IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **OSWALDO AMEZCUA** AND JOSEPH CONRAD FLORES, Defendants and Appellants.	SUPREME CT. NO. S133660 LASC KA050813

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE ROBERT J. PERRY, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

on behalf of

OSWALDO AMEZCUA

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Defendant and Appellant
OSWALDO AMEZCUA

DEATH PENALTY

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APPELLANT'S OPENING BRIEF

on behalf of

OSWALDO AMEZCUA

STATEMENT OF THE CASE

STATEMENT OF APPEALABILITY

This is an automatic appeal pursuant to Penal Code Section 1239,[1] subdivision (b), from a conviction and judgment of death entered on April 20, 2005, against appellant OSWALDO AMEZCUA in the Superior

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

Court of the State of California in and for Los Angeles County. (18CT 4775-4784; 14RT 3254-3264.)

The appeal is taken from a judgment that finally disposes of all issues between the parties.

INTRODUCTION

In this brief, appellant demonstrates that the trial court violated his rights to a fair trial and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when, during the selection of the jury, the trial court erred by restricting voir dire on the question of whether prospective jurors would always vote for death if appellant were to be convicted of multiple murders and by excusing a prospective juror who, despite conscientious reservations about imposing the death penalty, stated repeatedly that she was willing to carry out her duties as a juror in accordance with the court's instructions and her oath.

Appellant also asserts that the trial court committed federal constitutional error when it erroneously instructed the jury that a person who aids and abets is "equally guilty" of the crime committed by a direct perpetrator. In a prosecution for murder, an aider and abettor's culpability is based on the combined acts of the principals, but the aider and abettor's own mens rea and therefore his level of guilt "floats free."

In addition, appellant was denied his right of confrontation under the Sixth Amendment when the results of one victim's autopsy were entered into evidence through the in-court testimony of a forensic pathologist who did not perform the autopsy. The trial court also erred in

pathologist who did not perform the autopsy. The trial court also erred in admitting the prosecutor's jailhouse interview of appellants. Evidence Code section 1153, Penal Code section 1192.4, and public policy render statements regarding criminal conduct made in the course of plea negotiations inadmissible.

Further, appellant's rights to a fair trial, to present a defense, and to the presumption of innocence were prejudiced by heightened courtroom security. Here, the trial court did not base its security order exclusively on case-specific reasons as is required and did not state on the record why the need for the heightened security measures outweighed potential prejudice to the defendants. Also, the prosecutor committed misconduct and violated appellant's right to due process of law when he invited the jurors to depart from their duty to view the evidence objectively and instead to view the case through the eyes of the victims.

Appellant also asserts that his right to a reliable determination of the judgment of death was violated by the failure to present a penalty phase defense, appellant's express requests and the trial court's consent notwithstanding. In addition, the trial court erred in instructing the jury that death is a greater punishment than life imprisonment without possibility of parole and in so doing violated the Eighth Amendment's guarantee of a capital jury suitably instructed to avoid an arbitrary and capricious death verdict.

Appellant further asserts that California's Death Penalty statute, as interpreted by the courts and applied at appellant's trial, violates the United States Constitution.

PROCEDURAL HISTORY

In the early morning minutes of July 4, 2000, codefendant Joseph Conrad Flores (Flores)[2] used a public telephone on the Santa Monica Pier to return a contact made to his pager by San Bernardino County Sheriff's detectives investigating several shootings and homicides. Soon after, Santa Monica police dispatched to the pier used a description given them by the San Bernardino County Sheriffs to identify and arrest Flores. (10RT 2483.)

Appellant OSWALDO AMEZCUA was walking on the pier with Flores when Santa Monica police approached them. Flores made contact with the officers, but appellant turned and walked into the Playland Arcade where he barricaded himself and arcade customers. Appellant shot at and wounded police officers before he was arrested. (10RT 2379-2384.)

During the long and somewhat complex pretrial period[3] that preceded the capital trial in this case, appellant and Flores were at first

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[2] The victim in count 4 is George Flores and he is identified throughout this brief as either George Flores or George. Codefendant Joseph Flores is most often identified simply as Flores, but also sometimes as Joseph Flores.

[3] Appellant was arrested on July 4, 2000. On July 6, 2000, appellant made the first of multiple appearances in the Superior Court of Los Angeles County, Santa Monica Courthouse, in LASC No. SA039397 (Death Penalty Supplemental IV, Supplemental Clerk's Transcript, pp. 35-36 (hereinafter DPSuppIV, SuppCT 35-36)). (See Felony Complaint in LASC SA039397 filed on July 6, 2000, and First Amended Felony Complaint filed July 13, 2000 (DPSuppIV, SuppCT 5-13, 46-59).) On December 20, 2000, at the request of the prosecution, the trial court ordered a dismissal of the pleading in the Santa Monica case in the furtherance of justice (Pen. Code, § 1385), after the deputy district attorney represented that his office had filed a superseding complaint in West Covina (LASC

represented by counsel. (See, e.g., 2CT 295.) On January 7, 2002, however, the trial court granted the motion of each defendant to defend himself without counsel. (3CT 664ff., 773-774; *Faretta v. California* (1975) 422 U.S. 806). On May 6, 2002, at the request of each defendant, the trial court once again appointed counsel to represent both men. (7CT 1689-1690; 2RT 7.)

During the time the defendants acted as their own counsel, they met on several occasions in the Los Angeles County Jail with the trial prosecutor. (3RT 728, 738.) The lead investigator was also present for one of the interviews. (11RT 2626.) The trial prosecutor surreptitiously recorded two of the interviews. (3RT 738.) During these interviews, appellant and Flores made certain admissions regarding uncharged offenses. (3RT 728.) In addition, the prosecution also sought and obtained authorization to wiretap and did wiretap the jailhouse telephones used by appellant and Flores during a three-month portion of the period the defendants represented themselves.[4] (4RT 1048-1052.) Collectively, these events led to further police investigations and resulted in the filing of additional charges against the defendants.

In addition, during the pretrial period they were housed in Men's Central Jail in Los Angeles, Flores and appellant were individually reported to be in possession of shanks on separate occasions and also to

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the West Covina pleading. (DPSuppIV, SuppCT 124-125; DPSuppV, SuppCT 28-30.)

[4] The trial court denied the defendants' joint motion to suppress the use of the wiretap intercepts at the guilt and penalty phases of the trial. (4RT 1114-1115.) Ultimately, however, the prosecution chose not to present any of the wiretap intercepts at trial. (14RT 3083.)

have acted together in attacking an inmate on another occasion. (8RT 1989; 9RT 2149.)

