victim. The defendant "may have arrived" at the victim's home after the victim was already there. (*Id.* at pp. 1261-1262.)

Although this court has "never placed a fixed time limit" on the required period of watching and waiting, this court has held that "the period of watchful waiting must be *substantial*." (*People v. Moon*, *supra*, 37 Cal.4th at p. 23, italics

added, internal quotation marks omitted.)

In the instant case, no evidence was adduced that Mr. Sandoval watched and waited for a substantial period of time after he first observed the detectives. As noted above, the only evidence bearing on this subject was that the detectives had traveled approximately two house lengths in their vehicle between the time he first saw them and the time that he opened fire. Although no evidence was presented as to how long it took the detectives to drive the distance of two house lengths on Lime Avenue, it is evident that it would not have taken the detectives more than a matter of seconds to drive that short distance. The jurors saw visual evidence of the brief distance the detectives drove on Lime Avenue before being fired upon. (People's Exhibit 36.) No California court has held that the mental state necessary to support the lying-in-wait special circumstance, which is constitutionally required to entail more than "mere" premeditation and deliberation, can be formed in such a short period of time. Furthermore, there is no evidence, as opposed to speculation, that Mr. Sandoval ducked down in order to conceal himself for the purpose of "waiting for an opportune time to act...." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 508.) He ducked down so as to avoid being seen and arrested by the detectives for, *inter alia*, being in unlawful possession of a firearm. The prosecutor even acknowledged that Mr. Sandoval "conceal[ed] himself behind the

vehicle that he arrived in[,] in order that he not be seen by the police officers [who were] approach[ing] him." (10 RT 1934.)[145] Per his confession, he did not decide to shoot at the detectives until he saw them focus their attention on Rascal. (2 CT 296-297.) The decision and the shooting occurred instantaneously, rather than after a substantial period of watchful waiting.[146] Finally, as discussed at pp. 157 & 227, *ante*, the prosecutor stressed to the jury during his guilt phase argument the fact that Mr. Sandoval fired 28 separate shots, suggesting the jury could infer Mr. Sandoval's mental state from the number of shots fired. (10 RT 2031.) However, to the extent the number of shots fired reflects some type of evolving mental state, that evidence forecloses a finding that the requisite mental state had been formed "while" watching and waiting for an opportune time to act. Under the standard for reviewing the sufficiency of evidence, discussed at pp. 139-140, *ante*, the evidence in this case is insufficient to support the lying-in-wait special circumstance.

Thus, unless Penal Code section 190.2, subdivision (a)(15) is construed in some manner that fails to fulfil the constitutionally required narrowing function of

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[145] As defense counsel argued to the jury, Mr. Sandoval hid "not to lie in wait[,]" but to hide from the detectives. (10 RT 2049.)

[146] The prosecutor argued to the jury during the guilt phase that when Mr. Sandoval saw the detectives, he "duck[ed] down, and waited to see whether it[] [was] necessary ... to begin shooting...." (10 RT 2035.)

special circumstances in this state, the evidence adduced at trial was legally insufficient to support the jury's lying-in-wait special circumstance finding pursuant to the lying-in-wait special circumstance theory on which the trial court instructed the jury.

XI.

THE TRIAL COURT VIOLATED MR. SANDOVAL'S STATUTORY AND CONSTITUTIONAL RIGHTS BY CONDUCTING PROCEEDINGS OUT OF MR. SANDOVAL'S PRESENCE.

During deliberations in the guilt phase, the jury sent a note to the trial court asking the following question:

> If we find the person guilty of count two attempted murder, but find the attempt not to be premeditated, is this person still guilty of the crime?

(10 RT 2082; 5 CT 1179.)

Proceedings were convened in open court to address the jury's question. Mr. Sandoval was *not* present. The court asked defense counsel whether they wanted Mr. Sandoval brought to court. Lead defense counsel stated, "I'll waive his presence." (10 RT 2082.) The court then proceeded to discuss the jury's question with counsel and formulated a response. (10 RT 2082-2083.)

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By going forward with these proceedings in Mr. Sandoval's absence, the trial court violated Mr. Sandoval's constitutional and statutory rights.

Although Mr. Sandoval had orally waived his right to be present during any read-backs of testimony to the jury (10 RT 2070-2071), he had not *personally* waived — orally or in writing — his right to be present during proceedings involving the formulation of responses to questions from the jury beyond mere requests for read-backs.

"As a constitutional matter, a criminal defendant accused of a felony has the right to be present at every critical stage of the trial." (*People v. Rundle* (2008) 43 Cal.4th 76, 133, disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) "The right derives from the confrontation clause of the Sixth Amendment to the federal Constitution and the due process clauses of the Fifth and Fourteenth Amendments, and article I, section 15 of the California Constitution." (*Ibid.*) "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." (*Illinois v. Allen*, *supra*, 397 U.S. at p. 338; *Lewis v. United States* (1892) 146 U.S. 370.)

The right of a defendant to be present is also codified in Penal Code section 1043. A defendant charged with a felony can waive the right to be present.

However, in order to effectuate the waiver, the defendant must "personally" execute the waiver in writing in open court. (Penal Code section 977.)

In *People v. Romero*, *supra*, 44 Cal.4th 386, this court concluded a defendant's right to be present was violated when court responded to jury question out of the defendant's presence. Although the defendant had orally agreed to waive his right to be present during read-backs of testimony or in other proceedings convened to respond to jury questions, he had not executed that waiver in writing. (*Id.* at pp. 417-419)

The question asked by the jurors in the instant case was a significant question. It involved Mr. Sandoval's liability for the attempted murder charge in count two, and it revealed the jury was struggling with the question of whether Mr. Sandoval had acted with premeditation. (10 RT 2082; 5 CT 1179.) Under the authorities set forth above, the trial court violated Mr. Sandoval's constitutional and statutory rights by conducting proceedings concerning this question outside Mr. Sandoval's presence. In *People v. Romero*, *supra*, 44 Cal.4th 386, this court deemed harmless a comparable, though less serious, violation of a defendant's right to be present. In coming to that conclusion, this court stressed that the trial court in that case had not given a substantive response to a juror question in proceedings conducted without the defendant. (*Id.* at p. 419.) Here, by contrast,

the court formulated a response to the jury question in Mr. Sandoval's absence. (10 RT 2082-2083.) The error cannot be deemed harmless under either the *Chapman* standard or the *Watson* standard.

XII.

THE STATE'S RETRIAL OF THE PENALTY PHASE, FOLLOWING THE 7-5 DEADLOCK IN THE ORIGINAL PENALTY PHASE, WAS UNCONSTITUTIONAL.

The state and federal bans against cruel and/or unusual punishment (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17),[147] prohibit repeated attempts by the government to subject a capital defendant to the death penalty. Specifically, if a prosecutor is unable to convince a jury to unanimously vote to impose the death penalty upon a defendant, the prosecutor cannot, consistently with constitutional safeguards, make repeated attempts to exact the ultimate penalty against the defendant from new and different juries.

This court concluded otherwise in *People v. Taylor* (2010) 48 Cal.4th 574, 633-634. However, the Supreme Court of the United States has not addressed the issue, and Mr. Sandoval respectfully raises the issue here in order to preserve his

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[147] "Unlike its federal counterpart, [the California constitutional provision] forbids cruel *or* unusual punishment, a distinction that is purposeful and substantive rather than merely semantic." (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085, italics in the original.)

right to raise the issue in future proceedings, if necessary.

"[R]etrial is not the prevailing rule for capital penalty-phase proceedings." (*Jones v. United States* (1999) 527 U.S. 373, 419 (Ginsburg, J., dissenting).) "The majority of states have statutorily provided for an automatic sentence of less than death in the event of a deadlocked jury." (*State v. Peeler* (2004) 271 Conn. 338, 428 [857 A.2d 808, 867] cert. den. *sub nom. Peeler v. Connecticut* (2005) 546 U.S. 845; *State v. Hochstein* (2001) 262 Neb. 311, 323 [632 N.W.2d 273, 282].)

The death penalty is currently prohibited in the following 15 states: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, New Jersey, Mew Mexico, New York, Rhode Island, Vermont, West Virginia, and Wisconsin. It is also prohibited in the District of Columbia. (<<http://www.deathpenaltyinfo.org/states-and-without-death-penalty>>.)

The death penalty is available in 35 states. And, the federal judiciary is a 36th jurisdiction in which the death penalty is available. (18 U.S.C. § 3591, *et seq.*; see generally *United States v. Moussaoui* (4th Cir. 2010) 591 F.3d 263, 300-303.) In 25 of these 36 jurisdictions, penalty phase retrials are statutorily prohibited. In these 25 jurisdictions, if the jury in the original penalty phase does not unanimously vote in favor of the death penalty, the prosecution may not make a repeat attempt to secure the death penalty. Rather, the defendant must be

sentenced to life without parole or some lesser sentence.[148]

California is one of only five states that statutorily authorize retrial of a penalty phase following juror deadlock in the original penalty phase. (Penal Code section 190.4, subdivision (b).)[149] The other four states are Alabama, Arizona,

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[148] Title 18 United States Code section 3594; Arkansas Code Annotated section 5-4-603, subdivision (c); Colorado Revised Statutes section 18-1.3-1201, subdivision (2)(d); Georgia Code Annotated section 17-10-31, subdivision (c); Idaho Code section 19-2515, subdivision (7)(b); 720 Illinois Compiled Statutes 5/9-1, subdivision (g); Kansas Statutes Annotated section 21-4624, subdivision (e); Louisiana Code of Criminal Procedure article 905.8; Maryland Criminal Law Code Annotated section 2-303, subdivision (j)(2); Mississippi Code Annotated section 99-19-101, subdivision (3)(c); Missouri Revised Statutes section 565.030, subdivision (4); New Hampshire Revised Statutes Annotated section 630:5, subdivision (IX); North Carolina General Statutes section 15A-2000, subdivision (b); Oklahoma Statutes Annotated title 21, section 701.11; Ohio Revised Code Annotated section 2929.03, subdivision (D)(2); Oregon Revised Statutes section 163.150, subdivisions (2)(a) & (1)(c)(B); 42 Pennsylvania Consolidated Statutes Annotated section 9711, subdivision (c)(1)(v); South Carolina Code Annotated section 16-3-20, subdivision (C); South Dakota Codified Laws section 23A-27A-4; Tennessee Code Annotated section 39-13-204, subdivision (h); Texas Code of Criminal Procedure Annotated article 37.071.2, subdivision (g); Utah Code Annotated section 76-3-207, subdivision (5)(c); Virginia Code Annotated section 19.2-264.4, subdivision (E); Washington Revised Code Annotated section 10.95.080, subdivision (2); Wyoming Statutes Annotated section 6-2-102, subdivision (d)(ii).

[149] California previously adhered to the majority rule prohibiting penalty phase retrials following hung juries. (*People v. Kimble* (1988) 44 Cal.3d 480, 511, cert. den. *sub nom. Kimble v. California* (1988) 488 U.S. 871.)

Indiana, and Nevada.[150]

In two states, Connecticut and Kentucky, courts have determined, in the absence of specifically controlling legislation, that penalty phase retrials may go forward after original capital sentencing juries deadlock. (*State v. Daniels* (1988) 207 Conn. 374, 393-394 [542 A.2d 306, 317]; *Skaggs v. Commonwealth* (Ky. 1985) 694 S.W.2d 672, 681.)[151]

The remaining three states are Delaware, Florida, and Montana. The relevant statutes in these states provide that juries do not make the ultimate sentencing determination in capital cases.[152]

Thus, a national consensus has emerged that a capital case prosecutor should have only one opportunity to make his/her case for a death sentence. In light of this national consensus, if the prosecutor does not convince the originally empaneled jury to unanimously vote to impose the death penalty, the federal and

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[150] Alabama Code section 13A-5-46, subdivision (g); Arizona Revised Statutes section 13.752, subdivision (K); Indiana Code Annotated section 35-50-2-9, subdivision (f); Nevada Revised Statutes Annotated section 175.556, subdivision (1).

[151] Connecticut has only executed one person since 1976. (<<http://www.deathpenaltyinfo.org/state_by_state >>.)

[152] Delaware Code Annotated title 11, section 4209, subdivisions (c)(3)(b)(1) & (2); Florida Statutes section 921.141, subdivisions (2) & (3); Montana Code Annotated section 46-18-305.

state bans on cruel and/or unusual punishment prohibit the prosecutor from seeking to exact that penalty in a second penalty trial.

"Though the death penalty is not [presently deemed] invariably unconstitutional," the Supreme Court of the United States "insists upon confining the instances in which the punishment can be imposed." (*Kennedy v. Louisiana* (2008) 128 S.Ct. 2641, 2650.) The Court proceeds with rigor in this regard because the Eighth Amendment "imposes special limitations" on government authority to mete out the death penalty. (*Payne v. Tennessee* (1991) 501 U.S. 808, 824.) In California, it is the "imperative task of the judicial branch, as a coequal guardian of the [State] Constitution, to condemn any violation" of the prohibition against cruel or unusual punishment. (*People v. Dillon* (1983) 34 Cal.3d 441, 478, internal quotation marks omitted.)

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.... The Amendment must draw its meaning from the evolving standards of decency that mark the process of a maturing society." (*Trop v. Dulles*, *supra*, 356 U.S. at p. 100-101.) Thus, "the power to prescribe penalties [must] be exercised within the limits of civilized standards." (*In re Lynch* (1973) 8 Cal.3d 410, 424, internal quotation marks omitted.) In assessing whether imposition of the death penalty violates the Eighth Amendment in a particular type

of case, courts must look to "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 563.) The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 331.) The existence of a "national consensus" against imposing the death penalty in certain contexts can provide the basis for finding that the Eighth Amendment operates as a substantive ban on the death penalty in those contexts. (*Roper*, *supra*, 543 U.S. at pp. 563-564; *Graham v. Florida* (2010) 130 S.Ct. 2011, ____, 176 L.Ed.2d 825, 837.) When the country's legislatures have developed a consensus, a court must ask "whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (*Atkins v. Virginia* (2002) 536 U.S. 304, 313.)

The figures set forth above reveal a strong national consensus against allowing prosecutors to make multiple attempts to convince juries to impose the death penalty against a single defendant. Nearly 70% of the jurisdictions in which the death penalty is available limit the prosecution to one attempt.[153] Factoring in the 16 jurisdictions in which the death penalty is prohibited, no authority exists in

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[153] As noted above, 25 of the 36 jurisdictions in which the death penalty is available allow only one attempt. 25 is 69.4% of 36.

nearly 80% of the jurisdictions in this country for prosecutors to make multiple attempts to convince juries to impose the death penalty against a single defendant.[154]

The "contemporary values" reflected by this "national consensus" requires this court to ask "whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 313.) The answer to this question is no.

The Supreme Court of the United States has interpreted the Eighth Amendment to "require[] that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 442-443; accord, *Tennard v. Dretke* (2004) 542 U.S. 274, 285.) In Mr. Sandoval's original trial, five jurors felt that the death penalty was not warranted in this case. The voices of those *five jurors* have not been "give[n] effect" in this case.

In *Kansas v. Marsh* (2006) 548 U.S. 163, the Supreme Court of the United States found the Kansas death penalty statute to be constitutional because the state's capital sentencing system was "dominated by the presumption that life

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[154] In 41 out of 52 jurisdictions (the 50 states plus the District of Columbia and the federal judiciary), no repeat attempt may be made to secure the death penalty. 41 is 78.8% of 52.

imprisonment is the appropriate sentence for a capital conviction." (*Id.*, at p. 178.) A significant manifestation of this presumption is the statutory provision that "if the jury is unable to reach a unanimous decision—in any respect—a sentence of life must be imposed." (*Id.*, at p. 179.)

XIII.

THE TRIAL COURT'S *WITHERSPOON-WITT* ERROR IN THE REMOVAL OF PROSPECTIVE JUROR D.M. NECESSITATES AUTOMATIC REVERSAL OF THE DEATH PENALTY JUDGMENT.

The trial court improperly granted the prosecutor's request to exclude prospective juror D.M. for cause during the death-qualification stage of jury selection in the penalty-phase re-trial. (15 RT 2998-2999.) D.M. supports the death penalty and believes convicted murderers should be swiftly executed. (15 RT 2992-2993; 49 Supp. I CT 14152-14154.) Although he equivocated in response to questions as to whether he could vote to impose the death penalty in this case, by answering "yes", "I think so", and "I really don't know until I face that situation" (15 RT 2993-2998; 49 Supp. I CT 14154), D.M. unequivocally indicated he would listen to the evidence, follow the trial court's instructions, strive to determine the appropriate penalty, and serve as a fair and impartial juror. (15 RT 2993-2994, 2997-2998; 49 Supp. I CT 14145-14146, 14157.) Not only

was there no factual basis for the court's removal of D.M. for cause, but also the court applied an unconstitutional standard in assessing whether D.M. was subject to removal for cause. The trial court's erroneous disqualification of D.M. violated Mr. Sandoval's state and federal constitutional rights to a reliable penalty verdict, due process of law, and a fair and impartial jury. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)[155] The error necessitates *automatic* reversal of the death penalty judgment.

A. Factual Background

D.M. filled out a questionnaire (49 Supp. I CT 14127-14163), and answered questions during sequestered *Hovey*[156] voir dire. (15 RT 2992-2999.) After the voir dire, the trial court granted the prosecutor's request to excuse D.M. for cause over defense objection. (15 RT 2998-2999.)

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[155] "In a state such as California that in capital cases provides for a sentencing verdict by a jury, the due process clause of the Fourteenth Amendment of the federal Constitution requires the sentencing jury to be impartial to the same extent that the Sixth Amendment requires jury impartiality at the guilt phase of the trial.... California's Constitution provides an identical guarantee." (*People v. Earp* (1999) 20 Cal.4th 826, 852-853, internal quotation marks omitted, cert. den. *sub nom. Earp v. California* (2000) 529 U.S. 1005.)

[156] *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

1. D.M.'s Questionnaire and Voir Dire

In the juror questionnaire he filled out, D.M. indicated he could be a fair and impartial juror in this case. (49 Supp. I CT 14145.) He wrote that he held no religious preferences or beliefs that would make it difficult to sit in judgment of another person (49 Supp. I CT 14146), and that he had the ability to decide the case based on the evidence presented in court along with the instructions given by the judge. (49 Supp. I CT 14151.) D.M. wrote that he is in favor of the death penalty "in some cases." (49 Supp. I CT 14152.) Further, he indicated that he does not believe the death penalty is used too often, "except maybe in Texas." (49 Supp. I CT 14153.) He indicated in his questionnaire that he believes California should have the death penalty, that he supports the death penalty "in most cases[,]" and that he agrees with the proposition that convicted murderers should be swiftly executed. (49 Supp. I CT 14154, 14157.) In response to a question as to whether he could "vote for the death penalty on ... Ramon Sandoval, if [he] believed, after hearing all the evidence, that the penalty was appropriate[,]" D.M. answered, "yes[.]" (49 Supp. I CT 14154.) However, in response to a question as to whether he "realistically" saw himself "as a person capable of returning a verdict of death on another human being[,]" D.M. answered, "[I] don't know." (49 Supp. I CT

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14158.)[157]

During the prosecutor's sequestered voir dire of D.M., the following exchange took place:

Q: I take it you believe in the death penalty in some situations[,] depending on th[e] issues of the crime?

A: Correct.

Q: Okay. [¶] And the only thing I'm worried about at this point is, do you see yourself as a person that, as part of a jury, you have the ability to return a death verdict if it's warranted? [¶] Are you following me?

A: I am. [¶] I thought about it. [¶] And I honestly couldn't answer you. I've never been in that situation before.