As a result of these events, appellant and Flores were initially charged by felony complaint[5] and then by information[6] with multiple counts of first degree murder with special circumstances and multiple counts of attempted willful, deliberate, and premeditated murder, attended by gang and weapon enhancements.

Later in 2002, appellant and Flores were charged by grand jury indictment filed on November 26, 2002 (1CT 155-162) and determined to be a true bill (1CT 164) with additional counts of first degree murder with special circumstances and additional counts of attempted willful, deliberate, and premeditated murder, all of which were attended by gang and weapon enhancements.

On December 3, 2002, the trial court ordered the information and indictment consolidated into an amended information. (7CT 1744-1746; 2RT 595.)

On January 22, 2003, the amended information[7] on which this case eventually went to trial in 2005 was filed, alleging the 47 counts and

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[5] See Felony Complaint (LASC KA050813) filed December 19, 2000 (1CT 209-232); Amended Felony Complaint filed February 1, 2001 (2CT 266-289); Second Amended Felony Complaint filed March 19, 2001 (2CT 314-338); Third Amended Felony Complaint filed December 13, 2001 (2CT 472-498); Fourth Amended Felony Complaint filed February 25, 2002 (4CT 883-912); Fifth Amended Felony Complaint filed March 13, 2002 (5CT 1110-1138).

[6] See Information filed April 2, 2002. (7CT 1642-1676.)

[7] This version of the pleading was titled simply "Amended Information." (7CT 1751.)

the special circumstance, weapons, gang, and strike enhancements summarized below. (7CT 1751-1792.)

The amended information charged appellant with the crimes of murder[8] (Pen. Code, § 187, subd. (a)); attempted willful, deliberate, and premeditated murder[9] (Pen. Code, §§ 664/187, subd. (a)), including premeditated murder attempts committed against peace officers[10] (Pen. Code, § 664, subd. (e)); kidnapping[11] (Pen. Code, § 207, subd. (a)); false imprisonment[12] (Pen. Code, § 210.5); robbery in the second degree[13] (Pen. Code, § 211); assault with a firearm[14] (Pen. Code, § 245, subd. (a)(2)); assault with a semiautomatic firearm[15] (Pen. Code, § 245, subd. (b)); shooting at an inhabited dwelling[16] (Pen. Code, § 246); arson of property[17] (Pen. Code, § 451, subd. (d)); felon in possession of a firearm[18] (Pen. Code, § 12021, subd. (a)(1)); and custodial possession of a shank[19] (Pen. Code, § 4502, subd. (a)).

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8 Counts 1, 4, 11, 42, 45. (7CT 1751-1792.)

9 Counts 5-7, 18, 19, 20-24, 38, 43, 46. (7CT 1751-1792.)

10 Counts 14, 18-24. (7CT 1751-1792.)

11 Count 25. (7CT 1751-1792.)

12 Counts 28-33, 48. (7CT 1751-1792.)

13 Count 12. (7CT 1751-1792.)

14 Count 27. (7CT 1751-1792.)

15 Count 26. (7CT 1751-1792.)

16 Count 8. (7CT 1751-1792.)

17 Count 17. (7CT 1751-1792.)

18 Counts 2, 9, 13, 34. (7CT 1751-1792.)

19 Counts 37, 39, 41. (7CT 1751-1792.)

The amended information alleged the murders were committed within the meaning of the following special circumstances: multiple murder[20] (Pen. Code, § 190.2, subd. (a)(3)); witness killing[21] (Pen. Code, § 190.2, subd. (a)(10)); lying in wait[22] (Pen. Code, § 190.2, subd. (a)(15)); felony robbery[23] (Pen. Code, § 190.2, subd. (a)(17)); torture[24] (Pen. Code, § 190.2, subd. (a)(18)); and intentional discharge of a firearm from a vehicle[25] (Pen. Code, § 190.2, subd. (a)(21)).

The amended information also alleged that most of the crimes were committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)); that appellant had been previously convicted of a felony within the meaning of the strikes law (Pen. Code, § 667, subds. (b)-(i)); that some of the crimes involved the infliction of great bodily injury (Pen. Code, § 12022.7); and that many of the crimes involved one or more weapon enhancements (Pen. Code, §§ 12022, subds. (a), (b); 12022.53, subds. (b), (c), (d), (e)). (7CT 1751-1792.)

On May 21, 2003, the prosecution notified the parties of its intention to seek the death penalty. (Pen. Code, § 190.3; 7CT 1817; 2RT 633.)

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20 Counts 4, 11, 42, 45. (7CT 1751-1792.)

21 Count 11. (7CT 1751-1792.)

22 Count 1. (7CT 1751-1792.)

23 Count 11. (7CT 1751-1792.)

24 Counts 1, 11. (7CT 1751-1792.)

25 Counts 4, 42, 45. (7CT 1751-1792.)

The case was called for jury trial on February 22, 2005. (11CT 2810.) Twelve jurors and six alternates were sworn to try the cause on March 1, 2005. (17CT 4425; 6RT 1551.)

At the close of the prosecution's case on March 9, 2005, the trial court determined the evidence was insufficient to sustain convictions on appeal of the following matters and entered judgments of acquittal (Pen. Code, § 1118.1) as to them: the witness killing and torture special circumstances alleged as to count 11; the gang benefit enhancements alleged as to counts 18 through 33; the kidnapping alleged in count 25; the great bodily injury enhancement alleged in count 26; the false imprisonment alleged in count 32; the custodial possession of a shank alleged in count 41. (12RT 2766-2770, 2779-2782.)

The trial court also ordered the amended information to be amended to conform to proof, as follows: by adding a new false imprisonment charge (count 48) in the place of the kidnapping count (count 25) the court had earlier dismissed (Pen. Code, § 1118.1) and by adding appellant as a named defendant to the murder counts alleged in counts 42 and 45 and the attempted willful, deliberate, and premeditated murder counts alleged in counts 43 and 46, and to the strikes law enhancement.[26] (17CT 4465; 12RT 2785.)

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[26] The amendment of counts 42, 43, 45, and 46 to include appellant as a named defendant was made over defense counsel's objection that the amendment violated due process and was untimely. The prosecutor represented that the omission of appellant's name was attributable to a "screener's error." (12RT 2785-2786.)

Appellant's affirmative defense consisted of a stipulation regarding evidence relevant to counts 1 and 2.[27] (13RT 2854.)

The jury received the case on March 10, 2005. (13RT 3002.) On March 21, 2005, the jury returned verdicts acquitting appellant of one count of murder (count 1) and one count of being a felon in possession of a semiautomatic handgun (count 2). (17CT 4541-4542; 14RT 3035.)

The jury convicted appellant of four counts of first degree murder (counts 4, 11, 42, 45) with related findings that the murder was committed for the benefit of a criminal street gang (counts 4, 11, 42, 45) and that appellant intentionally discharged a semiautomatic firearm in the commission of specified offenses causing great bodily injury or death (counts 4, 11). (17CT 4543, 4549, 4569, 4570; 14RT 3035-3036, 3042-3043, 3056-3058.) As to counts 42 and 45, the jury found the shooting from a motor vehicle special circumstance allegation to be true. The jury also found the multiple murder special circumstance allegation to be true. (17CT 4569, 4570, 4573; 14RT 3056-3058, 3060.)

The jury also convicted appellant of 11 counts of attempted willful, deliberate, premeditated murder (counts 5-7, 18-24, 46) with related findings in some counts that the victim was a peace officer (counts 18-24); in some counts that the crimes were committed for the benefit of a criminal street gang (counts 5-7, 46); and in certain counts that the crimes involved the intentional discharge of a firearm (counts 5-7, 18-24). (17CT 4544-4546, 4559; 14RT 3037-3040; 3045-3052.)

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[27] The jury acquitted appellant in counts 1 and 2 (see succeeding paragraph).

The jury also convicted appellant of five counts of false imprisonment (counts 28-31, 33) (17CT 4562-4566; 14RT 3053-3055); of three counts of being a felon in possession of a firearm (counts 9, 13, 34) (17CT 4548, 4550, 4567; 14RT 3041, 3043-3044, 3055); of arson of property (count 17) (17CT 4552; 14RT 2045); of two counts of assault with a semiautomatic firearm (counts 26, 27) (17CT 4560, 4561; 14RT 3053, 3059); and of custodial possession of a shank (count 37) (17CT 4568; 14RT 3056).

The jury convicted appellant of shooting at an inhabited dwelling (count 8) (17CT 4547; 14RT 3040-3041) and of robbery in the second degree (count 12) (17CT 4550; 14RT 3043-3044) with the further findings that both of these crimes were committed for the benefit of a criminal street gang and involved the personal intentional discharge of a firearm.

The jury further found that appellant had been previously convicted of robbery in the second degree on June 2, 1993, in Los Angeles Superior Court Case number KA017616. (17CT 4574; 14RT 3059-3060.)

The jury declared it was deadlocked on counts 38, 39, and 43 as to appellant and on count 40 as to Flores. The trial court declared a mistrial as to them. (17CT 4686, 4703; 14RT 3080-3082.)

Before the trial's penalty phase began, defense counsel informed the court that while he had prepared a presentation of evidence for the penalty phase, appellant was now requesting that no evidence be presented even though counsel had advised appellant that such a course of action would substantially increase the chance the jury would impose the death penalty. (12RT 2817.) Counsel for codefendant Flores stated that

Flores also wanted no evidence presented on his behalf. (12RT 2819-2821.) In the hearing that followed, the court spoke directly to both appellant and Flores, jointly and separately, and advised them of their rights. Both defendants spoke directly to the court concerning the reasons for their decision. (12RT 2823-2842.)

In a separate subsequent hearing on the subject, appellant and Flores further informed the court that they also did not want their respective counsel to cross-examine any of the victim-impact witnesses or present any argument at the penalty phase. (13RT 3016.) The court confirmed with each defendant that he did not wish his counsel to ask any questions or present any evidence during the penalty phase of the trial. (13RT 3020.) The court then ascertained that each of the two trial counsel for each defendant believed the defendant was sincere in his belief and stated position. The court accepted the statements of both defendants and their counsel. (13RT 3020-3024.)

The penalty phase of the trial was presented on March 22, 2005. (18CT 4724; 14RT 3094.) At appellant's request, no opening statement, affirmative defense, examination of witnesses, or argument was presented on his behalf. (18CT 4724-4725; 14RT 3105, 3194, 3218.) Also at appellant's request and following a hearing on the subject, neither defense counsel nor the trial court made any statement to the jury about the silence on the part of appellant's defense during the penalty phase. (14RT 3086-3092.) The jury received instructions and began its deliberations the same day. ((18CT 4725; 14RT 3218-3231.)

On March 23, 2005, the jury returned verdicts of death for both appellant and Flores. (18CT 4747, 4748, 4752; 14RT 3236-3238.)

On April 20, 2005, the trial court heard and denied appellant's new trial motion and that of Flores, in which appellant had joined. Appellant argued the court erred in allowing the amendment of the charging papers to allege appellant as a named defendant in counts 42, 45, and 46; in denying the defense motions to recuse the district attorney's office and the trial prosecutor, respectively; and in denying the defendants' severance motion. As applicable to appellant, Flores argued error in allowing the jury to hear portions of the pro per defendants' surreptitiously recorded statements to the trial prosecutor; in failing to dismiss the case on the grounds related to the illegality of the wiretap intercepts of the pro per defendants and the interference with the defendants' *Faretta* (*Faretta v. California* (1975) 422 U.S. 806) rights; and in allowing the defendant to control the presentation of the penalty phase defense. (18CT 4770-4772, 4795; 14RT 3246.)

The trial court then turned to the matter of the automatic motion to modify the verdict of death (Pen. Code, § 190.4, subd. (e)). Defense counsel informed the court that appellant did not wish the court to reduce the penalty or consider the alternative. (14RT 3246.)

The trial court made the following findings pursuant to Penal Code section 190.4, subdivision (e), in denying the motion to modify the death verdict:

Appellant was convicted of the first degree murders of George Flores (count 4), Luis Reyes (count 11), John Diaz (count 42), and Arturo Madrigal (count 45). The special circumstance allegations of drive-by shooting (Pen. Code, § 190.2, subd. (a)(21); counts 42 and 45) and of multiple murders (Pen. Code, § 190.2, subd. (a)(3)) were found true.

The evidence of appellant's participation in these murders was compelling and included tape-recorded joint admissions by appellant and Flores, accomplice eyewitness testimony, and ballistics evidence.

Appellant was also convicted of many other crimes involving use of force or violence, including four counts of attempted murder of civilians, seven counts of attempted murder of police officers, and shooting at an inhabited dwelling. The evidence also proved that appellant had a prior felony conviction for robbery. Evidence of appellant's participation in an additional uncharged attempted murder was introduced and proven at penalty stage.

Appellant was a committed member of a criminal street gang.

The murders, attempted murders, and other acts of violence committed by appellant were unprovoked and demonstrated an extreme indifference and callous disregard for human life.

Appellant and Flores appeared to treat their participation in the shootings and killings as sport.