Q: Do you think you can listen to the evidence which is presented and make a determination as to what the appropriate punishment is for someone that did the things that you'll hear about [in this] court?

A: Yeah.

Q: Okay. [¶] And if it happens to be from listening to everything that you believe the death penalty is appropriate, can you return that verdict?

A: I think so. I really don't know until I face that situation.

Q: What sort of things would you consider in making that sort of ... conclusion, and making that sort of decision?

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[157] Three potential answers were listed on the questionnaire: Yes, No, and Don't Know. D.M. circled "Don't Know". (49 Supp. I CT 14158.)

A: I suppose the circumstances under which it happened, and maybe what I thought about the defendant.

Q: His role in the crime and things like that?

...

A: Yes.

Q: Would you do your best as a juror to make an honest evaluation and determination of what the appropriate penalty is?

A: Yes.

Q: And would you listen carefully to the evidence which comes from both sides as to what the defendant has done in his life?

A: Yes.

Q: And I'm not — obviously, you can't give us an answer because you don't know what the evidence is. [¶] But would you do your best to return a verdict which accurately reflects an appropriate verdict for his conduct?

A: Yes.

(15 RT 2992-2994.)

Then, the following exchange took place during defense counsel's questioning of the prospective juror:

Q: We just want to make sure that you can be fair to both sides. And at the end of the case, the jury will be given two possible verdicts, life without parole or death. You have to sign one. Each juror has to agree to one. [¶] Do you feel at this time that you could vote for either one?

A: To be honest, I'm not sure.

Q: Tell us about what it is that you're not sure....?

A: I think whether, perhaps, I should even have the ability or the power to decide life or death.

Q: Okay. [¶] So it doesn't really have to do with the facts of this case, but just the kind of situation that you're being put in?

A: Yeah. [¶] I'm not sure whether — I don't know. I'm not sure whether I'm up to the responsibility, to be honest.[158]

(15 RT 2995.)

Later in defense counsel's questioning of D.M., the following exchange occurred:

Q: We're giving you basically some of the facts of the case. He's already been convicted of killing a police officer —

A: I realize that.

Q: — who was in the performance of his duties.... And that there was another unrelated murder. I don't know if you caught that. [¶] But one question [in the questionnaire] was if there was another murder, would you automatically vote for the death penalty? [¶] And your answer was no. You'd have to look at all the circumstances. [¶] So now you understand what the case is about —

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[158] The record mistakenly reflects the last answer to the last question in the above-quoted exchange was given by defense counsel. However, it is evident that defense counsel did not answer his own question, but rather that the answer was given by prospective juror D.M. (15 RT 2995.)

A: Yes.

...

Q: And the question is, can you vote — if you thought that death was appropriate, okay, justified and appropriate after hearing all the evidence, which first the prosecution gives evidence and then the defense gives evidence, and then we have arguments by the attorneys, and the judge gives instructions. [¶] If you though that death is appropriate, could you vote for death?

A: To be honest, I could only say yes until I was at that actual point.

Q: Okay. [¶] Because you've never been at that actual point before?

A: Correct.

Q: And is it bothering you that it's a pretty momentous and difficult decision?

A: Yeah. Sure. Sure.

Q: Is that something that you've never really been confronted with, but in your life, you are able to make decisions in your life, even tough ones or not?

A: Not very well.

...

Q: And all we're asking you here is not a commitment. We don't want a commitment of what you decide, but that you will listen to the evidence and will decide one way or the other based upon your conscience, the evidence, the jury instructions, and the attorneys[']arguments, everything, the whole big ball of

wax. [¶] Could you do that?

A: I can do that.

(15 RT 2996-2998.)

After the sequestered voir dire, D.M. stepped outside of the courtroom, and the prosecutor moved to excuse him for cause "based on his ambivalence." (15 RT 2998.) The court agreed with the prosecutor's assessment, and stated:

> I think so too. I think he's too ambivalent one way or the other. I don't think he can make any decision. And his answer was in accordance with that ambivalence. In fact, I believe he didn't even answer the question on life without the possibility of parole. I believe he left that one blank.[159]

(15 RT 2998.)

Defense counsel proposed to bring the prospective juror back in for further questioning. (15 RT 2998-2999.) But, the court commented that the juror "kept saying ... [']I don't know[']", and that "he's not going to know until the moment of truth hits him between the eyes." (15 RT 2999.) Defense counsel countered that,

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[159] Thereafter, the court said, "I suppose he did[]" answer the question on his questionnaire. In fact, D.M. answered one of two similarly-phrased questions concerning this subject: Question 100 on the 37-page questionnaire called for the prospective juror to indicate whether he could realistically see himself returning a death verdict. Question 101 called for the prospective juror to indicate whether he could realistically see himself returning a sentence of life without the possibility of parole. D.M. answered the former question by circling "Don't Know", but he did not circle any answer in response to the latter question. (15 RT 2999; 49 Supp. I CT 14158-14159.)

in the end, the prospective juror said he would make a decision based upon the evidence and that he would take responsibility for making the decision. The court disagreed and excused the prospective juror for cause, declining defense counsel's request to bring the prospective juror back in for further questioning. (15 RT 2999.)

At no time did the court indicate its determination was based upon demeanor, body language, or anything other than D.M.'s verbal responses during voir dire.

2. The Trial Court's "Ambivalence/Equivocation" Standard

During the death-qualification phase of voir dire in the round of jury selection conducted before the guilt phase, the trial court had commented that "when jurors equivocate with [']I think so['], [']I feel I could['], [']I don't think I could['], [']I don't know['], that's a challenge for cause that's appropriate." (4 RT 814.) The court said "there's case after case that says" "when [prospective] jurors equivocate and say [']I don't know['] ... they can be excused for cause." (4 RT 814.) In support of this proposition, the court cited to *People v. Kaurish* (1990) 52 Cal.3d 648, cert. den. *sub nom. Kaurish v. California* (1991) 502 U.S. 837; *People v. Hamilton* (1989) 48 Cal.3d 1142, cert. den. *sub nom. Hamilton v. California* (1990) 494 U.S. 1039; *People v. Coleman* (1989) 48 Cal.3d 112, cert. den. *sub*

nom. Coleman v. California (1990) 494 U.S. 1038; and *People v. Guzman* (1988) 45 Cal.3d 915, cert. den. *sub nom. Guzman v. California* (1989) 488 U.S. 1050.[160] (4 RT 814.)[161]

B. Standard of Review

When an appellate court reviews a trial court's decision to excuse a prospective juror for cause based upon information elicited during the death-qualification phase of jury selection, the question "is not whether [the] reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." (*Wainwright v. Witt*, *supra*, 469 U.S. 412, 434.) Findings of the trial court in this regard are supposed to be directed at ascertaining whether a prospective juror's views concerning capital punishment "would prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath." (*Id.* at p. 424, internal quotation marks omitted.) Generally, a reviewing court must extend deference to the factual findings of the trial court concerning a prospective juror's

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[160] This court disapproved *Guzman* on other grounds in *Price v. Superior Court*, *supra*, 25 Cal.4th at p. 1069, fn. 13.

[161] As discussed below, none of these cases, nor any other decisions of this court, stand for the proposition asserted by the trial court.

ability to perform his/her duties. (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 9.)[162] However, an appellate court extends no deference in cases where "the trial court's findings are dependent on an apparent misapplication of federal law." (*Gray v. Mississippi* (1987) 481 U.S. 648, 661, fn. 10.) Furthermore, "a reviewing court may reverse [a] trial court's decision [to remove a prospective juror for cause] where the record discloses no basis for a finding of substantial impairment." (*Uttecht*, *supra*, 551 U.S. at p. 20.)

C. Governing Legal Principles

Only prospective jurors who cannot be impartial are subject to disqualification for cause. "In the usual sense, a biased juror is one who has a predisposition against or in favor of the defendant. In a more limited sense. A biased juror is one who cannot 'conscientiously apply the law and find the facts.'" (*Franklin v. Anderson* (6th Cir. 2006) 434 F.3d 412, 422, cert. den. *sub nom. Houk v. Franklin* (2007) 549 U.S. 1156; quoting *Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.)

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[162] The discretion of the trial court in this context is not boundless: "In exercising its discretion, the trial court must be zealous to protect the rights of the accused." (*Dennis v. United States* (1950) 339 U.S. 162, 168.) The trial court's exercise of discretion is "'subject to the essential demands of fairness.'" (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 730; *Aldridge v. United States* (1931) 283 U.S. 308, 310.)

Code of Civil Procedure section 225, subdivision (b)(1)(C) permits the exclusion for cause of a prospective juror who exhibits a state of mind "which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." Code of Civil Procedure section 230 provides: "Challenges for cause shall be tried by the court. The juror challenged and any other person may be examined as a witness in the trial of the challenge, and shall truthfully answer all questions propounded to them."

The requirement of impartiality has a special component in capital cases: A prospective juror cannot be deemed impartial if his or her views in favor of or against capital punishment would prevent him or her from conscientiously considering the sentencing alternatives of life without the possibility of parole and the death penalty. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 482.)

1. Burden of Proof

"[I]t is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 733, internal quotation marks omitted; *Lockhart v. McCree*, *supra*, 476 U.S. at p. 170, fn. 7; *Wainwright v. Witt*, *supra*, 469 U.S. at p. 423; *Reynolds v. United States* (1879) 98 U.S. 145, 157 ["The affirmative of the issue is upon the challenger."].)

2. Significance of Defense Objection

An objection from defense counsel to removal of a prospective juror is significant in this context. In *Uttecht v. Brown*, *supra*, 551 U.S. 1, the Supreme Court of the United States was confronted with the converse circumstance — removal of a prospective juror without objection from the defense. The Court explained the significance of the lack of objection:

> We ... take into account voluntary acquiescence to, or confirmation of, a juror's removal. By failing to object, the defense did not just deny the conscientious trial judge an opportunity to explain his judgment or correct any error. It also deprived reviewing courts of further factual findings that would have helped to explain the trial court's decision.

(*Id.* at p. 18.)

3. The Sixth and Fourteenth Amendments Have Been Construed to Prohibit Removal for Cause of a Prospective Juror in a Capital Case on the Basis of His/Her Views Concerning the Death Penalty Unless Those Views Would Completely or Substantially Inhibit the Prospective Juror's Capacity to Consider and Vote to Impose the Death Penalty.

The exclusion from a jury of all persons with reservations about the death penalty would result in a panel "uncommonly willing to condemn a man to die[,]" in derogation of a capital defendant's right, under the Sixth and Fourteenth Amendments, to an impartial jury. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521.) Accordingly, a prospective juror may be removed for cause only if his or her

views regarding the death penalty would "prevent or substantially impair the performance of his [or her] duties as a juror...." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; *People v. Lewis*, *supra*, 43 Cal.4th at p. 487; *People v. Blair* (2005) 36 Cal.4th 686, 741, cert. den. *sub nom. Blair v. California* (2006) 547 U.S. 1107.)[163]

It is difficult for the State to show prospective jurors are subject to removal for cause under this standard: Prospective jurors "who firmly believe that the death penalty is unjust may nevertheless serve ... so long as they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 176.) Similarly, prospective jurors whose "conscientious views relating to the death penalty" would lead them to "impose a higher threshold before concluding the death penalty is appropriate" or would otherwise find it "very difficult ... ever to impose the death penalty" are not subject

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[163] "The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths. [Citation.] To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It stacks the deck against the [defendant]. To execute ... a death sentence [imposed by a jury from which venire members were improperly excluded based on their views concerning the death penalty] would deprive [the defendant] of his life without due process of law." (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 658-659, internal quotation marks and brackets omitted.)

to removal for cause. (*People v. Stewart* (2004) 33 Cal.4th 425, 447.) Even prospective jurors whose opposition to the death penalty would "predispose" them "to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded unless that predilection would actually preclude [them] from engaging in the weighing process and returning a capital verdict." (*People v. Kaurish*, *supra*, 52 Cal.3d at p. 699.)[164] Thus, prospective jurors who express opposition to the death penalty and/or reluctance about their willingness to impose the death penalty cannot be removed for cause on that basis. Rather, they can only be removed for cause based upon evidence that engenders a "definite impression that [they] would be unable to faithfully and impartially apply the law." (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 425-426.)

"A juror's refusal to inflict the death penalty because of the personal demands of conscience over the firm dictates of the law is, of course, an example of juror nullification." (*Merced v. McGrath* (9th Cir. 2005) 426 F.3d 1076, 1080,

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[164] "[W]here jurors express conscientious views concerning the death penalty yet still make clear that they are able to follow their oaths to act impartially, they cannot be excluded for cause from participating on the jury." (*People v. Cahill* (2003) 2 N.Y.3d 14, 47, 809 N.E.2d 561, 576, 777 N.Y.S.2d 332, 347.)

cert. den. *sub nom. Merced v. Kirkland* (2006) 547 U.S. 1036.)[165] According to the Supreme Court of the United States, only the readiness of a prospective juror to engage in nullification of a death penalty statute will justify removal for cause during the death-qualification process: "[I]f prospective jurors are barred from jury service because of their views about capital punishment on any broader basis than inability to follow the law or abide by their oaths, the death sentence [imposed by a jury from which they were excluded] cannot be carried out." (*Adams v. Texas* (1980) 448 U.S. 38, 48, internal quotation marks omitted.)

a. The Significance of Equivocation and/or Ambivalence on the Part of Prospective Jurors During the Death-Qualification Process

During the process of death qualification, prospective jurors frequently equivocate regarding their ability or willingness to impose one of the two available penalties. When confronted with such equivocation, a trial judge must determine whether the uncertainty bespeaks an inability or substantial impairment of the capacity to apply the law conscientiously and without favoritism.

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[165] Conversely, "the belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's inability to follow the law." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 735.) "Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of the law." (*Ibid.*)

As elaborated below, the standard applied by the trial court in making such a determination differs from the standard pursuant to which an appellate court reviews the trial court's determination. In the *trial* court, equivocation is a factor to be considered; it may, upon inquiry, prove to be commensurate with inability or substantial impairment, but, in and of itself, it is not dispositive. In the *appellate* court, a trial court's determination that equivocation actually signified inability or substantial impairment will be dispositive, provided the trial court conducted an adequate inquiry and applied the correct standard in reaching its determination. Thus, whereas equivocation triggers a duty on the part of a trial court to inquire whether the prospective juror's uncertainty is actually tantamount to inability or substantial impairment, equivocation can effectively negate the need for any appellate inquiry.

Significantly, and obviously, the equivocation of a given venireperson may indicate impairment, but not *substantial* impairment. While the latter amounts to cause for removal, the former does not.

1) Background — The Evolution of High Court Precedent Pursuant to Which Equivocation Has Become Increasingly Relevant

In *Witherspoon v. Illinois*, *supra*, 391 U.S. 510, the Supreme Court of the United States adopted a rigorous standard pursuant to which exclusion of a

prospective juror for cause due to views regarding the death penalty was proper only if the prospective juror made it "unmistakably clear" during voir dire that he/she "would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case...." (*Id.* at p. 522, fn. 21, italics in the original.) Under that standard, a prospective juror's mere equivocation regarding willingness or ability to vote in favor of capital punishment was insufficient to constitute cause for removal. For, mere equivocation does not amount to unmistakable clarity.

Then, in *Wainwright v. Witt*, *supra*, 469 U.S. 412, the Court retreated from the inflexible *Witherspoon* standard[166] and "clarified" that a prospective juror may be removed based on views concerning capital punishment that "would '*prevent or substantially impair* the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.'" (*Id.* at p. 424, italics added; quoting *Adams v. Texas*, *supra*, 448 U.S. 38, 45.) In order to make a finding of substantial impairment, the trial court must be left with a "'definite impression that a prospective juror would be *unable* to faithfully and impartially apply the law.'" (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 425-426, italics

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[166] When considering controlling precedents concerning this subject, "*Witherspoon* is not the final word, but it is a necessary starting point." (*Uttecht v. Brown*, *supra*, 551 U.S. at pp. 5-6.)

added.)[167] Under this refinement of the *Witherspoon* standard, mere equivocation remains insufficient, in and of itself, to justify removal for cause, because equivocation does not necessarily connote unwillingness or inability to follow the law.

Nevertheless, because unmistakable clarity is no longer required, issues arise when prospective jurors are removed pursuant to prosecutorial challenges for cause after making equivocal or ambiguous remarks regarding their ability or willingness to vote for the death penalty. Such issues arise frequently, because, as this court has recognized, prospective jurors "will often give conflicting or confusing answers regarding [their] impartiality or capacity to serve...." (*People v. Weaver* (2001) 26 Cal.4th 876, 910, cert. den. *sub nom. Weaver v. California* (2002) 26 Cal.4th 535 U.S. 1058.)

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[167] "Because this rule is grounded in the Sixth Amendment's guarantee of an impartial jury, not the Eighth Amendment, exclusions under it are no different from exclusions of jurors for any other form of bias." (*United States v. Mitchell* (9th Cir. 2007) 502 F.3d 931, 955, cert. den. (2008) 128 S.Ct. 2902; citing *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 423, 429.) "[T]here is nothing talismanic about juror exclusion under *Witherspoon* merely because it involves capital sentencing juries.... Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts." (*Witt*, *supra*, 469 U.S. at p. 423.)

2) Equivocation Is Not Tantamount to Substantial Impairment.

As noted, even after the *Witt* Court's refinement of the *Witherspoon* standard, mere equivocation or ambivalence on the part of a prospective juror does not give rise to cause for removal. Thus, the Illinois Supreme Court has explained: "While a prospective juror may be removed for cause when that person's views would prevent or substantially impair the performance of his [or her] duties as a juror [citation], an equivocal response does not require that a juror be excused for cause." (*People v. Buss* (1999) 187 Ill.2d 144, 187 [718 N.E.2d 1, 26], internal quotation marks omitted, cert. den. *sub nom. Buss v. Illinois* (2000) 529 U.S. 1089; accord, *People v. Williams* (1996) 173 Ill.2d 48, 67 [670 N.E.2d 638, 648] ["Simply giving an equivocal response ... will not require that a venireperson be excused for cause."]; see also *United States v. Johnson* (8th Cir. 2007) 495 F.3d 951, 963-964 [upholding trial court's determination that juror could be impartial despite juror's "equivocal answers"]; *Hightower v. Schofield* (11th Cir. 2004) 365 F.3d 1008, 1039-1040 [no error where trial court refused to excuse juror for cause based upon "equivocal answers"];[168] *State v. Erickson* (1999) 227 Wis.2d 758, 776 [596 N.W.2d 749, 759] ["[A] prospective juror need

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[168] The Eleventh Circuit's decision in *Hightower* was vacated on other grounds in *Hightower v. Schofield* (2005) 545 U.S. 1124.

not respond to voir dire questions with unequivocal declarations of impartiality."]; cf. *Head v. Carr* (2001) 273 Ga. 613, 622-624 [544 S.E.2d 409, 417-419] [finding defendant was not prejudiced by counsel's failure to move to strike prospective jurors who alternated between stating that they would automatically impose the death penalty and stating that they could vote to impose a life sentence].)

In accord with the foregoing decisions, this court has held that prospective jurors are not removable for cause when they 1) vacillate between assertions that they would automatically impose the death penalty in all cases of intentional, deliberate, or premeditated murder, and assertions that they would consider both available penalty options, or 2) otherwise equivocate concerning their ability to consider the punishment of imprisonment for life without the possibility of parole as an alternative to the death penalty. (*People v. Riggs* (2008) 44 Cal.4th 248, 285-288, cert. den. *sub nom. Riggs v. California* (2009) 129 S.Ct. 2386; *People v. Lewis*, *supra*, 43 Cal.4th at pp. 488-490; *People v. Blair*, *supra*, 36 Cal.4th at pp. 740-744.)