The aggravating circumstances in appellant's criminal acts were overwhelming. Appellant deliberately and voluntarily chose to offer no evidence of mitigating circumstances at penalty phase.

In conclusion, the trial judge stated that based on this review and weighing of evidence, he had determined that the jury's findings and verdict that the aggravating circumstances outweighed the mitigating circumstances were consistent with the law and fully supported by the evidence. (18CT 4766; 14RT 3247-3249.)

On April 20, 2005, the court ordered that a judgment of death commitment order and death warrant setting forth appellant's sentence, as follows, be filed. (18CT 4775; 14RT 3254-3267.)

Indeterminate Terms

Counts 4, 11, 42, 45 – The trial court sentenced appellant to death (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(3), (21)) plus 10 years (Pen. Code, § 186.22, subd. (b)(1)). As to counts 4 and 11, the court imposed a consecutive term of 25 years to life (Pen. Code, § 12022.53, subd. (d)) and ordered the remaining weapon enhancement (Pen. Code, § 12022.53, subd. (c)) stayed.

Counts 5-7, 18-24, and 46 – The trial court sentenced appellant to a consecutive life term (Pen. Code, §§ 664/187, subd. (a)) with a 15-year minimum parole eligibility date doubled to 30 years (Pen. Code, § 186.22) for each count. As to counts 5, 18, 19, the court imposed a consecutive term of 25 years to life (Pen. Code, § 12022.53, subd. (d)) and ordered the remaining weapon enhancement (Pen. Code, § 12022.53, subd. (c)) stayed. As to counts 6, 7, 20-24, the court imposed a consecutive term of 20 years to life (Pen. Code, § 12022.53, subd. (c)).

Determinate Terms

Count 8 – The court selected this count as the principal determinate term. The court found aggravating circumstances in appellant's prior record of conviction and in evidence appellant is a danger to society. The court imposed the term of 7 years (Pen. Code, § 246) doubled to 14 years by appellant's prior strike (Pen. Code, § 667, subds. (b)-(i)) and a consecutive term of 20 years (Pen. Code, § 12022.53, subd. (c)) plus 10 years (Pen. Code, § 186.22, subd. (b)(1)).

Count 9 – The court stayed the sentence for felon in possession of firearm used in committing counts 4-8 (Pen. Code, §§ 654, 12021, subd. (a)).

Count 12 – The court stayed the sentence for robbery of the victim in count 11 (Pen. Code, §§ 211, 654.)

Count 13 – The court stayed the sentence for felon in possession of firearm used in committing count 11 (Pen. Code, §§ 654, 12021, subd. (a)).

Count 17 – The court found the arson of property of the victim in count 11 involved a separate intent and objective and therefore deserving of consecutive sentencing and imposed a term of 16 months, calculated as one-third of the midterm of two years (or eight months) doubled due to the prior strike. (Pen. Code, §§ 451, subd. (d)), 654.)

Counts 26, 27 – The court imposed the term of two years consecutive for each violation of assault with a semiautomatic firearm, calculated as one-third the midterm of six years doubled due to the prior strike. (Pen. Code, § 245, subd. (b)).

Counts 28-31, 33 – The court imposed the term of three years four months consecutive for each violation of false imprisonment, calculated as one-third of the midterm of five years doubled due to the prior strike. (Pen. Code, § 210.5.)

Count 34 – The court stayed the sentence for felon in possession of firearm used in committing counts 26-31, 33. (Pen. Code, §§ 654, 12021, subd. (a).)

Count 37 – The court imposed the term of two years consecutive for the custodial possession of a shank, calculated as one-third

the midterm of three years doubled due to the prior strike. (Pen. Code, §§ 654, 4502, subd. (a).)

Count 48 – The court stayed the sentence for the false imprisonment of the victim of the assault with firearm charge in count 26. (Pen. Code, § 654.)

The court imposed the consecutive term of five years for the serious felony prior conviction (Pen. Code, § 667, subd. (a)(1)) and a restitution fine of $200 (Pen. Code, § 1202.4). The court noted that all of the counts involved separate victims and/or separate intents and objectives and ordered all of the sentences to be served consecutively. (18CT 4775, 4842; 14RT 3254-3267.)

STATEMENT OF FACTS[28]

THE PROSECUTION'S GUILT PHASE EVIDENCE

A. The Diaz and Gonzales Crimes[29]

Brothers John Diaz and Paul Gonzales lived on Merced Street in an area of Baldwin Park claimed by gangs. Diaz was a member of a Monrovia gang and had "Monrovia" tattooed above his right knee. Gonzales was not a gang member. Sometime around midnight on April 11, 2000, Diaz and Gonzales stopped briefly at a Circle K store on their way home. (6RT 1613, 1636, 1646-1647.) They were seen there by Baldwin Park Police Detective Ernie Collaso, who was seated in his car in the store's parking lot. (6RT 1624-1626.)

The brothers had one bike between them. When they left the Circle K, Diaz rode on the handlebars while Gonzales pedaled. At the

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[28] The Statement of Facts includes descriptions of events that resulted in charges against appellant that ended in conviction, acquittal, or mistrial following the jury's declaration of deadlock, as well as of events or incidents pertaining to codefendant Flores alone. Accompanying footnotes describe the outcome of charged events that did not result in convictions.

[29] At the close of the prosecution's case, the trial court amended the charging document to name appellant as a defendant in counts 42 and 43. As amended, count 42 charged appellant and Flores with the murder of John Diaz attended by weapon and gang enhancements and with the special circumstance of shooting from a motor vehicle. Count 43, as amended, charged appellant and Flores with the attempted willful, deliberate, and premeditated murder of Paul Gonzales. (12RT 2785-2786.) The jury convicted appellant of the first degree murder of Diaz and found the gang enhancement and special circumstance to be true. (17CT 4569; 14RT 3056-3057.) The trial court declared a mistrial on the charge and enhancements related to Paul Gonzales after the jury declared a deadlock as to count 43. (17CT 4574; 14RT 3059-3060, 3080-3082.)

Merced Street intersection, Gonzales and Diaz crossed in front of a black sport utility vehicle (SUV) and continued down Merced Street. The black SUV drove past them, made a U-turn, and drove past them once more. Gonzales continued to pedal toward home. (6RT 1637-1639.)

The SUV made another U-turn. When it returned, Gonzales saw that it was occupied by a passenger in addition to the driver. The passenger yelled, "Where you from?" Gunfire erupted from the SUV. Gonzales jumped off the bike and took cover behind a car. (6RT 1640-1643.)

When the SUV sped off, Diaz told Gonzales, "Call the ambulance, fool," before falling to the ground. Gonzales placed a sweatshirt under Diaz's head and ran for help. (6RT 1646.)

At the sound of gunshots, Officer Collaso, who was still in his police car in the Circle K parking lot, drove in the direction of Merced Street. Along the way, he received a radio call about a gunshot victim on Merced Street. When Collaso arrived, Diaz was lying face down on the lawn, but still breathing. Collaso called for paramedics. Diaz was pronounced dead at the hospital. (6RT 1628-1630.)

Right after the shooting, Gonzales told police the shooter was 18 to 22 years old, light-complected, with a fade haircut. (6RT 1662, 1669.) Two years after that, in June 2002, Gonzales identified Flores as the shooter by circling his picture in a six-pack photo lineup. (6RT 1667, 1673, 1680-1681.) Five years later, at trial, Gonzales looked at Flores, who was then 34 years old, and identified him as the passenger and shooter. Gonzales made no identification of appellant. (6RT 1649-1650, 1675, 1684.)

An autopsy revealed that Diaz, 23 years old, had been shot three times. Two bullets penetrated the abdominal cavity, perforating the liver, vena cava, aorta, and stomach, and were deemed fatal; the third bullet penetrated the urinary bladder and was considered life-threatening. (6RT 1601-1603, 1613.)

The forensic pathologist recovered one projectile from the chest area, which was turned over to police. (6RT 1603, 7RT 1701.) At the scene of the shooting, police recovered five expended 9 millimeter shell casings. All five casings were head-stamped "BMC." (7RT 1696.)

Firearms analysis of the five "BMC" expended shell casings showed them to have been fired from a single 9 millimeter firearm. (12RT 2717.) Firearms analysis of the coroner's bullet indicated it was a 9 millimeter Luger bullet with eight lands and grooves that could possibly match a pistol of Lorcin manufacture. (12RT 2717-2718.)

Baldwin Park Detective David Reynoso testified as the prosecution's gang expert. Reynoso, who had had field contacts with both appellant and Flores, described both men as self-admitted members of the Eastside Bolen Parque (ESBP) gang, a territorial Hispanic gang with roots in Baldwin Park. (11RT 2542-2546, 2549-2550, 2557-2558.) According to Reynoso, ESBP committed crimes ranging from vandalism to murder. Many of its members committed violent crimes for the benefit of, at the direction of, and to promote the reputation of ESBP.[30] (11RT 2547-2548.)

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[30] The trial court admonished the jury that evidence that ESBP committed a variety of serious crimes was limited in use to proving the gang enhancement and not to be used to prove the guilt or innocence of the defendants. (11RT 2546.)

Reynoso said Flores' allegiance to ESBP was memorialized in his tattoos: "Laro Este Bolen Park" (Eastside Bolen Park) and "ESBP." (11RT 2550-2552, 2588.) Appellant also had body tattoos: "Bolen," "ESBP," "ES" and "BP," and on his forehead above his eyebrows: "Eastside Bolen Parque." (11RT 2557-2558, 2566.)

Reynoso testified to his opinion that shots were fired at Diaz and Gonzales for the benefit of the ESBP gang within the meaning of Penal Code section 186.22. Diaz was a member of a rival Monrovia Hispanic gang with tattoos on his body and was dealt with severely for that reason. Reynoso listened to the recorded statements[31] the defendants made to the trial prosecutor Deputy District Attorney Darren Levine and lead investigating officer Thomas Kerfoot and came to the opinion that the defendants perceived Diaz and Gonzales to be rival gang members in territory claimed by ESBP. Reynoso concluded the shooting was committed to promote the gang's reputation and thus was committed for the benefit of the gang. (11RT 2559-2563.)

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[31] The prosecution played redacted versions of the recorded statements in its case-in-chief. Summaries of the interview statements are set forth below in Subsection I.

B. The Madrigal and Gutierrez Crimes[32]

On the night of May 25, 2000, Arturo Madrigal and Fernando Gutierrez were seated in Madrigal's Chevrolet Blazer in Baldwin Park. Madrigal was attempting to park the Blazer near the corner of Rexwood and Maine when a car stopped alongside the Blazer's driver's side door. (8RT 2028-2029.)

Someone from the car asked, "Where you from?" Gutierrez answered, "We're not from nowhere." (8RT 2030-2031.) Gutierrez saw the flash from a gun and dove under the dashboard. When the shooting stopped, Gutierrez could hear blood dripping from Madrigal. Gutierrez got out of the car and ran for help. (8RT 2032-2033.)

Gutierrez told police that night there were four male Hispanics between the ages of 20 to 25 in the car, all with shaved heads. He said the passenger did the shooting and that he was unable to identify anyone. (8RT 2035-2036.)

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[32] As occurred with the Diaz and Gonzales counts, *supra*, at the close of the prosecution's case, the trial court ordered the amended information further amended to include appellant as a named defendant in counts 45 and 46. As amended, appellant was charged in count 45 with the murder of Arturo Madrigal with weapon and gang enhancements and the special circumstance allegation of shooting from a motor vehicle. Count 46, as amended, charged appellant with the attempted willful, deliberate, and premeditated murder of Fernando Gutierrez with weapon and gang enhancements. (12RT 2785-2786.) The jury convicted appellant of the first degree murder of Madrigal and found the gang benefit enhancement and the shooting from motor vehicle special circumstance to be true. (17CT 4570; 14RT 3057-3058.) The jury also convicted appellant of the attempted premeditated murder of Gutierrez and found the gang benefit enhancement to be true. (17CT 4571; 14RT 3059.)

Gutierrez testified that neither he nor Madrigal were members of a gang. (8RT 2034.)

The forensic pathologist who performed the autopsy recovered a bullet from Madrigal's skull and determined that he was killed by a gunshot wound to the head that severed the brain stem. (7RT 1739-1740.) Madrigal also sustained a nonfatal grazing wound to one knee. (7RT 1743.)

Police recovered four expended nine millimeter Luger cartridge casings and two expended bullets from the area near the Blazer and one expended bullet from the inside the driver's door. (7RT 1714-1717, 1728.) Trajectory rods inserted into three bullet holes found on the driver's side of the Blazer showed that the shots came from outside the Blazer. (7RT 1726.)

Firearms analysis showed the four expended nine millimeter cartridge cases were fired from a single firearm. The coroner's bullet was one of four coroner's bullets in this case fired from a single firearm. These coroners' bullets showed six lands and grooves with a right hand twist and would be consistent with having been fired from a nine millimeter Smith & Wesson semiautomatic pistol. (12RT 2721.)