3) Equivocation May Reflect a Degree of Impairment Without Rising to the Threshold Level of Substantial Impairment.

In a federal habeas case involving review of a claim that a prospective juror was improperly dismissed for cause in violation of *Witherspoon*, the Third Circuit

Court of Appeals was confronted with facts that caused it to discuss the difference between *mere* impairment and the degree of impairment required by *Witherspoon*, i.e., *substantial* impairment. *Martini v. Hendricks* (3d Cir. 2003) 348 F.3d 360, 362-368, cert. den. (2004) 543 U.S. 1025. The prospective juror, who was personally opposed to the death penalty (*id.* at p. 364), gave "noncommittal" responses to questions concerning his ability to vote to impose the death penalty. (*Id.* at p. 367.) The responses "create[d] considerable doubt as to whether [the prospective juror] could separate his personal beliefs (his opposition to the death penalty) from the task at hand." (*Ibid.*) According to the Third Circuit, "[t]he inevitable question [was] how to interpret the 'I think so's' and the 'I guess so's,' which constitute[d] the bulk" of the prospective juror's responses to death-qualification questions put to him during voir dire. (*Id.* at pp. 366-367.) While the court felt "constrained," under AEPDA,[169] which requires "very substantial deference" to state court factual determinations,[170] to find a lack of "clear and

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[169] AEDPA is the Antiterrorism and Effective Death Penalty Act of 1996. (Pub. L. 104-132, 110 Stat. 1214 (1996).)

[170] 28 U.S.C. § 2254(e)(1) is a part of AEDPA, It provides: "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

convincing evidence" that the state trial court judge had incorrectly found substantial impairment (*id.* at pp. 367-368), the court acknowledged that the prospective juror "may have been somewhat impaired[,]" but "not 'substantially impaired,' as *Witherspoon* requires." (*Id.* at p. 368.) Thus, had the Third Circuit not been constrained by the exceedingly deferential AEDPA standard, which requires greater deference than this court extends to trial court findings in the *Witherspoon/Witt* context, the Third Circuit may have granted relief.

4) Appellate Treatment of Equivocation Differs From the Manner in Which a Trial Court Must Handle Equivocation.

In a case where a prospective juror equivocates about his or her ability to impose the death penalty, trial courts are vested with broad discretion to determine whether inability or substantial impairment exists. (*People v. Roldan* (2005) 35 Cal.4th 646, 696-698, cert. den. *sub nom. Roldan v. California* (2005) 546 U.S. 986, disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) In such a case, a trial court's finding of inability or substantial impairment will not be disturbed on appeal if 1) the trial court applied the correct legal standard, 2) afforded the opportunity for an adequate inquiry regarding the views of the prospective juror, and 3) reached the finding of inability or substantial impairment based upon substantial evidence contained in the record.

(*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 729-731; *Gray v. Mississippi*, *supra*, 481 U.S. at p. 661, fn. 10; *People v. Heard* (2003) 31 Cal.4th 946, 958-968, cert. den. *sub nom. Heard v. California* (2004) 541 U.S. 946; *People v. Cash* (2002) 28 Cal.4th 703, 718-723, cert. den. *sub nom. Cash v. California* (2003) 537 U.S. 1199.)

The fact that trial courts have broad discretion to determine whether equivocation demonstrates inability or substantial impairment does not mean that trial courts may invariably treat equivocation as inability or substantial impairment. To the contrary, it would be error for a trial court to necessarily equate equivocation with inability or substantial impairment. (*Adams v. Texas*, *supra*, 448 U.S. at p. 50 & fn. 8 [exclusion of prospective jurors who "were unable to positively state whether or not their deliberations would in any way be 'affected'" by the possibility of the death penalty is unconstitutional].) A court confronted with an equivocal prospective juror must endeavor to ascertain the prospective juror's "true state of mind." (*People v. Ghent* (1987) 43 Cal.3d 739, 768 , cert. den. *sub nom. Ghent v. California* (1988) 485 U.S. 929.)

The appellate standard of review, pursuant to which deference is extended to a trial court's finding that equivocation amounted to inability or substantial impairment, differs from the legal standard applied by a trial court confronted with

equivocation. As discussed above, the trial court seeks to answer the ultimate question of whether inability or substantial impairment exists, i.e., whether the prospective juror's equivocation derives from a "true state of mind" that prevents or substantially impairs the prospective juror's ability to be fair and impartial. (*Ibid.*) That question is not automatically answered in the affirmative in the event of equivocation. Rather, the question must be answered in the negative unless the court is left with the "definite impression that a prospective juror would be unable to faithfully and impartially apply the law." (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 425-426.) Thus, whereas the appellate court applies a deferential standard, when reviewing a trial court's determination that a prospective juror was substantially impaired, the trial court applies an exacting, probing standard to determine whether the equivocal prospective juror is in fact substantially impaired.

b. The Requirement of Substantial Evidence of Substantial Impairment

In order for an appellate court to uphold the removal of a prospective juror for cause against a *Witherspoon* challenge, the record must contain *substantial evidence* that the prospective juror lacked impartiality, in that he or she would have been unable to fairly consider voting for the death penalty.

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One of this court's capital decisions demonstrates the consequence of removal of a prospective juror without substantial evidence of bias: In *People v. Heard*, *supra*, 31 Cal.4th 946, this court set aside a death penalty judgment due to *Witherspoon/Witt* error in the removal of a single prospective juror. (*Id.* at 958-968, 982.) In his juror questionnaire, the prospective juror made reference to "past psychological experiences" or bad childhood abuse to which the defendant may have been subjected, as possible justifications for imposing a sentence of life without the possibility of parole. Following up on this subject during voir dire, the trial court asked the prospective juror if the presence of "past psychological factors would weigh heavily enough that [the prospective juror] probably wouldn't impose the death penalty[.]" Following a lengthy pause, the prospective juror responded, "Yes, I think they might." When the court queried whether the prospective juror was "absolutely committed to that position[,]" he responded affirmatively. However, the prospective juror qualified that answer by explaining that he did not think he would automatically vote for life without parole based upon *any conceivable* "psychological factors." (*Id.* at pp. 960-961.)

The prosecutor challenged the prospective juror for cause. Defense counsel objected. The trial court stated, "I will excuse for cause. I think that his answers were such that I think he would, given background conditions, vote for life in

prison without possibility of parole." (*Id.* at p. 963, internal brackets omitted.)

This court concluded there was no "substantial evidence to support a determination that [the prospective juror] harbored views that would prevent or substantially impair the performance of his duties so as to support his excusal for cause." (*Id.* at p. 965.) The trial court had failed to "explain what there was in [the prospective juror's] responses that indicated that he would not be willing or able to follow the law in determining whether life in prison without the possibility of parole, or death, was the appropriate punishment in light of all the evidence presented." (*Id.* at p. 965.) As this court observed, the fact that the prospective juror indicated he might have been influenced by "psychological factors" in choosing between life and death did not demonstrate that he "would not properly be exercising the role that California law assigns to jurors in a death penalty case." (*Ibid.*) Because the answers the prospective juror gave in response to questions in voir dire "indicated he was prepared to follow the law and had no predisposition one way or the other as to imposition of the death penalty[,]" the trial court erred in excusing him for cause. (*Id.* at p. 967.) In reaching this conclusion, this court was mindful of the deference accorded "to determinations made by a trial court in the course of jury selection," but found the trial court had "provided ... virtually nothing of substance to which [this court could] properly defer." (*Id.* at p. 968.)

c. Application of an Erroneous Legal Standard

As noted above, in the discussion concerning the standard of review applicable to *Witherspoon/Witt* claims, the deference that is generally owed to a trial court's findings of fact "is inappropriate, where ... the trial court's findings are dependent on an apparent misapplication of federal law, [citation], and are internally inconsistent." (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 661, fn. 10.)

D. Analysis

Witherspoon/Witt error occurred in the instant case when the trial court removed D.M. for cause. First, the record contains no substantial evidence of inability or substantial impairment on the part of D.M. Second, no deference is warranted with respect to the trial court's determination that D.M. lacked the requisite impartiality, because the trial court a) applied an erroneous legal standard pursuant to which equivocation was deemed tantamount to inability or substantial impairment, and b) applied an erroneous double-standard pursuant to which equivocation on the part of prospective jurors predisposed to impose the death penalty was not deemed cause for removal. Thus, because the trial court's finding regarding D.M. is entitled to no deference, and because no substantial evidence supports the trial court's finding, the death penalty verdict imposed by the jury from which D.M. was excluded cannot be upheld.

1. No Substantial Evidence of Inability or Substantial Impairment

The record does not provide any basis for a finding D.M.'s views would have "prevent[ed] or substantially impair[ed] the performance of his duties as a juror...." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) He unequivocally expressed his belief that the death penalty is warranted in certain circumstances. (15 RT 2992-2993; 49 Supp. I CT 14152-14154, 14157.) In fact, he expressed the view that those convicted of murder should be swiftly executed. (49 Supp. I CT 14154.) The only uncertainty he expressed pertained to whether he would be able to vote for the death penalty if the time ever came for him to actually have to make the decision. (15 RT 2993, 2995-2997; 49 Supp. I CT 14158.) At no point did he indicate he would be unable to do so. Rather, he said he would be able to listen to the evidence presented and make an appropriate determination as to punishment. (15 RT 2993.) He indicated in his questionnaire that he could vote to impose the death penalty. (49 Supp. I CT 14154.) And, when the prosecutor asked him during sequestered voir dire if he could vote for the death penalty if he deemed that penalty appropriate after considering the evidence, D.M. answered, "I think so. I really don't know until I face that situation." (15 RT 2993.) Thus, like the prospective juror who was erroneously excused for cause in *People v. Heard*, *supra*, 31 Cal.4th 946, D.M. "indicated he was prepared to follow the law and had

no predisposition one way or the other as to imposition of the death penalty." (*Id.* at p. 967.)

D.M.'s hesitancy to unequivocally commit in advance that he would be able to vote for the death penalty in this case does not constitute evidence that his views would have prevented or substantially impaired his ability to fulfill his duties as a juror. Rather, his uncertainty reflected the thoughtfulness and deliberate introspection one would expect of a reasonable, law-abiding prospective juror who generally supports the death penalty and who is confronted for the first time with the prospect of assessing whether he could personally vote to impose the death penalty on a human being. The reasonableness and lack of cognizable bias (i.e., absence of evidence of inability or substantial impairment) evinced by D.M.'s questionnaire responses and voir dire testimony is compellingly fortified by the responses given during jury selection by another prospective juror whose job affords a unique opportunity to develop an informed perspective on the death penalty: That prospective juror was a deputy attorney general who works on capital appeals. (35 Supp. I CT 10299-10337.) In response to a question as to whether he could impose the death penalty upon Mr. Sandoval if he "believed, after hearing all the evidence, that the penalty was appropriate[,]" the prospective juror / deputy attorney general answered: "Yes, I believe so. *Although I doubt*

anyone can fully appreciate his or her ability to do so until actually asked to." (35 Supp. I CT 10326, italics added.) Thus, the deputy attorney general's appropriate, impartial position was essentially the same as D.M.'s.

As this court has recognized, "a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled — indeed, duty bound — to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446, internal quotation marks and brackets omitted, italics in the original.) D.M. was precisely this type of juror. He believes in the death penalty. (15 RT 2992-2993; 49 Supp. I CT 14152-14154, 14157.) Nevertheless, he felt it would be very difficult, but not impossible or improbable, for him to vote to impose the death penalty. (15 RT 2993; 49 Supp. I CT 14154.) He was willing and able to listen to the evidence, follow the court's instructions, and decide upon an appropriate penalty. (15 RT 2993-2994, 2997-2998.) Thus, the trial court's disqualification of D.M. violated Mr. Sandoval's constitutional rights to a reliable penalty verdict, due process, and a fair and impartial jury. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 657-659; *Adams v. Texas*, *supra*, 448 U.S. at pp. 45, 49-51; *Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 521-523; *People v. Heard*, *supra*, 31 Cal.4th at pp. 958-968.)

Even if D.M. could plausibly be deemed impaired, he cannot be deemed *substantially* impaired. (*Martini v. Hendricks*, *supra*, 348 F.3d at pp. 362-368.) At no time did he say he could not impose the death penalty. Rather, he vacillated between saying he could, he thought he could, and he did not know whether he could. (15 RT 2993-2998; 49 Supp. I CT 14154, 14158.) A prospective juror who supports the death penalty but equivocates in this limited respect regarding his ultimate ability/willingness to pull the trigger at decision time in capital deliberations cannot be deemed *substantially* impaired. There must be something more, such as revealing mannerisms or body language, none of which were noted by the trial court with respect to D.M. Nothing in D.M.'s written and verbal responses to questions propounded to him could have left a reasonable and objective decision maker with "the definite impression that [D.M.] would be unable to faithfully and impartially apply the law." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 426.)

Finally, unlike the circumstances in *Uttecht v. Brown*, *supra*, 551 U.S. 1, where defense counsel did *not* object to removal of the prospective juror in question, thereby implicitly acknowledging substantial impairment (*id.* at p. 18), defense counsel in the instant case opposed the prosecution's request to remove D.M. Defense counsel stressed D.M.'s express willingness to follow the law.

After the trial court indicated that it believed cause existed to remove D.M., defense counsel asked the court to bring D.M. back into the courtroom for further questioning. The court denied the request. (15 RT 2998-2999.) Thus, the trial court was afforded ample opportunity to articulate any legitimate justification for removing D.M. However, there was none. The prosecution, as the proponent of the challenge for cause against D.M., bore the burden of proving his inability or substantial impairment. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 733; *Lockhart v. McCree*, *supra*, 476 U.S. at p. 170, fn. 7; *Wainwright v. Witt*, *supra*, 469 U.S. at p. 423; *Reynolds v. United States*, *supra*, 98 U.S. at p. 157.) The prosecution adduced no such proof.

2. The Trial Court's Application of Erroneous Legal Precepts

Normally, a trial court's finding that a prospective juror cannot be fair and impartial is entitled to deference when the finding is challenged on appeal. (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 9.) However, such deference "is inappropriate, where, as here, the trial court's findings are dependent on an apparent misapplication of federal law, [citation], and are internally inconsistent." (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 661, fn. 10.) The trial court in the instant case erroneously a) treated equivocation as tantamount to cause, and b) applied a double-standard, i.e., one standard as to challenges for cause made by

the defense, and another, substantively inconsistent standard as to challenges for cause made by the prosecution. Accordingly, no deference is warranted with respect to the trial court's decision to excuse D.M. for cause.

a. Erroneously Equating Equivocation With Cause

When confronted with prospective jurors who expressed hesitancy and/or ambivalence regarding their capacity to impose the death penalty, the trial court erroneously treated such equivocation as grounds for exclusion ipso facto. As noted above, during the round of jury selection that preceded the guilt phase, the trial court asserted that "when jurors equivocate with [']I think so['], [']I feel I could['], [']I don't think I could['], [']I don't know[']', that's a challenge for cause that's appropriate." (4 RT 814.) In support of this proposition, the court cited to four of this court's decisions: *People v. Kaurish*, *supra*, 52 Cal.3d 648; *People v. Hamilton*, *supra*, 48 Cal.3d 1142; *People v. Coleman*, *supra*, 48 Cal.3d 112; and *People v. Guzman*, *supra*, 45 Cal.3d 915. (4 RT 814.) This court did not hold in any of these four cases that a trial court may apply a standard under which equivocation is treated as tantamount to inability or substantial impairment. While this court did expressly apply a standard in one of these cases pursuant to which it deferred to a trial court determination that equivocation on the part of pro-life prospective jurors amounted to inability or substantial impairment, that standard

was a deferential standard of *appellate* review. (*Guzman*, *supra*, 45 Cal.3d at pp. 954-956.)[171]

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[171] Two of the cases cited by the trial court — *Kaurish* and *Coleman* — had nothing to do with equivocation regarding willingness to vote for the death penalty. In *Kaurish*, although this court considered an issue concerning equivocation on the part of a venireperson, the equivocation had nothing to do with death-qualification. The venireperson had several relatives who were police officers, and she made conflicting remarks as to whether she would give the testimony of police officers greater credence than the testimony of other witnesses. (*People v. Kaurish*, *supra*, 52 Cal.3d at pp. 674-675.) In *Coleman*, a pro-life prospective juror did not equivocate regarding the death penalty. She flat-out said she could not vote to impose it. She only equivocated regarding her ability/willingness to return a first degree murder conviction in a capital case. Because of her flat-out, unequivocal unwillingness to impose the death penalty, this court concluded she "was properly disqualified because her views would have prevented or substantially impaired the performance of her duties as a juror." (*People v. Coleman*, *supra*, 48 Cal.3d at pp. 136-137.)

Additionally, the "equivocation" of some of the prospective jurors in the *Hamilton* and *Guzman* cases more closely resembled unmistakable clarity than ambivalence. For example, a prospective juror in *Hamilton* indicated that he would be unable to vote for the death penalty unless he had personally witnessed the defendant's commission of the murder. This court noted that any ambiguities in his responses to questions during voir dire were ultimately "eliminated," and that it was "unmistakably clear that he would not vote for the death penalty, regardless of the evidence...." (*People v. Hamilton*, *supra*, 48 Cal.3d at pp. 1165-1166.) And, one of the prospective pro-life venirepersons in *Guzman* stated that he did "not think" he would have been able to vote for the death penalty in Charles Manson's case, and he was "not sure" whether he could "conjure up in his mind a crime so heinous that he would vote for the death penalty, even one which involved him personally." (*People v. Guzman*, *supra*, 45 Cal.3d at p. 955, internal quotation marks and brackets omitted.) Thus, these prospective jurors were excludable for cause under the rigid, unrefined *Witherspoon* standard because of their unequivocal unwillingness to consider imposition of the death penalty.

Although the deferential standard of appellate review in this context is necessarily unsuited for application at the trial court level, the trial court in this case applied an adaptation of that standard: Relying on this court's pronouncements that a trial court's factual finding of inability or substantial impairment with respect to an equivocal prospective juror is generally binding upon a reviewing court (*People v. Guzman*, *supra*, 45 Cal.3d at p. 956 [noting that the trial court "could properly have concluded from their responses that [the prospective] jurors' views would 'prevent,' or at least 'substantially impair,' performance of their duties[,]" and deferring to that conclusion]; *People v. Ghent*, *supra*, 43 Cal.3d at p. 768 ["where equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court"][172]), the trial court felt it was bound to treat equivocation as inability or substantial impairment. (4 RT 814 ["when jurors equivocate with [']I think so['], [']I feel I could['], [']I don't think I could['], [']I don't know['], that's a challenge for cause"]; 15 RT 2998-2999 [removing D.M. for cause because "he's too ambivalent" and "he's not going to know until the moment of truth hits him between the eyes"].)

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[172] This court cited *Ghent* in three of the cases cited by the trial court: *People v. Hamilton*, *supra*, 48 Cal.3d at p. 1165; *People v. Coleman*, *supra*, 48 Cal.3d at p. 137; and *People v. Guzman*, *supra*, 45 Cal.3d at p. 955;

However, as discussed above, a trial court cannot deem equivocation to be proof of inability or substantial impairment. (*Adams v. Texas*, *supra*, 448 U.S. at p. 50 & fn. 8 [exclusion of prospective jurors who "were unable to positively state whether or not their deliberations would in any way be 'affected'" by the possibility of the death penalty is unconstitutional].) Instead the court must seek to discern whether a prospective juror, regardless of any equivocation, is able "to faithfully and impartially apply the law." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 426.) The court must seek to discern the prospective juror's "true state of mind." (*People v. Ghent*, *supra*, 43 Cal.3d at p. 768.) Thus, the trial court mistakenly replaced the standard by which it should have assessed whether prospective jurors lacked impartiality with an awkward adaptation of an appellate standard of review. Because of this misapplication of legal principles, no deference is appropriate with respect to the trial court's finding that D.M. was subject to removal for cause.

b. Double-Standard

The trial court also misapplied governing legal principles in another respect in its rulings on challenges for cause: Although trial courts are required to be "evenhanded" in the death-qualification process (*People v. Mills*, *supra*, 48 Cal.4th at p. 189; *People v. Champion* (1995) 9 Cal.4th 879, 908-909), the trial

court in this case employed a double-standard with respect to ambivalent answers by prospective jurors in the death-qualification process: While the court treated prospective jurors' ambivalence or equivocation about the ability to vote for death as grounds for disqualification (4 RT 814; 15 RT 2998-2999), when the defense made reverse-*Witherspoon* challenges for cause[173] to pro-death prospective jurors,

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[173] A reverse-*Witherspoon* challenge for cause allows an accused on trial for his life to remove "those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 733.) Even if such prospective jurors profess an ability and willingness to generally follow the law, they are subject to removal for cause if voir dire reveals that they "would impose death regardless of the facts and circumstances...." (*Id.* at 735.) Such prospective jurors actually "cannot follow the dictates of the law." (*Ibid.*) Thus, the availability of reverse-*Witherspoon* challenges makes the death-qualification process a two-way street: Prospective "jurors — whether they be unalterably in favor of, or opposed to, the death penalty in every case — by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding." (*Ibid.*) Just as "the State may exclude from capital sentencing juries that 'class' of venire[persons] whose views would prevent or substantially impair" their ability to impose the death penalty if warranted (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424, fn. 5), the accused may exclude "that 'class' of venire[persons]" whose views would prevent or substantially impair their ability to impose a sentence of life without the possibility of parole if warranted. (*Morgan*, *supra*, 504 U.S. at pp. 733-734.) Thus, the State's right to exercise *Witherspoon* challenges for cause against prospective jurors who lack the "qualifications" to vote for the death penalty exists in tandem with and is counterbalanced by the accused's "complementary" right to exercise reverse-*Witherspoon* challenges for cause against prospective jurors who lack the "qualifications" to vote for a sentence of life without the possibility of parole. (*Ibid.*) It is a two-way-street. (*People v. Cash*, *supra*, 28 Cal.4th 703, 720 ["the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty"].)

the court did not treat ambivalence or equivocation about the ability to vote for life without the possibility of parole as grounds for disqualification.

"The qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 488, internal quotation marks and brackets omitted.) However, contrasting the trial court's treatment of the prosecution's challenge for cause as to D.M. with the three reverse-*Witherspoon* challenges for cause made by the defense as to prospective jurors Z.A., J.C., and C.D., reveals that the trial court applied a double standard rather than proceeding with evenhandedness:

1. Prospective Juror Z.A.

Prospective juror Z.A. stated she was unsure whether she could be fair and impartial to both sides in this case. (15 RT 3024-3025.) In her questionnaire, Z.A. wrote that she believes the death penalty is "appropriate" and "necessary" in some cases. (37 Supp. I. CT 10716, 10719.) During sequestered voir dire, she unequivocally stated she would be able to impose the death penalty in this case. (15 RT 3022.) She also initially stated she would be open to the possibility of voting for either the death penalty or life in prison without the possibility of parole. (15 RT 3023.) However, when confronted with case-specific information, she began to equivocate about her ability to consider life without parole as an

alternative to the death penalty: Asked whether she could be fair and impartial, knowing that Mr. Sandoval was convicted of murdering a police officer and was involved in an additional homicide, Z.A. answered, "I don't know. [¶] I think so." (15 RT 3023-3024.) Then, when asked generally at the conclusion of her voir dire examination whether she could be fair and impartial, she answered, "I think so. [¶] I don't know." (15 RT 3024-2035.)

Defense counsel challenged Z.A. for cause due to her ambivalence. The trial court denied the motion. (15 RT 3025-3026.)

If, as the trial court stated, equivocation with an answer such as "I don't know" justifies a challenge for cause (4 RT 814), and if ambivalence on D.M.'s part was sufficient to support a challenge for cause (15 RT 2998-2999), then, under an even-handed standard, Z.A.'s equivocation and ambivalence about her ability to be fair and impartial should have subjected her to removal for cause.

2. Prospective Juror J.C.

Prospective juror J.C. stated unequivocally that she could vote for the death penalty in this case (16 RT 3199), but that "it would be very hard" for her to vote for life without the possibility of parole. (16 RT 3200.) She believes convicted murderers should be swiftly executed. (35 Supp. I CT 10248.) J.C. said that because she has " a lot of respect for police officers," the defense would have to

"really convince" her that Mr. Sandoval did not deserve to die for killing Detective Black. (16 RT 3200.) She said she could only imagine not voting for the death penalty if there was evidence that Detective Black had been "a rogue cop," who had been "going around killing everybody or something like that." (16 RT 3200-3201.) Although she declined to say that her decision to vote for the death penalty would be automatic, she said "I'm really leaning ... toward the death penalty, if you want the truth." (16 RT 3201.) After the foregoing information was elicited in voir dire conducted by the prosecutor and defense counsel, the trial court inquired whether J.C. would listen to any evidence presented by the defense and take that evidence into account before reaching a decision. J.C. responded affirmatively. (16 RT 3201-3202.)

J.C. then exited the courtroom at the trial court's request. Citing *People v. Boyette*, *supra*, 29 Cal.4th 381, defense counsel moved to excuse J.C. for cause. Defense counsel contended J.C.'s answers demonstrated substantial impairment. (16 RT 3202.)[174] The trial court denied the motion. (16 RT 3203.) The substance

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[174] In *Boyette*, this court held a trial court erred by rejecting a reverse-*Witherspoon* challenge for cause to a prospective juror who was strongly in favor of the death penalty. (*People v. Boyette*, *supra*, 29 Cal.4th at pp. 415-418.) The prospective juror "indicated he would apply a higher standard ('I would probably have to be convinced') to a life sentence than to one of death, and that an offender (such as defendant) who killed more than one victim should automatically receive the death penalty. Finally, he admitted he would not follow an instruction to

of the court's ruling is set forth in the following exchange between the court and defense counsel:

COUNSEL:	She is substantially impaired. She's said that.
THE COURT:	Really[?] [¶] Based on what?
COUNSEL:	Based on her answers.
THE COURT:	Based on what, sir?
COUNSEL:	That she said ["]I would have to be convinced[.] I'm going to vote for the death penalty.["]
THE COURT:	I understood her to say she'd listen and weigh all the answers."
COUNSEL:	I don't know why the court is taking it upon itself to try and qualify them for the death penalty.
THE COURT:	Well, Mr. Ringgold, the *Hovey* issue you're supposed to address is whether or not their personal views would preclude them from listening to the evidence and weighing the evidence and reaching an appropriate verdict. And when she said that she would listen to the evidence, weigh the evidence, and then decide the verdict and would not automatically vote for death under *Hovey*, that's the appropriate answer.

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assume that a sentence of life in prison with no possibility of parole meant the prisoner would never be released." (*Id.* at p. 418.) As this court explained, the prospective juror should have been excused for cause because his views "would have prevented or substantially impaired the performance of his duties as a juror in accordance with his instructions and his oath." (*Ibid.*, internal quotation marks and brackets omitted.)

COUNSEL: She said, ["]I would probably vote for the death penalty.["]

THE COURT: Leaning towards the death penalty.

COUNSEL: No. [¶] Probably vote.

THE COURT: She did not say that she would automatically vote for the death penalty, Mr. Ringgold. That's what I heard.

COUNSEL: She doesn't have to say automatically. [¶] She said, ["]I would probably have to be convinced. I'm leaning strongly in favor of the death penalty....["]

THE COURT: I didn't hear the same thing you heard. [¶] I'll note your objection....

COUNSEL: I know that the court wants us to hurry through this process.

THE COURT: No, sir. I don't think that's a fair statement. I'm not hurrying.

COUNSEL: Well, you're stopping voir dire.

THE COURT: No. [¶] You've taken an inordinate amount of time. And you've asked questions way beyond *Hovey*. And I think I've been tremendously patient with questions that haven't qualified under *Hovey*, and I'm taking it up now.

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COUNSEL: And it's the perception of the defendant that you are rehabilitating jurors that have clearly said they could not be fair and [are] predisposed to give the death penalty. And the court is leading them into I guess what the court feels is the proper answer to keep them on the panel.

THE COURT: I don't agree with you.

(16 RT 3202-3204.)

The court's assertion that it "didn't hear" J.C. stating that she "would probably have to be convinced[,]" and that she was "leaning strongly in favor of the death penalty" (16 RT 3203), indicates that the court apparently did not hear what J.C. actually said. As summarized above, J.C. did in fact state that "it would be very hard for [her]" to vote for life without parole in this case (16 RT 3200), the defense would have to "really convince [her]" not to vote for the death penalty (16 RT 3200), and there was no way she could conceive of voting for a penalty other than death unless the defense presented evidence that Detective Black had been a "rogue cop" who had gone "around killing everybody." (16 RT 3200-3201.) She emphatically stated: "I'm really leaning ... toward the death penalty, if you want the truth." (16 RT 3201.)[175]

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[175] If the trial court missed some of J.C.'s remarks, it could have simply had the court-reporter read back J.C.'s voir dire.

Having already presided over the guilt phase and the original penalty phase, the trial court was well aware that there was no evidence that Detective Black had been a "rogue cop." To the contrary, it was undisputed that Detective Black was a fine and well-respected police officer and a good and decent person. Thus, it was apparent that no evidence was going to be introduced in the penalty-phase re-trial to support the only scenario of which J.C. could conceive that would have led her to consider life without parole as an alternative to the death penalty. Accordingly, by the terms of her own voir dire testimony, J.C. was virtually a lock to vote for the death penalty. While she professed a willingness to listen to the evidence presented by both sides and to take that evidence into account before reaching a decision (16 RT 3201-3202), so too did D.M. assert his willingness to consider all the evidence concerning the crime and Mr. Sandoval's background in making an appropriate penalty determination. (15 RT 2993-2994, 2997-2998.) Thus, under an evenhanded assessment, if the virtual certainty of J.C.'s unwillingness to vote for life without parole did not constitute cause for removal, D.M.'s uncertainty about his ability to vote for the death penalty should not have constituted cause for removal.

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3. *Prospective Juror C.D.*

Prospective juror C.D. believes the death penalty "is an appropriate punishment for [a] capital crime[.]" (35 Supp. I CT 10170.) In his questionnaire, prospective juror C.D. wrote that he does *not* think it is important to know as much as possible about a capital defendant and his background in deciding between the possible penalties of death or life in prison without parole. (35 Supp. I CT 10173.) During sequestered voir dire, C.D. reaffirmed his view in this regard. (16 RT 3185-3186.) As he put it, "We are responsible for our actions, however you got to that point." (16 RT 3186.) He said Mr. Sandoval's "action is what he was being tried for, not his background." (16 RT 3187.) After the court pointed out that the law requires consideration of the defendant's background and history (16 RT 3187), defense counsel asked whether C.D. would automatically vote for the death penalty, without considering background information, because Mr. Sandoval had killed a police officer. However, before C.D. could answer, the court interrupted, and asked, "Did you ever say that you wouldn't listen to information about his background?" C.D. responded, "I didn't say that. No." C.D. then said he would listen to information about Mr. Sandoval's background. (16 RT 3188.) When defense counsel followed up by inquiring whether C.D. could conceive of any information regarding Mr. Sandoval's background that

would make a difference to C.D., the prosecutor objected. The court sustained the objection, asserting, "That's ... improper *Hovey*." (16 RT 3188-3189.) The court said the issue is whether C.D.'s views about the death penalty would prevent him from considering background evidence. In response, C.D. said he would listen to the background evidence, but was "predisposed to the death penalty in the case of the death of an officer." (16 RT 3189.)

In response to further questioning from defense counsel, C.D. indicated that he was not starting in a neutral place, that he was pro-death, and that the defense would have to convince him not to impose the death penalty. (16 RT 3189.) Additionally, C.D. responded affirmatively when counsel asked whether he would be even more predisposed to vote for the death penalty if the prosecution presented evidence that Mr. Sandoval had been involved in a second killing. (16 RT 3190.)

Thereupon, the trial court interceded, and concluded the voir dire of C.D. with the following abbreviated colloquy:

> THE COURT: All right. [¶] Let me ask you this. [¶] Given your views that you're predisposed towards the death penalty, does that mean that you would ... automatically vote for the death penalty without listening and considering and weighing the evidence that both sides would present?

C.D.: No, Ma'am.

THE COURT: No. [¶] All right. [¶] Thank you. [¶] Come back at 2:30. We're going to start selection.

(16 RT 3190-3191.)

C.D. exited the courtroom (16 RT 3191), and Mr. Sandoval moved to have him excused for cause:

COUNSEL: Your Honor, there's a motion for cause. The man is trying to be as honest as he can. He's telling the court that he's predisposed for the death penalty. [¶] Do you think it's fair to have a jury of 12 people that have the same views that he does?

THE COURT: He says he wouldn't automatically vote for the death —

COUNSEL: That's after he —

THE COURT: Sir, please don't talk while I'm talking. [¶] *He said he would not automatically vote for death. That's the Hovey test.* [¶] Your objection is noted and overruled.

COUNSEL: You led him into saying that, Your Honor[.] You're rehabilitating him to put him on the jury. I don't think that's fair. This man should have been excused for cause.

THE COURT: No sir.

(16 RT 3191-3192, italics added.)

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Of course, the test is *not* whether a prospective juror would automatically vote for a particular penalty, as the trial court stated. Rather, the test is whether certain views or predispositions of the prospective juror would prevent or substantially impair the prospective juror's ability to consider and vote for either of the available penalties.

In any event, no evidence was adduced that D.M. would have automatically voted for life without parole. Accordingly, if the fact that C.D. indicated he would not automatically vote for the death penalty was sufficient to render him not excludable for cause, and if the trial court was applying an evenhanded standard, the fact that there was no evidence that D.M. would have automatically voted for a sentence of life without parole should have rendered him not excludable for cause. However, the record reveals that the trial court was not applying an evenhanded standard.

3. Conclusion — The Trial Court's Removal of D.M. for Cause Was Erroneous

Because the trial court failed to correctly apply governing legal principles when it removed D.M. for cause, the trial court's determination that D.M. was subject to removal for cause is entitled to no deference. Furthermore, because there is no substantial evidence that D.M. would not have been impartial, the trial

court's removal of him for cause was unconstitutional.

E. Remedy

When a trial court erroneously sustains a prosecutor's challenge for cause in violation of *Witherspoon* and *Witt*, the error "compel[s] the *automatic reversal* of [the] defendant's death sentence, and in that respect the error is not subject to a harmless-error rule, regardless [of] whether the prosecutor may have had remaining peremptory challenges and could have excused [the prospective juror(s) in question]." (*People v. Heard*, *supra*, 31 Cal.4th at p. 966, italics in the original; citing *Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-668 (plur. opn. of Blackmun, J.); *id.* at pp. 669-672 (conc. opn. of Powell, J.); *People v. Ashmus*, *supra*, 54 Cal.3d at p. 962.) The exclusion of a single prospective juror in violation of *Witherspoon* and *Witt* mandates reversal. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-668 (plur. opn. of Blackmun, J.); *id.* at pp. 669-672 (conc. opn. of Powell, J.); *Davis v. Georgia* (1976) 429 U.S. 122 (*per curiam*).) Because the trial court committed *Witherspoon/Witt* error by excusing prospective juror D.M. for cause during jury selection in the penalty-phase retrial, the judgment of death must be set aside.

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XIV.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENSE REQUEST FOR A MISTRIAL AFTER DETECTIVE DELFIN, WHILE ON THE STAND, CALLED MR. SANDOVAL A SON-OF-A-BITCH.

During the prosecutor's direct-examination of Detective Delfin in the penalty phase retrial, the detective referred to Mr. Sandoval as a "son of a bitch." (19 RT 3835-3836.) The trial court immediately interrupted the proceedings and directed the jury to leave the courtroom and go to the jury room. (19 RT 3836.)

The detective was wearing his uniform when he uttered the profanity from the witness stand. (19 RT 3967.)

The detective's outburst had an impact on the jury: According to the jurors, it was " very tense" and "emotional" in the jury room during the break ordered by the court. (19 RT 3867, 3870.)[176]

Detective Delfin's feelings and expression of rage against Mr. Sandoval are understandable. However, in the solemn context of a penalty phase trial, his outburst was inappropriate, and it undermined Mr. Sandoval's right to a fair and reliable penalty determination.

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[176] Evidence was presented regarding the atmosphere in the jury room following the detective's outburst, because events that occurred during the jury room at that time precipitated an investigation into juror misconduct. (See pp. 324-333, *infra*.)

Immediately after the detective's outburst, defense counsel moved for a mistrial or dismissal of the penalty proceeding, on the grounds that the eruption on the witness stand had violated Mr. Sandoval's due process rights and was impermissibly inflammatory in the context of a capital sentencing hearing.[177] Although the trial court acknowledged that the detective's outburst had been "dramatic" and "emotional," the court denied the motion. In support of its ruling, the court noted that Mr. Sandoval had already been found guilty. (19 RT 3836-3837.)[178] When the jury returned, the court admonished the jurors that they were to "disregard the profanity that was used in characterizing the defendant by this witness." (19 RT 3840.)

A. Standard of Review

This court reviews a trial court's denial of a motion for mistrial under the abuse-of-discretion standard. (*People v. Bolden* (2002) 29 Cal.4th 515, 555, cert. den. *sub nom. Bolden v. California* (2003) 538 U.S. 1016.)

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[177] As noted in footnote 49, *ante*, defense counsel stressed that Detective Delfin is a government official, and in that connection, quoted from Justice Brandeis' dissenting opinion in *Olmstead v. United States*, *supra*, 277 U.S. at p. 485: "When the government becomes a lawbreaker, it breeds contempt for the law." (19 RT 3837.)

[178] Mr. Sandoval also raised this issue as a ground for relief in his new trial motion. (6 CT 1506.)

B. Relevant Legal Principles

1. Mistrial

A mistrial should be granted "when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1029, cert. den. *sub nom. Lewis v. California* (2007) 127 S.Ct. 2130, *Oliver v. California* (2007) 127 S.Ct. 2130.)

2. The Prohibition Against "Evidence" That Poses a Risk of Causing a Jury to Impose a Death Sentence Based on Passion Rather than Reason

"[A]ny decision to impose the death sentence [must] be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358 (plur. opn. of Stevens, J.); accord *Payne v. Tennessee*, *supra*, 501 U.S. at p. 836 (conc. opn. of Souter, J.) [noting the "risk [of] a verdict impermissibly based on passion, not deliberation"].) Thus, victim-impact witnesses "may not characterize or give opinions on the defendant." (*United States v. Sampson* (D.Mass. 2004) 335 F.Supp.2d 166, 187; citing *Booth v. Maryland* (1987) 482 U.S. 496, 508, overruled on other grounds in *Payne v. Tennessee*, *supra*, 501 U.S. at p. 830 & fn. 2; accord *Parker v. Bowersox* (8th Cir. 1999) 188 F.3d 923, 931, cert. den. *sub nom. Parker v. Luebbers* (2000) 529 U.S.