Prosecution gang expert David Reynoso testified that the shootings of Madrigal and Gutierrez were committed for the benefit of the gang. Madrigal's head was shaved, creating the perception that he was a rival gang member present in ESBP territory in an act of disrespect. The shooting contributed to the gang's notoriety and so was committed for the benefit of the gang. (11RT 2563-2565.)

C. The Paul Ponce Crimes[33]

Around 4:45 a.m. on the morning of June 7, 2000, Katherine Shafer and Paul Ponce were in the garage of Ponce's Victorville home when a knock sounded on the front door. The garage monitor for the home's closed circuit security system displayed an unknown car in front of the house. Ponce left the garage to answer the front door. (7RT 1805-1808.)

About ten seconds later, Shafer heard a burst of gunfire, the shots coming one after another. Shafer hid. She heard no voices or footsteps and saw no one. She did not look again at the closed circuit monitor. After the silence had lasted for a few minutes, Shafer entered the house where she found Ponce's body lying near the living room coffee table. He was not breathing. Shafer called the police. (7RT 1809-1816, 1830.)

The parties stipulated as part of appellant's affirmative defense to the prosecution's guilt phase case that Katherine Shafer was interviewed by San Bernardino sheriff's deputy William Holland on June 7, 2000. During this interview, Shafer told Holland that she heard a vehicle drive up and then saw the vehicle pull into the home's driveway on the garage video monitor, which was linked to a camera at the front of the residence. A male subject then came to the front door and began to ring the

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[33] Appellant was charged with the murder of Paul Ponce (count 1) and with being a felon in possession of a semiautomatic firearm (count 2). Gang, weapon, and special circumstance enhancements (lying in wait; torture; and multiple murder) attended the murder count. The jury returned verdicts of not guilty in both counts 1 and 2. (17CT 4541, 4542; 14RT 3035.)

doorbell over and over. Paul Ponce then left the garage and went to the front door. Almost immediately after the front door opened, Shafer heard several very loud and distinct gunshots coming from that area. (13RT 2854.) At trial, Shafer testified on cross-examination that she did not tell deputy Holland that she saw on the video monitor a lone male subject come to the front door and ring the doorbell over and over. (7RT 1821.)

During their investigation of Ponce's home, San Bernardino sheriff's detectives recovered expended nine millimeter and .22 caliber shell casings. The expended .22 caliber casings appeared to be from a solid projectile firing, but the detectives also found .22 caliber birdshot projectiles stuck in the living room walls. (7RT 1838-1843.) A search of the home yielded less than one gram of methamphetamine and one-eighth ounce of a substance resembling either methamphetamine or cocaine, the latter quantity being sufficient to suggest that drugs were being sold from the house. Officers also found a loaded .44 caliber magnum revolver in the drawer of the coffee table and a .22 caliber revolver in a planter near the front door. (7RT 1854-1855.)

Investigators subsequently learned that Ponce was a member of the Eastside Bolen gang whose moniker was "Vago."[34] (7RT 1851.)

Forensic pathologist Frank Sheridan performed the autopsy upon Ponce's body and assigned multiple gunshot wounds as the cause of death. Dr. Sheridan estimated that Ponce died within two or three minutes of being shot. (7RT 1793-1795.)

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[34] The word "Bolen" was tattooed on Ponce's back. (7RT 1800.)

Dr. Sheridan identified nine entry wounds, four of which were fatal. (7RT 1786-1789.) A deposit of soot around one entry wound near the right ear indicated that the gun was fired from a distance of not more than one foot. (7RT 1765-1767.)

Dr. Sheridan recovered projectiles showing that Ponce had been shot with three different types of ammunition – nine millimeter, .22 caliber, and birdshot pellets, with the primary damage inflicted by the nine millimeter slugs. (7RT 1796, 1801.)

D. The Ledford Drive Crimes[35]

In June 2000, Robert Perez lived in a house on Ledford Drive in a Baldwin Park neighborhood ruled by the ESBP gang. Perez was always vigilant while outdoors because one of his relatives had been murdered there. (8RT 1895, 1898.)

Around 10:00 on the morning of June 19, Perez and his friends George Flores, Art Martinez, and Joe Mayorquin were in the front yard of the Ledford Drive residence. Earlier in the morning, they had fired guns at the shooting range, but now the guns were in a bag in the back

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[35] Appellant was charged with the murder of George Flores (count 4), with the attempted willful, deliberate, premeditated murders of Joe Mayorquin, Robert Perez, Jr., and Art Martinez (counts 5-7, respectively), with shooting at an inhabited dwelling house (count 8), and with being a felon in possession of a firearm (count 9). Gang and weapon enhancements attended counts 4 through 8. The jury convicted appellant of the charges, found the murder to be of the first degree, the attempted murders to be willful, deliberate, and premeditated, and the weapon and gang enhancements to be true. (17CT 4543-4548; 14RT 3035-3041.)

yard.[36] None of the four men was armed. (8RT 1897.) Perez was not a gang member; two of his friends were inactive members of the 22nd Street gang. (8RT 1916-1917.)

Perez took note of a Chevrolet Monte Carlo driving past because the Monte Carlo's occupants were staring at them. A minute later, the Monte Carlo returned, this time followed by a tan-colored Toyota. The driver and passenger in the Monte Carlo were both male. The Toyota was driven by a female; the front passenger was male. Perez called out to his friends to move to the back yard. Perez and Martinez walked up the driveway, but George Flores and Mayorquin wanted to see what was going on and stayed on the sidewalk. (8RT 1898-1902.)

The Monte Carlo stopped. At trial, Perez identified appellant as the man who stepped out from the Monte Carlo with a black pistol in his hand and who walked up to George Flores. Perez heard George Flores say that no one was disrespecting the neighborhood or them. (8RT 1902-1904.) Appellant asked, "Who's your homeboy?" (8RT 1920.)

At that point, Martinez, who had been squatting in front of a Cadillac parked in the driveway, moved. The movement caught appellant's attention and appellant fired. Perez jumped for cover in front of a Camaro that was also parked in the driveway. (8RT 1904.)

At trial, Perez identified defendant Joseph Flores as the male seated in the passenger seat of the Toyota. Flores had a tattoo on his neck

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[36] Although he was interviewed by police on several occasions, Perez never told the police about the guns in the bag until the guns were found. (8RT 1928.) At trial, he testified that the guns could not have been fired because the group had used up their ammunition at the shooting range earlier in the morning. (8RT 1937.)

and was looking at them and smirking. Perez heard him say, "Well, well, what do we have here?" (8RT 1905, 1909.) Perez heard the sound of a rifle slider from Flores' direction. Flores did not get out of the car. There was nonstop firing for 10 to 15 seconds. The gunshots from Flores' direction sounded louder than the first gunshot Perez heard. When the firing stopped, there was a lot of smoke in the area of the Toyota. Gunshots from the Toyota continued as the car drove away. Perez never saw the face of the Toyota's female driver and did not think she fired a gun. (8RT 1906-1910.)

Perez got up and checked himself. He had not been injured. He went down to the sidewalk. George Flores lay on his stomach, unmoving, with a wound in his neck. Mayorquin was shot in the leg and asked whether Flores was dead and whether he himself was going to die. (8RT 1912-1914.) Later, Perez found bullets in his house and garage. His father, his sister, and two young nieces were in the house. (8RT 1916.)

An autopsy showed that George Flores died as the result of a fatal gunshot wound that entered his back and perforated his lung, carotid artery, and jugular vein. A second, non-fatal, gunshot wound also entered his back and emerged at his left shoulder. (8RT 1864-1865.) Both wounds left large gaping exit holes indicating the bullets were fired from a high-powered weapon. (8RT 1873.)

The parties stipulated that Mayorquin was surgically treated for a gunshot wound to the upper right arm and the upper left and right thighs. A projectile was recovered from the thigh area and turned over to Baldwin Park police. (10RT 2300-2301.)

Police found two distinct groupings of ballistics evidence at the scene – one grouping of expended .32 caliber rifle casings and a separate grouping of nine millimeter casings – leading to the conclusion two weapons and two shooters, both basically stationary, were involved in the shooting. (8RT 1888-1890.)

Both the Cadillac and Camaro in the driveway were hit by gunshots. (89RT 1957.) Police recovered 14 expended nine millimeter cartridge casings and 16 expended 7.62 x 39 millimeter cartridge casings generally associated with AK-47 assault rifles, and four projectiles from the Ledford Drive shooting scene. (8RT 1961-1964, 1981.)

Around 11:30 p.m. on June 18, two days before the Ledford Drive shooting, Flores and appellant asked Katrina Barber[37] for a ride. At the time, Barber was driving a Toyota Corolla she had stolen. The trio drove around Baldwin Park and Alhambra for a while until the Corolla broke down. Barber then stole a Toyota Cressida and drove Flores and appellant to the home of Flores's mother in Hemet. It was 3:00 when they arrived. (8RT 2043-2044.)

The next morning, Flores and appellant carried two long black bags to the car. One bag was filled with clothes; the other with approximately ten guns. (8RT 2045-2048.) Barber drove Flores and appellant to the La Puente home of Luis Reyes. They showered, watched

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[37] The trial court instructed the jury that Barber was an accomplice as a matter of law in counts 4-12 and her testimony subject to the rule requiring corroboration. (17CT 4517.) At the time of trial, Barber had entered a plea to shooting at an inhabited dwelling and had been sentenced to state prison for five years. (8RT 2044; 9RT 2119.)

television, and used crystal methamphetamine, which Reyes provided. (8RT 2049.)

When they left, Flores, who did not drive, rode with Barber in the Toyota Cressida. Appellant rode with Reyes in Reyes's Chevrolet Monte Carlo. The cars drove in tandem to a hotel parking lot. Reyes stopped his car next to a car that appeared to have been waiting for him. Barber saw something passed between Reyes and the other driver. Flores told her the car looked like an FBI car. (8RT 2050-2052.)

The Monte Carlo and the Cressida returned to the freeway and the cars then drove to Baldwin Park. Barber became separated from the Monte Carlo when the cars got off the freeway. She began to drive toward her mother's house. On Ledford Drive, she and Flores passed by a group of guys sitting on the wall. Flores asked her if she knew them and when she said no, he told her to "Flip a bitch," meaning to make a U-turn. She did and then saw that the Monte Carlo was once more with them. (8RT 2053-2055.)

Barber stopped at the house where the guys were on the wall. The Monte Carlo also stopped. Flores said, "Well, well, well, what do we have here?" (8RT 2055-2057.)

Amezcua got out of the Monte Carlo with a pistol and started shooting at the people in front of the house. Flores also fired a gun he later told her was an AK-47. The gunfire lasted for a long time. (8RT 2058-2059.) Flores stopped shooting and handed Barber a .22. He told her it was hers. Barber fired three or four times in the direction of the house, but not at the people. Her gun was a semiautomatic. Flores continued shooting as she drove away. Barber saw someone who was attempting to get to the

front door of the house get shot and fall to the porch floor. (8RT 2062-2063.)

After the shooting, Barber told Flores she wanted to go to her mother's home. He told her no and that Reyes would drop her off later. The Monte Carlo and the Toyota got back onto the eastbound freeway toward San Bernardino. At Ontario, the Toyota began to shake. Barber took the Vineyard exit, followed by the Monte Carlo, and turned into the driveway of a business. (8RT 2063-2065.)

A latent print lifted from the rearview mirror of the Toyota Cressida used in the Ledford Drive shooting was matched to appellant's left thumb. (8RT 1944-1949.)

Fourteen cartridge casings recovered from the area near the driveway of the Ledford Drive scene were later matched to a nine millimeter Ruger linked to appellant at the Santa Monica Pier shooting, which appellant describes below. (12RT 2722.)

Prosecution gang expert David Reynoso testified to his opinion that the Ledford Drive shooting was committed for the benefit of the gang because it was disrespectful for a member of another gang to live openly in ESBP territory. (11RT 2569-2571.)

E. The Luis Reyes Crimes[38]

Katrina Barber[39] testified that when the Monte Carlo and the Cressida reached Ontario following the Ledford Drive shooting on June 19, 2000, she exited the freeway and drove the ailing Toyota Cressida down the driveway of an Ontario business. Barber stopped the Cressida. The Monte Carlo also stopped. As she was gathering her things to move them to the Monte Carlo, Barber heard ten shots from the Monte Carlo. She looked over and saw appellant shooting Reyes. (8RT 2068.)

Flores asked appellant, "What are you doing that here for?" Flores and appellant pulled Reyes out from the driver's seat. Barber could hear Reyes gagging and choking. He was bleeding a lot. (8RT 2069.)

Barber, Flores, and appellant got into the Monte Carlo. Flores noticed that Reyes' right leg was still caught in the car and told Barber to just run him over. (8RT 2072.)

Barber got back onto the freeway and drove to Los Angeles. They stopped first at appellant's cousin's workplace and then went to the cousin's home in Pasadena. They took showers; Flores ironed. They ate food from Carl's Junior. (8RT 2073.)

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[38] Appellant was charged with the murder (count 11), robbery (count 12), and arson of the property (count 17) of Luis Reyes, and of being a felon in possession of a firearm in the commission of these crimes (count 13). Counts 11 and 12 were attended by gang and weapon enhancements. The jury convicted appellant of the charged crimes, determined the murder to be of the first degree and the robbery of the second degree and found the gang and weapon enhancements to be true. (17CT 4549-4552; 14RT 3042-3045.)