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In *Stockton v. Virginia* (4th Cir. 1988) 852 F.2d 740, cert. den. *sub nom. Virginia v. Stockton* (1989) 489 U.S. 1071, the Eighth Circuit granted habeas relief by vacating the death sentence of a state prisoner because the jurors who had returned a death verdict had been exposed, during their deliberations, to remarks of a local restaurant owner who suggested they "fry the son of a bitch." (*Id.* at pp. 741-746.) The exposure of the jurors to these remarks denied the defendant "his right to a fair and impartial jury during the sentencing deliberations." (*Id.* at p. 741.) The "comment posed a potential for prejudice that was too serious to ignore." (*Id.* at p. 745.) "[A] comment could be no more pointed than 'I hope you fry the son-of-a-bitch.'" (*Ibid.*, internal brackets omitted.) The comment "was no mere offhand comment." It was made by a man who "knew that he was addressing his opinion to members of the jury...." (*Id.* at p. 746.)

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[179] In *Booth v. Maryland*, *supra*, 482 U.S. 496, the Court held that victim impact evidence was banned by the Eighth Amendment in all capital sentencing hearings. (*Id.* at pp. 501-503.) Then, in *Payne v. Tennessee*, *supra*, 501 U.S. 808, the Court overruled *Booth*'s wholesale prohibition against victim impact evidence. (*Id.* at p. 830 & fn. 2.) However, *Payne* left certain aspects of *Booth* intact; it "did not overrule the prohibitions in *Booth* against the admission of 'information concerning a victim's family members' characterization of and opinions about the crime, the defendant, and the appropriate sentence.'" (*United States v. McVeigh* (10th Cir. 1998) 153 F.3d 1166, 1217, cert. den. (1999) 526 U.S. 1007; quoting *Payne*, *supra*, 501 U.S. at p. 835, fn. 1 (conc. opn. of Souter, J.).)

3. *Remarks Made by a State Official, Disparaging a Criminal Defendant, Are Inherently Prejudicial*

In *Parker v. Gladden* (1966) 385 U.S. 363, the Supreme Court of the United States found a prejudicial violation of the Sixth and Fourteenth Amendment rights of the accused when a court bailiff made the following statements about the accused to jurors: "'Oh that wicked fellow [petitioner], he is guilty.... If there is anything wrong [in finding petitioner guilty] the Supreme Court will correct it.'" (*Id.* at pp. 363-364, brackets in the original.) The bailiff was "an officer of the State...." (*Id.* at p. 364.) The Court explained that "the official character of the bailiff — as an officer of the court as well as the State — beyond question carries great weight with a jury...." (*Id.* at p. 365.) Thus, the Court concluded "'it would be blinking reality not to recognize the extreme prejudice inherent' in such statements...." (*Ibid.*)

C. Analysis

The detective's intemperate outburst on the stand, which the trial court characterized as "dramatic" and "emotional" (19 RT 3837), violated Mr. Sandoval's right to due process and his right to a fair and reliable penalty determination. The detective's characterization of Mr. Sandoval as a "son-of-a-bitch" is precisely the time of comment during a penalty phase proceeding that

poses a "risk [of] a verdict impermissibly based on passion, not deliberation." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 836 (conc. opn. of Souter, J.); *Stockton v. Virginia*, *supra*, 852 F.2d at pp. 741-746.) It was inherently prejudicial because it was made to a jury by a state official in uniform. (*Parker v. Gladden*, *supra*, 385 U.S. at pp. 363-365.)

Furthermore, as discussed immediately below, the detective's outburst was a precipitating factor in an episode of jury misconduct that occurred in the jury room immediately following the outburst. Indeed, some of the jurors discussed the outburst in the jury room (19 RT 3859, 3869-3871, 3875-3879), and described the atmosphere in the jury room as "very tense" and "emotional." (19 RT 3870.)

Under these circumstances, the trial court abused its discretion by failing to grant a mistrial due to the violations of Mr. Sandoval's basic constitutional rights occasioned by the detective's emotional and dramatic outburst.

XV.

PRESUMPTIVELY PREJUDICIAL JUROR MISCONDUCT, INCLUDING POSSIBLE PRE-DELIBERATION JUROR BALLOTING, OCCURRED DURING THE PENALTY PHASE RETRIAL.

Shortly after Detective Delfin's outburst, Juror No. 11 reported to the court that he had heard two jurors discussing the case. (19 RT 3854.) On the following

day, the court conducted a hearing to inquire into the matter. The court asked Juror No. 11 to explain, out of the presence of the other jurors, what had happened. Juror No. 11 gave the following account: The jurors were on a break in the jury room after the court had called for a recess following Detective Delfin's outburst. (19 RT 3858-3862.) Two male alternate jurors who were seated on a couch in the jury room were discussing the case. They discussed "the curse word" used by the detective. Then, one of the alternate jurors stated: "I can't believe this is happening. The consensus is probably seven-to-five still. I don't know what these people are thinking." (19 RT 3859.) According to Juror No. 11, "they were talking about who was voting for this and who was voting for that." (19 RT 3862.)

Juror No. 11 exited the courtroom after describing the foregoing events. Then, the trial judge commented that the reference to the consensus being "seven-to-five" indicated that "somebody" had read a newspaper article because an article had been recently published in which it was reported that the jury in the original penalty phase had hung seven-to-five. (19 RT 3863.)

Thereafter, the court individually questioned each of the other jurors and alternate jurors. (19 RT 3865-3885, 3889-3895.) Juror No. 7 confirmed that two male alternate jurors had been "talking about the case" (19 RT 3868), and that they

had specifically discussed the fact that the detective was "very upset" (19 RT 3869) and had "broke[n] down." (19 RT 3871.) Juror No. 12 heard the alternate jurors talking, but did not hear what they had said. (19 RT 3874.) Alternate Juror No. 3 acknowledged that he had asked a fellow juror what Detective Delfin had said, but denied otherwise discussing the case. (19 RT 3875-3879.) Alternate Juror No. 4, who had been on the couch with Alternate Juror No. 3 during the break, said there had been no discussion at all in the jury room during the break. (19 RT 3880-3881.) The remaining alternate juror[180] and the other seated jurors did not hear the conversation in question. (19 RT 3889-3895.)

In the midst of the foregoing separate questioning of the jurors, the court had Juror No. 11 come back into the courtroom. Juror No. 11 indicated that he had been unaware of the seven-to-five hung jury in the original penalty phase trial. The first time he had heard reference to a seven-to-five division was in the jury room. He assumed it was a reference to "who was gonna vote for this penalty and who was gonna vote for that penalty." (19 RT 3884-3885.)

The defense moved for dismissal of the death penalty proceeding, or, in the alternative, a mistrial. As a further alternative, the defense requested the removal

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[180] Although four alternate jurors were originally selected for the retrial (6 CT 1411), one of the alternates was excused prior to opening statements pursuant to a stipulation by the parties. (6 CT 1416.)

of Alternate Juror No. 3 and Alternate Juror No. 4. (19 RT 3885.)

Initially, the trial court expressed wariness regarding the "seven-to-five" reference, stating: "[I]t's a viable reference to what happened before; that is, the numbers are meaningful numbers, in the context that that was the split last time. They're not just numbers out of the air." (19 RT 3888.) Nevertheless, the court denied the defense motion for a mistrial, stating that the events in the jury room were not "a reflection of the impact" on the jury of Detective Delfin's testimony. Further, the court determined there was no basis for a finding of jury misconduct, noting that a majority of the jurors had not heard any discussion in the jury room, and characterizing the statements regarding the seven-to-five split as "statements which have nothing to do with the evidence in the case[,]" but rather as statements bearing on the "state of mind" of the alternate juror who uttered the statements. (19 RT 3896.) The court also denied the defense request to remove Alternate Juror No. 3 and Alternate Juror No. 4. (19 RT 3897.)

A. Standard of Review

In determining whether jury misconduct occurred, appellate courts accept trial courts' "'credibility determinations and findings on questions of historical fact if supported by substantial evidence.... Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate

court's independent determination.'" (*People v. Majors* (1998) 18 Cal.4th 385, 417; quoting *People v. Nesler* (1997) 16 Cal.4th 561, 582 (lead opn. of George, C.J.).)

B. Applicable Legal Authorities

Penal Code section 1122, subdivision (b) provides that jurors must not "converse among themselves, or with anyone else, on any subject connected with the trial, or ... form or express any opinion thereon until the cause is finally submitted to them." "Violation of this duty is serious misconduct." (*In re Hitchings* (1993) 6 Cal.4th 97, 118; citing *People v. Pierce* (1979) 24 Cal.3d 199, 207.) "It is of course improper for jurors to discuss a case prior to its submission to them...." (*Smith v. Brown* (1929) 102 Cal.App. 477, 484.)

> It is a generally accepted principle of trial administration that jurors must not engage in discussions of a case before they have heard both the evidence and the court's legal instructions and have begun formally deliberating as a collective body.

(*United States v. Resko* (3d Cir. 1993) 3 F.3d 684, 688.)[181]

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[181] "Appellate courts in several other jurisdictions have confronted the problem of alleged juror misconduct resting solely upon conversations among jurors outside the jury room, and have uniformly adhered to the principle that such conduct is improper." (*State v. Drake* (1976) 31 N.C. App. 187, 191-192 [229 S.E.2d 51, 54] [collecting cases].)

"'[A] judge may reasonably conclude that a juror who has violated instructions to refrain from discussing the case ... cannot be counted on to follow instructions in the future.'" (*People v. Ledesma* (2006) 39 Cal.4th 641, 743; quoting *People v. Daniels* (1991) 52 Cal.3d 815, 865.) Such misconduct "raises a presumption of prejudice." (*In re Hitchings*, *supra*, 6 Cal.4th at p. 118.)

In jury trials spanning multiple days, trial courts are required to daily admonish jurors of their obligations not to discuss the case or form any opinions concerning the case prior to the submission of the case to them. (*People v. Moore* (1971) 15 Cal.App.3d 851; see also *People v. Burton* (1961) 55 Cal.2d 328, 354.)

"It is of course improper for jurors to discuss a case prior to its submission to them...." (*City of Pleasant Hill v. First Baptist Church* (1969) 1 Cal.App.3d 384, 429, internal quotation marks omitted.) "Insofar as any juror formed and expressed an opinion prior to the submission of the case, he violated the prescribed protocol for the performance of his duties." (*Ibid.*)

Prejudicial juror misconduct occurred in *People v. Brown* (1976) 61 Cal.App.3d 476, when, in a discussion prior to commencement of deliberations, one juror expressed to another juror the opinion that the defendant was guilty. (*Id.* at pp. 479-482.) The misconduct violated the defendant's "constitutional right to a fair trial by 12 impartial jurors...." (*Id.* at p. 482.)

Numerous courts have held that constitutional error occurs when jurors in criminal cases engage in pre-deliberation discussions concerning the evidence, or when a trial court instruct jurors that they may discuss the case prior to the commencement of deliberations. (*Winebrenner v. United States* (8th Cir. 1945) 147 F.2d 322, 326-329 [the rights "under the Fifth and Sixth Amendments to the Constitution to a fair trial [and] to an impartial jury"], cert. den. (1945) 325 U.S. 863; *State v. McLeskey* (2003) 138 Idaho 691, 693-694 [69 P.3d 111, 113-114] ["the right of the defendant to a fair trial"]; *State v. Miller* (1994) 178 Ariz. 555, 557 [875 P.2d 788, 790]; *Commonwealth v. Kerpan* (1985) 508 Pa. 418, 422-424 [498 A.2d 829, 831-832] ["constitutional right to a fair and impartial jury"]; *People v. Hunter* (1963) 370 Mich. 262, 269-273 [121 N.W2d 442, 446-449].)

Premature jury deliberations and/or discussions concerning the case are forbidden for a number of reasons:

> First, since the prosecution presents its evidence first, any premature discussions are likely to occur before the defendant has a chance to present all of his or her evidence, and it is likely that any initial opinions formed by jurors, which will likely influence other jurors, will be unfavorable to the defendant for this reason.

(*United States v. Resko*, *supra*, 3 F.3d at p. 689.)

> Second, once a juror expresses his or her views in the presence of other jurors, he or she is likely to continue to adhere to that opinion and pay greater attention to evidence presented that comports with

that opinion. Consequently, the mere act of openly expressing his or her views may tend to cause the juror to approach the case with less than a fully open mind and to adhere to the publicly expressed viewpoint.

(*Ibid.*)

Third, the jury system is meant to involve decision making as a collective, deliberative process and premature discussions among individual jurors may thwart that goal.

(*Ibid.*)

Fourth, because the court provides the jury with legal instructions only after all the evidence has been presented, jurors who engage in premature deliberations do so without the benefit of the court's instructions on the reasonable doubt standard.

(*Ibid.*)

Fifth, if premature deliberations occur before the defendant has had an opportunity to present all of his or her evidence ... and jurors form premature conclusions about the case, the burden of proof will have been , in effect, shifted from the government to the defendant, who has the burden of changing by evidence the opinion thus formed.

(*Ibid.*, internal quotation marks omitted.)

Finally, requiring the jury to refrain from prematurely discussing the case with fellow jurors in a criminal case helps protect a defendant's Sixth Amendment right to a fair trial as well as his or her due process right to place the burden on the government to prove its case beyond a reasonable doubt.

(*Id.* at pp. 689-690.)

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"Almost without exception, where the issue has been properly raised, every court has held that an instruction permitting the jurors to discuss the case before its submission to them constitutes reversible error." (*State v. Washington* (1980) 182 Conn. 419, 426-427 [438 A.2d 1144, 1148] [collecting cases].)

C. Analysis

Although the trial court in this case regularly instructed the jury during the penalty phase retrial concerning its duty not to discuss the case prior to deliberations (14 RT 2794; 17 RT 3427, 3534; 18 RT 3709), certain members of the jury plainly violated this duty. Prior to submission of the case to them, certain jurors not only discussed Detective Delfin's emotional testimony (19 RT 3859, 3868-3871, 3875-3879), but also discussed the numerical division amongst jurors in the case. (19 RT 3859, 3862, 3884-3885.) It is unclear whether the referenced numerical division pertained to the jury in the original penalty phase trial or the jury in the retrial. The trial court believed it was the former (19 RT 3888), and Juror No. 11 believed it was the latter. (19 RT 3884-3885.) In either event, certain jurors and alternate jurors committed misconduct by violating the court's instruction to refrain from discussing the case until it was submitted to them. The misconduct violated Mr. Sandoval's Sixth, Eighth, and Fourteenth Amendment rights to a fair penalty trial and an impartial jury. (*United States v. Resko*, *supra*, 3

F.3d at pp. 689-690.) The misconduct was presumptively prejudicial. (*In re Hitchings*, *supra*, 6 Cal.4th at p. 118.) No basis exists for a finding that the abridgment of Mr. Sandoval's constitutional rights occasioned by the misconduct was harmless beyond a reasonable doubt. Accordingly, the verdict rendered in the penalty phase retrial cannot stand.

In light of the facts that certain jurors violated the court's instructions by discussing Detective Delfin's outburst, and, more problematically, by engaging in discussions and/or pre-deliberations that culminated in the "seven-to-five" reference, the trial court should have granted the defense request for a mistrial. The court's inquiries of the individual jurors did not lead to a definitive discovery of what exactly the seven-to-five reference pertained to. However, given Juror No. 11's stated belief that it pertained to "who was gonna vote for this penalty and who was gonna vote for that penalty" (19 RT 3884-3885), the jurors in this case may have conducted pre-deliberation ballots. If that is the case, Mr. Sandoval's penalty phase retrial was irreparably tainted. Because the trial court's juror investigation did not rule out the possibility of such irreparable taint, the court should have granted a mistrial. At this post-verdict stage, a new penalty phase trial must be granted because there is no basis upon which to rebut the prejudice presumptively occasioned by the juror misconduct.

XVI.

BY EXPOSING THE JURY TO EVIDENCE OF UNCHARGED SHOOTINGS MR. SANDOVAL HAD MENTIONED IN HIS CONFESSION, THE PROSECUTOR VIOLATED THE TRIAL COURT'S ORDER EXCLUDING THAT EVIDENCE AND RENDERED MR. SANDOVAL'S PENALTY PHASE RETRIAL FUNDAMENTALLY UNFAIR.

During the penalty phase retrial, the prosecutor furnished the jury with transcripts of Mr. Sandoval's confession. The transcripts supplied by the prosecutor included a written reproduction of an admission by Mr. Sandoval that he had shot other people with the same weapon with which he had shot and killed Detective Black. (21 RT 4288-4289; 2 CT 468.) Earlier in the proceedings, the trial court had made a ruling excluding evidence of that portion of Mr. Sandoval's recorded confession. (9 RT 1844-1846.) After the parties noticed the presence in the transcripts of the inadmissible remark, the trial court ordered the bailiff to collect the transcripts and admonished the jury to disregard Mr. Sandoval's admission. Defense counsel did not request the trial court to take any other action. (21 RT 4288-4289.)

Mr. Sandoval was severely prejudiced by the presentation to the jury of his memorialized admission that he had shot people other than Detective Black with the CAR-15. Once the jurors saw that evidence, the proverbial bell had been rung,

and it could not be unrung. Thus, notwithstanding the trial court's admonition, Mr. Sandoval is entitled to an order vacating his death sentence, based upon the jury's exposure to this quintessentially prejudicial evidence.

A. Legal Principles and Reviewing Standards Concerning Prosecutorial Misconduct and Ineffective Assistance of Counsel

Whether relief is warranted due to prosecutorial misconduct (the prosecutor's presentation of the excluded evidence to the jury) or ineffective assistance of counsel (the failure of counsel to request a mistrial), Mr. Sandoval is entitled to relief due to the jury's exposure to the disastrously damaging evidence.

1. Prosecutorial Misconduct

"It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order." (*People v. Crew* (2003) 31 Cal.4th 822, 839, cert. den. *sub nom. Crew v. California* (2004) 541 U.S. 991.) "The focus of the inquiry is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor." (*People v. Hamilton* (2009) 45 Cal.4th 863, 920.)

2. Ineffective Assistance of Counsel

In assessing whether a trial attorney has performed ineffectively, reviewing courts "consider whether counsel's representation fell below an objective standard

of reasonableness under prevailing professional norms...." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Reviewing courts presume counsel performed in accordance with the governing standards of professional competence, unless the defendant is able to demonstrate otherwise. (*In re Andrews* (2002) 28 Cal.4th 1234, 1253.) This court independently reviews whether a defendant has been prejudiced by trial counsel's ineffectiveness. (*People v. Ault* (2004) 33 Cal.4th 1250, 1264, fn. 8.) To show prejudice, the defendant "need not show that it is *more likely than not* that a different result would have occurred had trial counsel provided effective representation." (*In re Andrews*, *supra*, 28 Cal.4th at p. 1279 (dis. opn. of Kennard, J.), italics in the original.) Rather, the defendant need only show a "reasonable probability," i.e., a probability "sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, 466 U.S. at p. 694.)

B. Procedural and Factual Background

On August 14, 2002, Mr. Sandoval's trial counsel filed a multi-faceted pre-trial motion, which included a request to redact certain portions of Mr. Sandoval's recorded statement. (1 CT 227-228.) Prior to any ruling from the court, the prosecutor prepared a redacted transcript of the interview. Then, as a result of a ruling made by the court on October 15, 2002, during the course of guilt phase

proceedings, the prosecutor prepared a transcript with further redactions, including redaction of the statement about Mr. Sandoval shooting other people with the murder weapon. (9 RT 1844-1846.) The resultant "corrected and redacted" transcript was presented during the guilt phase. (10 RT 1967-1968; 2 CT 268-328.)[182] The first page of this version of the transcript bears the handwritten notation "Corrected and Redacted Guilt Phase Transcript". (2 CT 268.)

Another version of the transcript was presented to the jury during the penalty phase retrial After it was presented to the jury, and while the audiotape of Mr. Sandoval's recorded statement was being played for the jury,[183] trial counsel for Mr. Sandoval requested a sidebar conference. Counsel noted there was text in the transcript — regarding Mr. Sandoval admitting he had shot people in unrelated cases — that should have been redacted. The prosecutor agreed, stating he had inadvertently provided the jury a version of the transcript from which that text was not redacted. Counsel for Mr. Sandoval noted the text in question had been redacted from the transcript presented to the jury during the guilt phase of the

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[182] This version of the transcript was People's Exhibit number 73-A in the guilt phase of the original trial. The tape recording itself was People's Exhibit number 73. (10 RT 1967-1968.)

[183] The tape recording was People's Exhibit 76 in the retrial. (21 RT 4286-4287.)

original trial. (21 RT 4287-4289.)

As noted above, after the sidebar conference, the trial court instructed the jury that there was "absolutely no evidence the defendant ever shot anybody else with the CAR-15," and admonished the jury to "disregard the statements to that effect." (21 RT 4289.)

C. The Prejudicial Nature of the Evidence that Mr. Sandoval Had Admitted to Shooting Other People

Early in the guilt phase of Mr. Sandoval's trial, the trial court expressly recognized the "highly prejudicial" nature of the evidence in question. (2 RT 249-250.) "Evidence of uncharged crimes is inherently prejudicial...." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 380; *State v. Henderson* (Mo. App. 2003) 105 S.W.3d 491, 497-498 [reversing due to introduction of "highly prejudicial evidence of [an] uncharged shooting"].)

"A confession is like no other evidence." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296.) A defendant's confession is "probably the most probative and damaging evidence that can be admitted against him." (*Ibid.*, internal quotation marks omitted.)

When a jury is exposed to inadmissible evidence like the damning admission made by Mr. Sandoval about shooting other people with the murder

weapon, the jury cannot be expected to follow an admonition from the trial court to disregard such blockbuster evidence. "The naïve assumption that prejudicial effects can be overcome by instructions to the jury ... [is an assumption] all practicing lawyers know to be unmitigated fiction." (*Bruton v. United States* (1968) 391 U.S. 123, 129; quoting *Krulewitch v. United States*, *supra*, 336 U.S. at p. 453 (conc. opn. of Jackson, J.).) Nevertheless, reviewing courts "normally presume a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions [citation], and a strong likelihood that the effect of the evidence would be devastating to the defendant." (*Greer v. Miller* (1987) 483 U.S. 756, 767.) The "presumption fades" when a court's cautionary instruction calls upon the jury "to perform humanly impossible feats of mental dexterity." (*United States v. McDermott* (2d Cir. 2001) 245 F.3d 133, 139-140; *United States v. Daniels* (D.C. Cir. 1985) 770 F.2d 1111, 1118 ["To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capabilities."]; *United States v. Johnson* (5th Cir. 1977) 558 F.2d 1225, 1230 ["Though the trial court instructed the jury not to consider the remark, the testimony was so prejudicial that a simple

instruction cannot cure it."].)

D. Analysis

Defense counsel fought hard to secure a ruling from the trial court preventing the jury from receiving evidence of Mr. Sandoval's statement that he had shot other people with the murder weapon. They won the battle when the court ruled the evidence inadmissible,[184] but lost the war when the evidence made its way before the jury anyway.

The failure of defense counsel to seek a mistrial when the devastating evidence slipped through the cracks is incomprehensible. The facts that defense counsel moved to exclude the evidence and that the trial court excluded the evidence demonstrates Mr. Sandoval was entitled to have the evidence kept from the jury. The failure of defense counsel to enforce the ruling and to seek appropriate relief when the ruling was violated falls below any "objective standard of reasonableness under prevailing professional norms...." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) Had defense counsel moved for a mistrial when the evidence was presented to the jury, the trial court would have been

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[184] As noted, the trial court granted the defense motion during the guilt phase to exclude the evidence. (9 RT 1844-1846.) Then, at the outset of the penalty phase retrial, the court granted a defense request to treat all rulings from the original trial as remaining in full force and effect in the retrial. (14 RT 2739-2740.)

obliged to grant the motion. Hence, the defense attorneys' omission to request a mistrial was prejudicial to Mr. Sandoval.

Furthermore, taking the prosecutor at his word, his negligent misconduct resulted in the inadvertent presentation of the inadmissible evidence to the jury. (21 RT 4288.) Misconduct occurred because the evidence was presented in violation of the trial court's order excluding the evidence. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839.) Whether the prosecutor's presentation of the evidence was intentional or accidental is of no moment, as the focus "is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor." (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 920.) Thus, because of the "highly prejudicial" nature of the evidence, which the trial court had expressly recognized early in the case (2 RT 249-250), Mr. Sandoval is entitled to relief based upon the misconduct that resulted in the jury's exposure to the evidence.

The inflammatory nature of the evidence resulted in a violation of Mr. Sandoval's right to due process and to a fundamentally fair and reliable penalty determination. No jurors could have been expected to heed the trial court's instruction to disregard the evidence, presented to them in black and white, that Mr. Sandoval had admitted shooting other people with the murder weapon. (*Greer v. Miller*, *supra*, 483 U.S. at p. 767.)

XVII.

THE PROSECUTOR RENDERED MR. SANDOVAL'S PENALTY PHASE TRIAL UNFAIR BY COMMITTING MISCONDUCT DURING ARGUMENT TO THE JURY.

During closing argument in the penalty phase retrial, the prosecutor committed misconduct. First, the prosecutor told jurors that Mr. Sandoval had been endeavoring to deceive them during the retrial. (23 RT 4605-4606, 4618, 4621.) The prosecutor made this contention despite the fact that Mr. Sandoval did not testify. Second, the prosecutor falsely and inappropriately told the jurors that the defense attorneys were going to make certain purportedly standard and ridiculous arguments in their effort to convince the jury not to return a death penalty verdict. (23 RT 4608-4611.) These were specious, unfair arguments. By advancing these arguments, the prosecutor committed prejudicial misconduct and violated Mr. Sandoval's right to a fundamentally fair and reliable penalty determination.

A. Standard of Review

> Under California law, a prosecutor commits reversible misconduct if he or she makes use of deceptive or reprehensible methods when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted.... Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights — such as comment

> upon the defendant's invocation of the right to remain silent — but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action so infected the trial with unfairness as to make the resulting conviction a denial of due process.

(*People v. Dykes* (2009) 46 Cal.4th 731, 760, internal quotation marks omitted, cert. den. *sub nom. Dykes v. California* (2010) 130 S.Ct. 1088.)

B. Factual Background

1. Mr. Sandoval's Lying Hair

As noted in the Statement of Facts, at page 63, *ante*, the prosecutor argued to the jury in the penalty phase retrial that Mr. Sandoval tried to "deceive" the jurors by the manner in which he had his hair cut throughout the retrial. (23 RT 4605-4606, 4618, 4621.) In this regard, the prosecutor presented the following argument over objections from defense counsel:

> THE PROSECUTOR: [Mr. Sandoval] is the person that was on Lime [Avenue]. That's the person that went to McDonald's; not the guy that started growing his hair out two months ago to deceive you, because that's why he did it. [¶] He doesn't have his hair this way, and it won't be this way for 15 minutes after your verdict.
>
> DEFENSE COUNSEL: I object. That's improper argument.
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> THE COURT: Overruled.
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> THE PROSECUTOR: He began growing his hair out to deceive

you. He began doing it when he knew this case was coming to trial. That's why he did it.

DEFENSE COUNSEL: There's no evidence of this, Your Honor.

THE COURT: Counsel may argue inferences from the evidence. Overruled.

(23 RT 4605-4606.)

Defense counsel was correct. No evidence supported the prosecutor's argument. No evidence was adduced that Mr. Sandoval had his hair cut at any particular time for any particular purpose. Mr. Sandoval's sister had testified that Mr. Sandoval's head had been shaved approximately two months before the retrial (22 RT 4501), but she had also noted that he had had different hair styles over the course of various time periods. (22 RT 4512-4513.)

2. Phantom Defense Arguments

The prosecutor said to the jury: "I want to tell you about some of the arguments you're likely to hear from defense counsel. As these are the things that they argue." (23 RT 4608.) Thereupon, the prosecutor proceeded to tell the jury about three arguments they would purportedly hear from defense counsel, and he purported to preemptively debunk each of the arguments. (23 RT 4608-4611.) First, he said defense attorneys make "a triangle argument." (23 RT 4608.)

According to the prosecutor, defense attorneys use a triangle to "represent[] the world at large" and to suggest that only an "infinitesimal portion" of people — the worst of the worst, symbolized by the tip of the triangle — "should get the death penalty." (23 RT 4608-4609.) Second, the prosecutor said, "[t]hey will also make a 10-20-life argument." (23 RT 4609.) The prosecutor asserted defense counsel would unconvincingly argue that if the jury imposed a sentence of life without the possibility of parole, Mr. Sandoval would be in prison "ten years from now[,]" [twenty] years from now[,]" and "thirty years from now[,]" and that the jurors could "be safe in the knowledge that he's put away, incarcerated." (23 RT 4609-4610.) Third, the prosecutor said defense attorneys "also make arguments [about] how we're merciful people." (23 RT 4610.) He claimed defense counsel would "ridiculous[ly]" point out that if Mr. Sandoval had a heart attack "right now[,]" efforts would be made to save him "because we're a caring, compassionate people." (23 RT 4610-4611.)

During the foregoing line of argument, defense counsel interposed an objection, stating, "[T]here's no evidence of this, Your Honor." The trial court overruled the objection. (23 RT 4610.)

In the prosecutor's argument during the original penalty phase, the prosecutor made the very same remarks, telling the jury in that proceeding defense

counsel would make the same three arguments summarized above. (13 RT 2606-2609.) The trial court overruled two defense objections during that phase of the argument. (13 RT 2606, 2608.) And, after the conclusion of that argument, the trial court overruled defense counsel's further objections that the prosecutor's line of argument had violated Mr. Sandoval's due process rights by 1) preemptively trivializing defense counsel's argument, 2) making "it appear that each case is the same" rather than individualized, and 3) "tak[ing] away from the jurors' sense of responsibility in this particular case...." (13 RT 2637-2638.)

At the outset of the penalty phase retrial, the parties stipulated, with the trial court's assent, that objections previously made and overruled were to be deemed made and overruled in the retrial. (17 RT 3377-3378.)

In their argument to the jury in the original penalty phase trial, while defense counsel naturally urged the jury to impose a sentence of life without parole (13 RT 2641-2642, 2644-2645, 2647, 2658-2659, 2662, 2672, 2674), and supported that plea by noting a sentence of life without parole would result in Mr. Sandoval never getting out of prison (13 RT 2641-2642, 2647), and stressing that the jury had the right to extend mercy by imposing such a sentence (13 RT 2644, 2658-2659, 2661), defense counsel did not make any of the three specific arguments the prosecutor told the jury they would make. Similarly, defense

counsel did not make those arguments in the penalty phase retrial.

C. *Legal Principles Concerning Prosecutorial Misconduct During Argument to the Jury*

1. *Preserving a Claim of Misconduct*

As a general rule, in order to preserve a claim of prosecutorial misconduct for appellate review, the defendant must promptly object and request a curative instruction. (*People v. Monterroso* (2004) 34 Cal.4th 743, 785; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) However, "[a] defendant will be excused from the necessity of either a timely objection and/or request for admonition if either would have been futile." (*People v. Hill* (1998) 17 Cal.4th 800, 820; citing *People v. Arias* (1996) 13 Cal.4th 92, 159; *People v. Noguera* (1992) 4 Cal.4th 599, 638.) Furthermore, "the absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.'" (*Hill, supra*, at pp. 820-821, brackets in the original; quoting *People v. Green, supra*, 27 Cal.3d at p. 35, fn. 19.)

2. *Arguing Purported Facts Outside the Record*

A prosecutor "is not privileged to testify in the guise of a closing argument." (*United States v. Peak* (6th Cir. 1974) 498 F.2d 1337, 1339.)

"Statements of supposed facts not in evidence are a highly prejudicial form of misconduct, and a frequent basis for reversal." (*People v. Hill*, *supra*, 17 Cal.4th at p. 828, internal quotation marks and ellipsis omitted.)

> "[S]uch statements tend to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence."

(*Ibid.*, internal quotation marks and brackets omitted.)[185]

An attorney's obligation to confine remarks in argument to matters established by evidence in the record derives from basic ethics and fundamental fairness, "because the facts determine the law ('*ex facto jus oritur*'). (Sevilla, *Combating the Fact Smuggler* (1998) 22 Champion 22.)

A prosecutor may not make "improper suggestions, insinuations or assertions of personal knowledge." (*United States v. Manriquez-Arbizo* (10th Cir. 1987) 833 F.2d 244, 247 ["The prosecutor's remark, referring to what defense counsel must have been thinking, placed an improper inference into the minds of the jurors and was clearly inappropriate."].)

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[185] *Accord*, *People v. Cash*, *supra*, 28 Cal.4th at p. 732; *People v. Johnson* (1981) 121 Cal.App.3d 94, 103.

3. *Suggesting that a Non-Testifying Defendant Was Somehow Lying to the Jury*

A "prosecutor is entitled to comment on the credibility of witnesses based on the evidence adduced at trial." (*People v. Thomas* (1992) 2 Cal.4th 489, 529.) "The prosecution may properly refer to a defendant as a 'liar' if it is a 'reasonable inference based on the evidence.'" (*People v. Wilson* (2005) 36 Cal.4th 309, 338; quoting *People v. Coddington*, *supra*, 23 Cal.4th at p. 613.) A defendant who takes the stand "put[s] his own credibility in issue...." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139.)

It is misconduct for a prosecutor to refer to a defendant as a liar when the defendant has not testified and when the defendant's credibility is not otherwise at issue. (*Floyd v. Meachum* (2d Cir. 1990) 907 F.2d 347, 354.) Although a prosecutor may appropriately argue that a testifying defendant has lied, a prosecutor may not argue that a non-testifying defendant is a liar. (*Id.*, at pp. 354-355.) Such argument is tantamount to contending that a defendant's not guilty plea is a lie, which is also misconduct. (*Lopez v. State* (Tex. Crim. App. 1973) 500 S.W.2d 844, 845; *Perkins v. State* (Tex. App. 1981) 630 S.W.2d 298, 302-303.)

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D. Analysis

The prosecutor in this case is not clairvoyant. He had no idea whether Mr. Sandoval was going to shave his head following the penalty phase retrial. Furthermore, the prosecutor had adduced no evidence that Mr. Sandoval's hair had been cut in a particular way at any time for any particular reason. Thus, when the prosecutor suggested to the jury that Mr. Sandoval had grown his hair out for the retrial in order to "deceive" the jury (23 RT 4605-4606, 4618, 4621), the prosecutor committed misconduct by stating supposed facts not in evidence and baselessly accusing a non-testifying defendant of trying to deceive the jury.

The prosecutor also committed misconduct by "forecasting" and preemptively debunking certain aspects of arguments Mr. Sandoval's trial attorneys would purportedly make in an effort to convince the jury to spare Mr. Sandoval's life. (23 RT 4608-4611.) This misconduct was particularly egregious in light of the fact that the defense attorneys had not made any of the prosecutor's "forecasted" arguments in Mr. Sandoval's original penalty phase trial. Necessarily, the prosecutor's "forecast" was based on supposed facts outside the record — supposed facts with which the experienced prosecutor was apparently familiar. The argument/forecast was pernicious because it suggested to the jury that defense attorneys like those representing Mr. Sandoval learn standardized

argument techniques at seminars and present them to juries in all manner of cases. It suggested that the defense attorneys would try to appeal to jurors by resort to a tried and true sales pitch rather than a straightforward analysis based on the relevant facts.

The prosecutor's misconduct rendered Mr. Sandoval's penalty phase retrial fundamentally unfair. Unconstrained by evidence properly adduced, the prosecutor portrayed Mr. Sandoval and his counsel as a team out to deceive the jury by means of false appearance and insincere ploys. Independently, and together with the other prejudicial errors in the penalty phase retrial, the prosecutor's misconduct warrants relief.

XVIII.

THE PROSECUTOR'S USE DURING CLOSING ARGUMENT OF AN EMOTIONAL POWER POINT PRESENTATION OF VICTIM-IMPACT EVIDENCE BROUGHT NEARLY HALF OF THE MEMBERS OF THE JURY TO TEARS AND VIOLATED MR. SANDOVAL'S DUE PROCESS AND EIGHTH AMENDMENT RIGHTS TO FUNDAMENTAL FAIRNESS IN HIS PENALTY PHASE RETRIAL.

Over repeated objections, the trial court allowed the prosecution to present an emotional audio-visual montage to the jury during the prosecution's argument

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in the penalty phase retrial. (23 RT 4587-4588, 4637-4639.)[186] The presentation exceeded the bounds of permissible 1) victim-impact evidence, and 2) aggravating evidence. Because of the eulogy-like and otherwise inflammatory nature of the presentation, which played on the passions of the jurors (23 RT 4640), the presentation rendered the penalty phase retrial unfair, in derogation of Mr. Sandoval's Eighth and Fourteenth Amendment rights.

In addition to objecting to the audio-visual presentation during trial, Mr. Sandoval raised this issue as a ground for relief in his new trial motion. (6 CT 1506.)

A. Standard of Review

Reviewing courts evaluate the presentation of victim-impact evidence to assess whether it rendered the trial fundamentally unfair. (*Payne v. Tennessee*, *supra*, 501 U.S. 808, 825.)

B. Factual Background

In the prosecution's argument to the jury in both the original penalty phase trial and the penalty phase re-trial, the prosecution presented an audio-visual montage to the jury. (13 RT 2635-2637, 23 RT 4637-4639.) In both proceedings,

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[186] During the course of record correction proceedings, the trial prosecutor assembled portions of the audio and visual components of the presentation on a single disk, which the trial court made part of the record. (1/28/09 RT 2-3.)

the trial court allowed the prosecution to do so over defense objection. (13 RT 2635-2636, 23 RT 4587-4588, 4637-4639.) The presentation was a PowerPoint® exhibition displaying still photos of Daryle Black at various periods in his life — from infancy to adulthood. It included photos of Detective Black after he had been fatally shot, followed by photos of his flag-draped coffin at a memorial service in Long Beach. The dramatic and emotional photos of the memorial service revealed an outpouring of support from the thousands of attendees. It also displayed still photos of members of Detective Black's family and photos of Rick Delfin and his family. Then, it displayed photos of Mr. Sandoval in various gang-related settings, with a change in the tone of the music. (13 RT 2635-2637, 23 RT 4587, 4637, 4697, 4735, 4737-4740.) The PowerPoint® presentation of the still photos was accompanied by two tracks from the album *Freedom*, by the artist Michael W. Smith. (23 RT 4737-4738; 2 Supp. III CT 365-367, 398-404.) According to the prosecutor, the music was selected by the Black family. (23 RT 4637.) During the presentation in the penalty phase re-trial, five jurors were openly crying. (23 RT 4640.)

The defense objections to the presentation of this audio-visual montage consisted not only of objections to the presentation altogether, but also to the court allowing a musical accompaniment to the video presentation. (13 RT 2636, 23 RT

4637.)[187] Further, the defense objected in the penalty phase re-trial when the prosecutor informed the jury that the music had been selected by members of the Black family (23 RT 4637), and when Daryle Black's brother rendered mechanical assistance to the prosecutor as the presentation was proceeding before the jury. (23 RT 4638-4639.)

C. Legal Principles

"[T]he punishment phase of a criminal trial is not a memorial service for the victim." (*Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, 335-336.) "[A]ny decision to impose the death sentence [must] be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358 (plur. opn. of Stevens, J.).) Accordingly, the presentation of victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair" violates the Due Process Clause of the Fourteenth Amendment. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) Such prejudice and unfairness is occasioned by victim-impact evidence and/or "jury argument predicated on it" which is "so inflammatory as to risk a verdict impermissibly based on passion, not deliberation." (*Id.*, at p. 836 (conc. opn. of Souter, J.).) However, a prosecutor

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[187] Defense counsel submitted: "Perhaps the People could not have the music." The prosecutor rejoined: "If I were capable of playing a guitar, I'd be entitled to sing my closing argument." (13 RT 2636.)

may present to the jury "'a *quick glimpse* of the life'" the defendant took. (*Id.* at p. 822 (opn. of the Court), italics added; quoting *Mills v. Maryland* (1988) 486 U.S. 367, 397 (dis. opn. of Rehnquist, C.J.).)

> Courts must exercise great caution in permitting the prosecution to present victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents.... In order to combat this strong possibility, courts must strictly analyze evidence of this type and, if such evidence is admitted, courts must monitor the jurors' reactions to ensure that the proceedings do not become injected with a legally impermissible level of emotion.

(*People v. Prince* (2007) 40 Cal.4th 1179, 1289, *cert. denied sub nom. Prince v. California* (2008) 128 S.Ct. 887.)

When victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming." (*Kelly v. California* (2008) 129 S.Ct. 564, 567 (opn. of Stevens, J., respecting denial of cert.); *id.* at p. 568 (opn. of Breyer, J., dis. from denial of cert.) ["the due process problem of disproportionately powerful emotion is a serious one"]; *People v. Kelly* (2007) 42 Cal.4th 763, 805-806 (conc. & dis. opn. of Moreno, J.) [a victim-impact audio-visual presentation "akin to a eulogy" or "memorial service"

is inappropriate], cert. den *sub nom. Kelly v. California*, *supra*, 129 S.Ct. 564.)

"[S]everal courts have allowed some video clips of various kinds to be admitted during a sentencing phase presentation of evidence." (*United States v. Sampson*, *supra*, 335 F.Supp.2d 166, 191.) "In each of these cases, the admitted video was brief and found to be probative of some aspect of the victim's life." (*Ibid.*)

In a case involving the murder of an adult victim, the probative value of victim-impact evidence consisting of "'infant-growing-into-youth' photographs is *de minimis*." (*Salazar v. State*, *supra*, 90 S.W.3d at p. 337.) "However, their prejudicial effect is enormous because the implicit suggestion is that [the] appellant murdered this angelic infant...." (*Ibid.*) Such evidence is "very prejudicial" because of its "undue emphasis upon the adult victim's halcyon childhood." (*Ibid.*)

In the *Salazar* case, the State acknowledged on appeal that music accompanying the video montage presented to the jury in that case was irrelevant. (*Id.*, at pp. 338-339.) And the Court of Criminal Appeals of Texas found the "background music greatly amplifie[d] the prejudicial effect" of the improper presentation of the video. (*Ibid.*) The court found that presentation of a "seventeen-minute video montage of photographs depicting the murder victim's

life" had been improper in that case. Accordingly, the court reversed and remanded the case for a lower appellate court to assess whether the error had been prejudicial. (*Id.* at p. 332.)

In the cases in which this court has upheld the presentation of audio-visual montages, this court has stressed that the trial courts preview the presentations, so as to be in a position to exercise discretion in determining whether to allow the presentations to go before juries. (*People v. Kelly*, *supra*, 42 Cal.4th at p. 797.)

D. By Bringing Jurors to Tears with the Eulogy-Like Audio-Visual Presentation, the Prosecutor Rendered Mr. Sandoval's Penalty Phase Retrial Fundamentally Unfair.

The prosecutor converted a significant portion of his argument to the jury into a memorial service for Detective Black. The PowerPoint® presentation, along with much of the other evidence introduced by the prosecutor concerning Detective Black's family, character, and background,[188] gave the jury much more than a "quick glimpse" of the fine person that the detective was. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.) The PowerPoint® presentation depicted the detective as an infant, a child, a young man, and an adult. It depicted the actual memorial service held for the detective, and it depicted the thousands of attendees at that memorial service. The presentation brought five of the jurors to tears. (23

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[188] See pages 48-50, *ante*.

RT 4640.) Manifestly, that is the type of presentation in a capital case that gives rise to decision making based upon caprice or emotion rather than reason. (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.) The trial court did nothing to prevent the "legally impermissible level of emotion" that existed when multiple jurors were in tears. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1289.) These circumstances deprived Mr. Sandoval of his right to a reliable and fundamentally fair penalty phase trial.

XIX.

THE TRIAL COURT VIOLATED MR. SANDOVAL'S CONSTITUTIONAL RIGHT TO A FAIR PENALTY DETERMINATION BY INSTRUCTING THE JURY, DURING LEAD DEFENSE COUNSEL'S ARGUMENT, THAT IT WAS NOT ALLOWED TO ACCEPT COUNSEL'S REPRESENTATION THAT A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE WOULD RESULT IN MR. SANDOVAL SPENDING THE REST OF HIS LIFE IN PRISON.

During the closing argument of Mr. Sandoval's lead defense counsel in the penalty phase retrial, counsel told the jury a sentence of life without the possibility of parole (LWOP) would result in Mr. Sandoval never getting out of prison because that is what an LWOP sentence means. (23 RT 4677-4678.) The prosecutor objected to this statement, and, following a side bar conference, the trial court improperly told the jury it was "not allowed to accept the statement that

life without the possibility of parole means exactly what it is." Instead, the court told the jury it was only to "assume" an LWOP sentence would result in Mr. Sandoval spending the rest of his life in prison. (23 RT 4678.)

Although it is permissible for a court to tell a jury to *assume* that an LWOP sentence will result in a capital defendant spending the rest of his/her life in prison (*People v. Williams* (2008) 43 Cal.4th 584, 646, cert. den. *sub nom. Williams v. California* (2009) 129 S.Ct. 1000; *People v. Fierro* (1991) 1 Cal.4th 173, 250, cert. den. *sub nom. Fierro v. California* (1992) 506 U.S. 907), it is improper for a court to prohibit defense counsel from arguing to a jury that an LWOP sentence will *in fact* result in the defendant never being released from prison. (*People v. Thompson* (1988) 45 Cal.3d 86, 130-131 & fn. 29, cert. den. *sub nom. Thompson v. California* (1988) 488 U.S. 960; see also *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1271 [defense counsel's argument to jury that defendant "will always be behind prison walls" obviated need for court to instruct jury regarding defendant's parole ineligibility].) By erroneously "correcting" defense counsel's argument that an LWOP sentence would actually result in imprisonment for life, the trial court violated Mr. Sandoval's right to a scrupulously fair and reliable penalty determination — a right safeguarded by the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15 of

the California Constitution.

A. Factual Background

Defense counsel made the following remarks to the jury:

> What is L.W.O.P.? [¶] You hear us using those words. That means life without parole.
>
> And I'm always amazed when I talk to jurors that they think, well, that means he'll do seven years, and then he'll be released. Well, that's not true.
>
> And they always go back to the Charles Manson example. Charles Manson and Sirhan [Sirhan], if you remember those cases. Those are famous California cases. They were convicted back in the late 60's of murders, and they were all sentenced to the death penalty.
>
> And then in 1972, the Supreme Court of the United States overturned the death penalty in all the states in the United States because of the way the law was written. So then after that, each state, the ones that chose to have a death penalty, reenacted a new death penalty law. And California did that in 1978, in which they provide for the two sentences, either the death sentence or life without parole.
>
> And life without parole means just what it sounds like. And if you don't believe me, if you're thinking I'm trying to pull the wool over your eyes, you can ask the court. And the court will explain it to you. It means that you will never get out.

(23 RT 4676-4677)

The prosecutor then interposed an objection, and a side bar conference took place. (23 RT 4677-4678.) At side bar, the court stated: "I think the correct statement of the law is that you are to assume that it means that." Defense counsel asked the court to "admonish" the jury in this regard. (23 RT 4678.)

The following exchange then took place before the jury:

THE COURT: Life without the possibility of parole, that sentence, you are to assume that it means that. That is the statement of the law. You are to assume life without the possibility of parole means life without the possibility of parole.

DEFENSE COUNSEL: If anyone has any question on that, the court will explain it further. [¶] But you are to assume that that's what it means because that's what it does mean. It means that Ramon Sandoval will spend the rest of his life in a California Maximum security prison.

THE COURT: Excuse me. [¶] *The jury is not allowed to accept the statement that life without the possibility of parole means exactly what it is. You're to assume that that's what it means.* [¶] Thank you.

DEFENSE COUNSEL: Well, okay. [¶] You're to assume that Ramon Sandoval will spend the rest of his life in a California Maximum security prison....

(23 RT 4678-4679, italics added.)

B. Controlling Constitutional Principles

State and federal constitutional guarantees are implicated when the parties or judges in capital cases draw the attention of jurors to the meaning of LWOP sentences: In states like California, which authorize LWOP sentences, a defendant has a constitutionally protected right to advocate imposition of an LWOP sentence

by informing the jury that such a sentence precludes release on parole, thereby allaying concerns jurors may have about future dangerousness of the defendant and/or possible lack of fulfillment of the sentence selected by the jury. (*Kelly v. South Carolina* (2002) 534 U.S. 246, 248.) As a constitutional corollary to this right, the judge and prosecutor in a capital trial are generally prohibited from informing the jury about possible post-judgment modification of an LWOP sentence that could result in eventual release of the defendant from prison. (*People v. Ramos* (1984) 37 Cal.3d 136, 153-155, cert. den. *sub nom. Ramos v. California* (1985) 471 U.S. 1119.)[189]

1. The Federal and State Constitutional Rights of a Capital Defendant to Inform the Jury an LWOP Sentence Will Result in the Defendant Spending the Rest of His/Her Life in Prison

This court has expressly recognized that an attorney representing a capital defendant may inform the jury an LWOP sentence will result in the defendant never being released from prison: It is "within the scope of legitimate argument" for defense counsel to tell a jury a defendant will never be released from prison if he/she receives a sentence of life without the possibility of parole. (*People v. Thompson*, *supra*, 45 Cal.3d at p. 130-131 & fn. 29.) As this court observed in

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[189] In *Ramos*, this court reached this conclusion by interpreting article I, sections 7 and 15 of the California Constitution. (*People v. Ramos*, *supra*, 37 Cal.3d at pp. 153-155.)

People v. Ledesma, *supra*, 39 Cal.4th 641: "Instructing jurors to take literally the words 'life without possibility of parole' serve[s] to impress upon them the seriousness of their decision and to overcome the common misperception that all life prisoners may eventually be paroled." (*Id.* at p. 666.)[190]

A capital defendant's right to provide parole ineligibility information to the jury is a right of federal constitutional magnitude. (*Ramdass v. Angelone* (2000) 530 U.S. 156, 180 (opn. of O'Connor, J., concurring in the judgment) ["Whether a defendant is entitled to inform the jury that he is parole ineligible is ultimately a question of federal law...."].) The United States Supreme Court's recognition of this constitutional right came with a slight caveat: In a line of cases beginning with *Simmons v. South Carolina* (1994) 512 U.S. 154, the Court has held that "*when 'a capital defendant's future dangerousness is at issue*, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant "to inform the jury of his parole ineligibility, either by a jury instruction or in arguments by counsel."'" (*Kelly v. South Carolina*, *supra*, 534 U.S. at p. 248, italics added, internal brackets omitted; quoting *Shafer v. South Carolina* (2001) 532 U.S. 36, 39; quoting in turn

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[190] When the defense attorney in *Ledesma* had told jurors that "life without parole meant exactly that, ... the prosecutor's objection to that statement was overruled by the trial court." (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 666.)

Ramdass v. Angelone, *supra*, 530 U.S. at p. 165.)[191] This right safeguards a capital defendant's interest in receiving a fair and reliable determination of penalty, because studies show information regarding parole eligibility has a significant influence over sentencing decisions of capital juries. (*Baze v. Rees*, 553 U.S. at p. 79, fn. 12 (opn. of Stevens, J., concurring in the judgment).)[192]

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[191] A majority of the Justices in the seminal *Simmons* case predicated a capital defendant's right in this regard on due process principles. (*Simmons v. South Carolina*, *supra*, 512 U.S. at p. 169 (plur. opn. of Blackmun, J.); *id.* at p. 172 (conc. opn. of Souter, J.); *id.* at p. 174 (conc. opn. of Ginsburg, J.); *id.* at p. 177 (opn. of O'Connor, J., concurring in the judgment).) Justice Souter, joined by Justice Stevens, concluded the right is also based on the Eighth Amendment, which "entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed." (*Id.* at p. 172 (conc. opn. of Souter, J.); see *O'Dell v. Netherland* (1997) 521 U.S. 151, 159 [identifying the constitutional underpinnings of the separate opinions in *Simmons*].)

[192] Although most states in which the death penalty is available provide for an alternative punishment of LWOP, not all do. (Mulroy, *Avoiding "Death by Default": Does the Constitution Require a "Life Without Parole" Alternative to the Death Penalty?* (2004) 79 Tul. L.Rev. 401, 404 (hereafter *Avoiding Death by Default*).) And, in those jurisdictions where an LWOP option is not available, "a growing and overwhelming body of empirical evidence now demonstrates that the absence of an LWOP option causes the death penalty to be imposed as an expedient rather than as the product of a reasoned judgment that death is the appropriate punishment." (*Id.* at p. 405.) "The empirical evidence shows overwhelmingly that concern about the defendant's eventual release from prison significantly biases jurors in favor of death, regardless of jurisdiction, regardless of whether LWOP is a sentencing option, and regardless of whether the prosecution explicitly raises future dangerousness." (*Id.* at p. 430, footnote omitted.)

To the extent that the right of capital defendants to present information concerning parole ineligibility is preconditioned on the prosecution raising the issue of "future dangerousness," it does not appear that the precondition poses any significant limitation. This is so because future dangerousness is inexorably at issue in capital cases. (*Commonwealth v. King* (1998) 554 Pa. 331 [721 A.2d 763, 785] (conc. opn. of Flaherty, C.J.) ["[I]t is self-evident that every juror in the penalty phase of a capital case is always concerned with the issue of future dangerousness."], cert. den. *sub nom. King v. Pennsylvania* (2000) 528 U.S. 1119; *Avoiding Death by Default, supra*, 79 Tul. L.Rev. at p. 430 ["[T]he reality of death penalty sentencing is that future dangerousness is always at issue."]; Blume, et al., *Future Dangerousness in Capital Cases: Always "At Issue"* (2001) 86 Cornell L.Rev. 397.) Indeed, in *Kelly v. South Carolina, supra*, 534 U.S. 246, the Court observed: "[I]t may well be that the evidence in a substantial proportion, if not all, capital cases will show a defendant likely to be dangerous in the future." (*Id.* at p. 254, fn. 4; *id.* at p. 261 (dis. opn. of Rehnquist, C.J.) ["It is difficult to envision a capital sentencing hearing where the State presents no evidence from which a juror might make such an inference."]; see *Bronshtein v. Horn* (3d Cir. 2005) 404 F.3d 700, 716 [noting that "the holding in *Simmons* was arguably broadened in *Kelly*"], cert. den. *sub nom. Beard v. Bronshtein* (2006) 546 U.S.

1208.)

When a trial court refuses to allow defense counsel to inform a jury that an LWOP sentence will result in the defendant never being released from prison, and instead informs the jurors that they are to *assume* the sentence they select will be carried out, the trial court undercuts the defendant's right to inform the jury regarding his parole eligibility. Indeed, "an instruction phrased in this qualified language may unnecessarily raise questions in the jurors' minds." (*People v. Kipp* (1998) 18 Cal.4th 349, 378-379, cert. den. *sub nom. Kipp v. California* (1999) 525 U.S. 1152.)

2. The State Constitutional Prohibition Against Informing Juries of Possible Post-Judgment Modification of an LWOP Sentence

"Many state courts have held it improper for the jury to consider or be informed — through argument or instruction — of the possibility of commutation, pardon, or parole." (*California v. Ramos* (1983) 463 U.S. 992, 1013, fn. 30.) Although states are free to maintain this prohibition in their capital proceedings, the Supreme Court of the United States has held the prohibition is not mandated by the United States Constitution. (*Id.*, at pp. 997-1009, 1013.)[193] This

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[193] Similarly, the United States Constitution does not strip states of "the prerogative to determine how much (if at all) juries" are to be *accurately* informed of other "postsentencing legal regime[s,]" including appellate proceedings, which could result in reversal or sentence reduction. (*O'Dell v. Netherland*, *supra*, 521

prohibition exists in California by virtue of this court's holding that the due process provisions of the California Constitution (article I, sections 7 and 15) prohibit any instruction to the jury regarding the governor's power to commute or pardon an LWOP sentence. (*People v. Ramos*, *supra*, 37 Cal.3d at p. 153; accord, *People v. Beames* (2007) 40 Cal.4th 907, 933 ["[C]onsideration of the possibility of commutation is improper in capital penalty phase determinations."].)

Deviation from this prohibition is permissible only in cases where juries specifically inquire about the possibility of post-judgment modification of an LWOP sentence: "When the jury makes a specific inquiry about how a postconviction proceeding such as commutation might affect [a] defendant's sentence," this court "has suggested that trial courts issue a short statement emphasizing that it would be a violation of the jury's duty to consider the possibility of commutation in determining the appropriate sentence." (*People v. Benavides* (2005) 35 Cal.4th 69, 115.) And, provided the court emphasizes the jury's duty to refrain from considering such a possibility, it is not error for the court to inform the jury of the Governor's power to commute either a death

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U.S. at p. 164; citing *Caldwell v. Mississippi* (1985) 472 U.S. 320.) Of course, in order for any such information in this regard to be accurate, it would have to convey that it is "rare" for such relief to be granted. (*People v. Samuels* (2005) 36 Cal.4th 96, 140 (2005) (conc. opn. of Werdegar, J.).)

sentence or an LWOP sentence. (*People v. Beames*, *supra*, 40 Cal.4th at p. 931.)

Courts and commentators have explained that this prohibition is necessary in order to prevent juries from returning death verdicts in cases in which they would otherwise be inclined to return LWOP verdicts: "A jury that believes that death is not necessarily warranted may nonetheless impose death in the mistaken belief that that is the only penalty that will avoid the possibility of commutation." (*People v. Ramos*, *supra*, 37 Cal.3d at p. 155.)

> It is no more proper for a jury to conclude that death be the penalty because a life sentence may be commuted or the defendant paroled, than it would be for a trial judge in other criminal causes deliberately to impose an excessive sentence to frustrate the statutory scheme committing parole to another agency.

(*Id.* at p. 158; quoting *State v. White* (1958) 27 N.J. 158 [142 A.2d 65, 76].)

Studies of capital jury decision making have shown that, even in states where the only alternative to the death penalty is LWOP, "jurors believe that defendants who [are] not executed w[ill] at some point be released from prison." (*Id.* at p. 432; citing Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing* (1999) 77 Tex. L.Rev. 605, 647-648, tbl. 1.) This finding correlates with another finding of the capital jury decision making studies: The more a juror believes the defendant would be released if not sentenced to death, "the more likely the juror would vote

for the death penalty." (*Ibid.*)

Because the California constitutional prohibition against informing a jury about possible post-judgment modification of an LWOP sentence safeguards a substantial liberty interest, i.e., the due process right, under article I, sections 7 and 15 of the California Constitution, to a fair penalty determination (*People v. Ramos*, *supra*, 37 Cal.3d at p. 153), abridgment of this state constitutional guarantee triggers federal due process concerns. (*Wolff v. McDonnell*, *supra*, 418 U.S. at pp. 557-558 [Because "[t]he touchstone of due process is protection of the individual against arbitrary action of government," "a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State."].)

C. Analysis

In the instant case, the parole ineligibility subject was handled in the penalty phase retrial in a manner that necessarily led the jury to believe Mr. Sandoval could some day be released from prison if not sentenced to death. Although the argument of Mr. Sandoval's lead counsel, that an LWOP sentence would result in Mr. Sandoval spending the rest of his life in prison (23 RT 4676-4679), was an argument Mr. Sandoval was constitutionally entitled to present (*Simmons v. South Carolina*, *supra*, 512 U.S. 154; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 666;

People v. Thompson, *supra*, 45 Cal.3d at pp. 130-131 & fn. 29;)[194] the trial court repudiated the argument. When counsel first made the argument, the court instructed the jury it was only to "assume" LWOP means LWOP. (23 RT 4678.) Then, when counsel parried and told the jury it was "to assume that that's what it means because that's what it does mean[,]"and that, accordingly, an LWOP sentence would result in Mr. Sandoval spending the rest of his life in prison, the court interrupted and said: "*The jury is not allowed to accept the statement that life without the possibility of parole means exactly what it is. You're to assume that that's what it means.*" (23 RT 4678, italics added.) As this court has recognized, "qualified language" like that used by the trial court can "unnecessarily raise questions in the jurors' minds. (*People v. Kipp*, *supra*, 18

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[194] For federal constitutional purposes, the "future dangerousness" precondition is fulfilled in the instant case in light of the following: 1) In his opening statement in the retrial, the prosecutor told the jury Mr. Sandoval is a "predator" (17 RT 3384), and that while Mr. Sandoval was in jail awaiting trial, he wrote on a cup in his jail cell, "I am Menace." (17 RT 3383.) 2) The State presented evidence that Mr. Sandoval had participated in another homicide prior to the homicide involved in this case. (17 RT 3437-3520, 3527-3533; 18 RT 3536-3556.) 3) The prosecutor argued to the jury that Mr. Sandoval would revert to his gang life-style after the jury's verdict by shaving his head in order to re-establish his gangster image (23 RT 4605-4606), he referred to Mr. Sandoval as "a vicious killer ... who enjoys what he does" (23 RT 4617) and lacks remorse for killing Detective Black (23 RT 4626-4627), and he characterized Mr. Sandoval's street-name, "Menace," as an appropriate name, because "[h]e's a menace." (23 RT 4614-4615, 4631-4633.)

Cal.4th at pp. 378-379.)

By telling the jury it was not allowed to accept the proposition that LWOP means LWOP, but only to assume LWOP means LWOP, the court confronted the jury with a paradox akin to the unreal conundrums Alice encountered in her journey through Wonderland, "in which up is down and down is up, and words lose their real meaning...." (*United States v. Galloway* (8th Cir. 1992) 976 F.2d 414, 438 (dis. opn. of Beam, J.), cert. den. *sub nom.*, *Galloway v. United States* (1993) 507 U.S. 974.)[195] Yet, the clear and impermissible message to the jurors from the court's remarks was that an LWOP sentence would not necessarily result in Mr. Sandoval's imprisonment for the rest of his life. (*People v. Kipp*, *supra*, 18 Cal.4th at pp. 378-379.)

Not only was it improper for the trial court to renounce counsel's argument concerning the meaning of an LWOP sentence, but also, because the jury did not request any information from the court concerning the meaning of LWOP, it was improper for the court to make remarks from which the jury would naturally infer that the sentence might not be carried out. Although this court has presumed that capital juries are readily capable of discerning the meaning of LWOP (*People v. Watson* (2008) 43 Cal.4th 652, 700 ["a trial court does not have to explain the

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[195] Carroll, Alice's Adventures in Wonderland (1865).

meaning of 'life without the possibility of parole' because the term has a plain meaning that does not require further explanation"]), the trial court in this case effectively stripped away the term's plain meaning.[196] Furthermore, this court has recognized "the common misperception that all life prisoners may eventually be paroled." (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 666.) Informing jurors that the words life without parole are to be taken at their literal meaning serves to disabuse jurors of this common misperception. (*Ibid.*)

Based upon the authorities discussed above, the trial court's remarks to the jury violated 1) Mr. Sandoval's due process right to inform the jury of his parole ineligibility (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), 2) the prohibition against informing the jury of possible post-judgment modification of an LWOP sentence (*People v. Ramos*, *supra*, 37 Cal.3d at p. 153; Cal. Const., art. I, §§ 7 & 15), and 3) Mr. Sandoval's Eighth Amendment right to an individualized and "reasoned moral" judgment "that death is the appropriate sentence." (*Penry v.*

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[196] Even accounting for the possibility of some post-judgment modification of an LWOP sentence for Mr. Sandoval's murder of Detective Black, the possibility of Mr. Sandoval ever being released from prison is virtually nil. Given the various offenses he was convicted of during the guilt phase, including the multiple enhancements, California sentencing law mandated imposition of well over a century of imprisonment. Indeed, as noted in the Statement of the Case, *ante*, the court imposed an aggregate term of 110 years to life, consecutive to the death sentence.

Johnson (2001) 532 U.S. 782, 797, internal quotation marks omitted.)

D. Prejudice

During argument in the *original* penalty phase trial, Mr. Sandoval's counsel told the jury an LWOP sentence would result in Mr. Sandoval never getting out of prison. (13 RT 2647.) The prosecutor did not object, and the trial judge did not inform the jury that counsel's representation was inaccurate. That jury deadlocked seven-to-five on the question of penalty. (13 RT 2725; 5 CT 1312.) The fact that such a result followed proper treatment of the parole ineligibility issue militates against a finding of harmlessness in the retrial, where a death verdict followed the trial court's improper treatment of the parole ineligibility issue.

More generally, a prior hung jury militates against a finding of harmlessness in a retrial. (*Kennedy v. Lockyer* (9th Cir. 2004) 379 F.3d 1041, 1056, fn. 18; *United States v. Santana* (1st Cir. 1999) 175 F.3d 57, 67; *United States v. Paguio* (9th Cir. 1997) 114 Fd.3d 928, 935; *United States v. Doe* (D.C. Cir. 1990) 903 F.2d 16, 28; *United States v. Schuler* (9th Cir. 1987) 813 F.2d 978, 982.) This is particularly so when the error at issue took place in the retrial, but not the original trial. (*United States v. Beckman* (8th Cir. 2000) 222 F.3d 512, 525.)

The fact that Mr. Sandoval was only 18 at the time of the offense is a mitigating circumstance in this case. (Pen. Code, § 190.3, subd. (i).) The chaplain

who visited him in the jail testified that Mr. Sandoval was in the process of making a painful transition from boyhood to manhood while in jail. (12 RT 2411.)[197] In light of the moral, normative nature of the penalty phase determination made by jurors (*People v. Prieto* (2003) 30 Cal.4th 226, 263, cert. den. *sub nom. Prieto v. California* (2003) 540 U.S. 1008), a reviewing court cannot venture to say whether the jury in the penalty phase retrial would have shown mercy based on this mitigating factor of youthfulness had the penalty phase been conducted without this constitutional error.

Finally, the studies noted above, which demonstrate that capital juries otherwise disposed to impose life sentences often return death verdicts if led to believe life sentences will not actually result in incarceration for life (*Baze v. Rees*, *supra*, 553 U.S. at p. 79, fn. 12 (opn. of Stevens, J., concurring in the judgment); (*Avoiding Death by Default*, *supra*, 79 Tul. L.Rev. at pp. 405, 430), weigh against treating the type of error committed by the trial court in this case as harmless.

Because the trial court's error is error of federal constitutional magnitude, the prejudicial effect of the error must be assessed under the *Chapman* standard. Applying that standard, and considering that nature of the error, the relevant empirical studies, the evenly divided jury in the original penalty phase, and the

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[197] The chaplain testified in the original trial, but not in the retrial.

mitigating circumstance of Mr. Sandoval's youthfulness, there is no basis for a judicial determination that the trial court's error was harmless beyond a reasonable doubt.

XX.

THE TRIAL COURT VIOLATED MR. SANDOVAL'S RIGHT TO A FAIR AND RELIABLE PENALTY DETERMINATION BY REFUSING HIS REQUEST TO INSTRUCT THE JURY THAT INDIVIDUAL JURORS DID NOT NEED TO AGREE WHETHER MITIGATING CIRCUMSTANCES WERE PRESENT IN ORDER TO CONSIDER AND GIVE EFFECT TO THOSE MITIGATING CIRCUMSTANCES.

Defense counsel requested the trial court to give the jury the following instruction:

> A mitigating circumstance does not have to be proved beyond a reasonable doubt to exist. The jurors need not unanimously agree on whether a particular mitigating circumstance is present. Each juror, in his or her own individual assessment of the evidence, may find that a mitigating factor exists if he or she finds there is any substantial evidence to support it.

(6 CT 1489; 23 RT 4583-4585.)

The trial court refused to give the instruction. (23 RT 4583-4585.)

Consistent with the requested instruction, CALCRIM No. 766 provides, in pertinent part:

> Each of you must decide for yourself whether aggravating or mitigating factors exist. You do not all need to agree whether such

> factors exist. If any juror individually concludes that a factor exists, that juror may give the factor whatever weight he or she believes is appropriate.

The trial court's refusal to give the requested instruction violated Mr. Sandoval's rights under the Eighth and Fourteenth Amendments to a fair and reliable penalty determination. The court's failure to instruct the jury as requested, coupled with the court's instruction to the jurors that all twelve of them needed to agree "[i]n order to make a determination as to the penalty" (23 RT 4702), impermissibly conveyed to the jurors that determinations "as to the penalty," such as determinations as to whether certain mitigating circumstances had been established, could only be made and given effect if all twelve jurors agreed concerning the mitigating circumstance.

"[I]t would be the 'height of arbitrariness to allow *or* require the imposition of the death penalty' where 1 juror was able to prevent the other 11 from giving effect to mitigating evidence." (*McKoy v. North Carolina*, *supra*, 494 U.S. 433, 440, italics in the original; quoting *Mills v. Maryland*, *supra*, 486 U.S. 367, 374.) Indeed, mitigating evidence may be relevant even if "one or more jurors either did not believe that the circumstance had been proved as a factual matter or did not think that the circumstance, though proved, mitigated the offense." (*Id.* at pp. 440-441.) "The Constitution *requires* States to allow consideration of mitigating

evidence in capital cases. And barrier to such consideration must therefore fall." (*Id.* at p. 442, italics in the original.)

"When the choice is between life and death," error that prevents the jury from giving weight to mitigating evidence "creates the risk that the death penalty will be imposed in spite of facts which may call for a less severe penalty." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605 (plur. opn. of Burger, C.J.).) "[T]hat risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendment." (*Ibid.*)

In *Mills v. Maryland*, *supra*, 486 U.S. 367, the Court explained: "Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, [citation]; by the sentencing court, [citation]; or by evidentiary ruling, [citation]." (*Id.* at p. 375.) "The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance." (*Ibid.*) Enforcement of such a barrier unconstitutionally prohibits the sentencer from "consider[ing] all of the mitigating evidence and risks erroneous imposition of the death sentence...." (*Ibid.*)

"It is no answer, of course, that the jury is permitted to 'consider' mitigating evidence when it decides collectively ... whether any mitigating circumstances exist." (*McKoy v. North Carolina*, *supra*, 494 U.S. at p. 442.) "Rather, *Mills*

requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." (*Id.* at pp. 442-443.) Thus, as Justice Scalia pointed out in his dissenting opinion in *McCoy*, the result of the Court's opinion is that "a single juror's finding regarding the existence of mitigation *must* control...." (*Id.* at p. 464 (dis. opn. of Scalia, J.), italics in the original.)

Studies have shown that jurors who are not given specific instructions about how to treat evidence of mitigating circumstances fall victim to confusion:

> About half the jurors incorrectly believe that a mitigating factor must be proven beyond a reasonable doubt. Less than a third of jurors understand that mitigating factors need only be proved to the juror's personal satisfaction. The great majority of jurors — in excess of sixty percent ... — erroneously believe that jurors must unanimously agree for a mitigating circumstance to support a vote against death.

Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L.Rev. 1, 11.)

In the instant case, the trial court's failure to instruct the jury that any one of them could consider and give weight to a mitigating circumstance, even if other jurors did not believe the mitigating circumstance was present, posed an unconstitutional barrier to individual juror consideration of the mitigating

evidence presented by Mr. Sandoval.[198] No instructions given by the trial court to the jury explained that an individual juror could consider and give effect to a mitigating circumstance without an agreement on the part of all the jurors that the mitigating circumstance had been established. To the contrary, the trial court expressly instructed the jury: "In order to make a determination as to the penalty, all the 12 jurors must agree." (23 RT 4702.)[199] Of course, in a capital case, a determination as to whether to consider and give effect to a mitigating circumstance is "a determination as to the penalty." Accordingly, Mr. Sandoval is entitled to a reversal of the death penalty verdict based upon the holdings of the Supreme Court of the United States in *Mills* and *McCoy*.

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[198] In *People v. Jennings* (1988) 46 Cal.3d 963, this court upheld a trial court's instruction to jurors "that unanimous agreement that [the] defendant committed the criminal conduct asserted as aggravating factors was not required, and that an individual juror who was satisfied beyond a reasonable doubt that [the] defendant committed the offense could consider it in making the penalty determination." (*Id.* at p. 988.) The instruction proposed by the defense in the instant case was the mitigating evidence corollary to the aggravating evidence instruction upheld in *Jennings*.

[199] The instant case is distinguishable from *People v. Breaux* (1991) 1 Cal.4th 281, where this court concluded a trial court's rejection of a requested defense instruction similar to that requested in the instant case survived constitutional scrutiny because "[t]he only requirement of unanimity" with respect to which the trial court instructed the jury "was for the verdict itself." (*Id.* at 314-315 & fn. 13.)

XXI.

BECAUSE OF THE NORMATIVE, SUBJECTIVE NATURE OF THE DECISION-MAKING PROCESS OF JURORS IN THE PENALTY PHASE OF A CAPITAL CASE, APPELLATE COURTS CANNOT TREAT PENALTY-PHASE ERRORS AS HARMLESS.

"As Shakespeare reminded us: 'The quality of mercy is not strain'd, It droppeth as the gentle rain from heaven Upon the place beneath.' So too, in our analysis of prejudice, we must remind ourselves that the possibility of mercy, like the possibility of gentle rain, is not predictable with certainty." (*Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 938, conc. opn. of Gould, J; quoting Shakespeare, The Merchant of Venice, act IV, scene 1, lines 183-185.)

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however, long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

(*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

"[T]he penalty phase determination is inherently moral and normative, not factual...." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263, internal quotation marks omitted; *People v. Holt*, *supra*, 15 Cal.4th 619, 684.) This subjective process is "not susceptible to a burden-of-proof quantification." (*People v. Box* (2000) 23

Cal.4th 1153, 1216, internal quotation marks omitted.) Capital jurors are "constitutionally tasked" with undertaking a "measured, normative process" in selecting the appropriate sentence for capital defendants. (*Kansas v. Marsh*, *supra*, 548 U.S. 163, 180; *People v. Taylor* (2009) 47 Cal.4th 850, 898 [adverting to "the individual normative character of capital jurors' penalty decisions"].) "Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider...." (*People v. Boyde* (1988) 46 Cal.3d 212, 253.)

"[T]he focus of ... the sentencer's deliberations in a capital-sentencing proceeding differs radically from an ordinary trial. The capital sentencer is not primarily finding facts but weighing and comparing them." (*State v. Davis* (1989) 116 N.J. 341, 408 [561 A.2d 1082, 1117] (dis. opn. of Handler, J.).) Because of the high degree of subjectivity involved in the process of choosing between life and death, "the task of assessing the extent" to which that choice may have been influenced by one or more errors is difficult, if not "quixotic." (*Id.* at p. 1117.)

Furthermore, as the Supreme Court of the United States has explained: "[In] the deliberative process in which the capital jury engages in determining the appropriate penalty, ... there is no single determinative issue apart from the general concern that the penalty be tailored to the individual defendant and the offense."

(*California v. Ramos*, *supra*, 463 U.S. at p. 1009.)

In light of the nature of the deliberative process in a capital case penalty phase proceeding, this court should abandon harmless-error review of penalty phase errors as disingenuous and intellectually dishonest. No reviewing court can reliably determine whether a penalty phase error, such as any of the numerous errors in this case, influenced a capital jury's penalty determination.

XXII.

THE DEATH PENALTY IS UNCONSTITUTIONAL.

"[T]he imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contribution to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'" (*Baze v. Rees*, *supra*, 553 U.S. at p. 86 (opn. of Stevens, J., concurring in the judgment), internal brackets in the original; quoting *Furman v. Georgia*, *supra*, 408 U.S. at pp. 380-384 (*per curiam*) (conc. opn. of White, J.).)

"[T]he death penalty experiment has failed. It is virtually self-evident ... that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question — does the system accurately and consistently determine which defendants

'deserve' to die? — cannot be answered in the affirmative." (*Callins v. Collins* (1994) 510 U.S. 1141, 1145 (opn. of Blackmun, J., dissenting from denial of cert.).)[200] "[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*, *supra*, 408 U.S. at pp. 309-310 (conc. opn. of Stewart, J.).)

"The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive." (*Baze v. Rees*, *supra*, 533 U.S. at p. 84 (opn. of Stevens, J., concurring in the judgment).)

"When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. 2641, 2650.)

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[200] "Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by ... history.... To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." (*McGautha v. California* (1971) 402 U.S. 183, 204.)

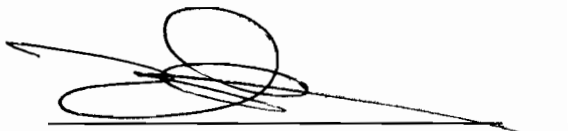
Mr. Sandoval is mindful that this court has repeatedly rejected challenges to the constitutionality of the death penalty. Nevertheless, because a number of the Justices of the Supreme Court of the United States have expressed the view over the years that the death penalty cannot be administered in a constitutional manner, and because a majority of the Justices of that Court may at some future time declare the death penalty unconstitutional, Mr. Sandoval respectfully presents this challenge to the constitutionality of the death penalty here so as to preserve his right to litigate the issue in further proceedings if necessary.

CONCLUSION

For the foregoing reasons, Mr. Sandoval respectfully requests this court to reverse the judgment of the superior court.

Dated: July 9, 2010

Respectfully Submitted,



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WORD COUNT CERTIFICATE

This appellant's opening brief complies with the word-count limit set forth in Rule 8.630(b)(1)(A) of the Rules of Court, as this brief contains 89,332 words, per the word-count function of the word-processing program on which this brief was created, Word Perfect X4.

Dated: July 9, 2010

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the above-entitled action; my business address is 428 J Street, Suite 350, Sacramento, California 95814.

On the date below, I served the following document(s):

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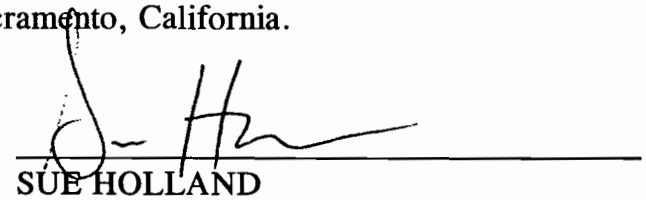

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