[39] Katrina Barber was prosecuted in San Bernardino as an accessory to the murder of Luis Reyes and was sentenced to three years in state prison. (9RT 2141.)

When they left, Barber, Flores, and appellant drove to the Hemet home of Flores' mother. The black bag with the guns was with them. Flores took the guns into his mother's home. Barber told Flores she wanted to go home, but he said she could not leave. They stayed there for three or four days. (8RT 2075-2076.)

Andrew Quiroz came across Reyes's body on the roadway on Guasti Road and stopped to give help. When he approached Reyes, he saw three circular bloodstains on Reyes's shirt. Reyes made gurgling sounds and reacted to Quiroz's voice. (9RT 2160-2164.)

An autopsy revealed that Reyes sustained 19 gunshot wounds to the body, some of which were caused when the same bullet entered, exited, and entered the body once more. (11RT 2639-2640.) Some of the wounds were fatal; some potentially fatal; some were defensive. (11RT 2642-2661.) Soot or stippling on the body indicated the distance from the gun to the body was roughly two feet or less. (11RT 2673.)

Police ran the license plate number of the abandoned Cressida and learned the car had been stolen in Alhambra. They recovered two .22 caliber shell casings and three 7.62 x 39 shell casings from the Cressida's interior. (9RT 2182-2184.)

Police also found a car payment receipt on Reyes and learned of the black Monte Carlo by checking with the Department of Motor Vehicles. (9RT 2179.) Ontario police issued a Department of Justice stop on the Monte Carlo, indicating the car was involved in a murder investigation and that its occupants were armed and dangerous. (9RT 2188.)

At the Guasti Road crime scene, police recovered a projectile from under Reyes's body and later, at the autopsy, were given a medium caliber copper-jacketed projectile and expended bullet from Reyes's chest. (9RT 2177, 2185.) Firearms analysis indicated that the bullets were consistent with having been fired from a nine millimeter Ruger recovered in the Santa Monica Pier arcade and linked to appellant, as described below. (12RT 2756, 2759.)

Police also located expended nine millimeter shell casings in the weeds on the roadside. (9RT 2175.)

Carina Renteria[40] was Flores's girlfriend in June 2000. On the night of June 24, 2000, Renteria met with Flores and appellant at her sister's house. She was driving her purple Honda Civic. Flores got into her car with a big black duffle bag. Appellant was driving a Monte Carlo. (9RT 2193-2195.)

Both cars, traveling in tandem, stopped at a 7-Eleven for drinks. On leaving, appellant drove out of the parking lot first. He was followed by a sheriff's deputy who had been parked in the store lot in his marked police unit. Renteria and Flores followed. The three cars got onto the Interstate 10 freeway. (9RT 2196-2199.)

Appellant began to increase his speed; the sheriff's deputy followed directly behind. Suddenly, as the cars approached the Sierra Highway exit, appellant cut in front of a diesel truck and exited the freeway. The sheriff's deputy did not. (9RT 2204-2206.)

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[40] Renteria entered pleas to arson and accessory. (9RT 2222-2223.) The trial court instructed the jury that Renteria was an accomplice as a matter of law in counts 14-17 and her testimony subject to the rule requiring corroboration. (17CT 4517.)

Flores told Renteria to accelerate and catch up with the deputy. When she did, Flores rolled down his window and levered the top half of his body out of the car. Flores began shooting at the deputy as Renteria drove the Honda past the driver's side of the police unit.[41]

Renteria got off the freeway at Citrus and drove to the home of Flores's mother in Hemet. A few minutes after they arrived, appellant pulled up in the Monte Carlo. (9RT 2210.)

Later, in a discussion with Flores's mother, appellant said the car was "too hot." The decision was made to burn the car. (RT 2212-2213.)

Flores had taken Renteria's car keys from her so she wouldn't leave. He now returned them so Renteria and Flores's mother could go to the gas station to fill the red plastic gas can Renteria kept in her car. When they returned to the house with the gas, Flores and appellant put the gas can into the Monte Carlo. Then, both cars traveled in tandem to an area where there was just one house on the corner. Flores and appellant were in the

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[41] San Bernardino Sheriff's deputy Andrew Putney testified that he followed a dark-colored car that left the 7-Eleven at a high rate of speed until the car made an abrupt hard right in front of him and took the Sierra Highway exit. (9RT 2227-2231.) Putney was talking with dispatch when a gunshot hit his driver's side front tire. He looked and saw a male Hispanic sitting in the door frame of a dark-colored compact car and firing rounds at him. Putney heard about 15 gunshots amid the sounds of bullets hitting his car before his car began to decelerate and the shooter's car moved on. (9RT 2231-2233.) Six bullet impact areas were found on the Tahoe that Putney was driving. (9RT 2250.) As the result of these events, Flores was charged with and convicted of the crimes of attempted willful, deliberate, premeditated murder of a peace officer; of assault upon a peace officer with a semiautomatic firearm; and of being a felon in possession of a firearm (counts 14-16, respectively). (7CT 1766-1767; 17CT 4585-4588.)

Monte Carlo. Flores' mother rode with Renteria. Renteria parked and waited until Flores and appellant got into her car. Then she drove back to Flores's mother's home. The next morning Renteria left and returned to her sister's home. (9RT 2214-2218.)

On June 25, 2000, at 2:58 a.m., firefighters responded to a vehicle fire on Seventh Street in San Jacinto, Riverside County. The fire was concentrated in the Monte Carlo's passenger compartment and engine. No one was around and the police were called because the car was thought to be possibly stolen. (10RT 2303-2306.) San Jacinto police ran the Monte Carlo's license plate number and contacted Ontario Police. (10RT 2307-2310.) Frank Huddleston, the arson investigator for the Ontario Fire Department, concluded the fire began in the Monte Carlo's interior and excavated there. He found a hard piece of red plastic he recognized as a gas can and noticed a strong odor of gas. He concluded the fire was intentionally set. (10RT 2312-2319.) During the investigation that followed, a forensic technician found several shells, bullets, and cartridge casings in the Monte Carlo. (10RT 2320.)

Prosecution gang expert David Reynoso testified that Luis Reyes was an ESBP gang member. At the time Reyes was killed, police were aware that Reyes was considered to be a "rat" because he had cooperated with the police. Reyes came forward to police officers who regarded him as a murder suspect and led them to the house of another gang member where Reyes asked people to give him an alibi. Reynoso believed that Reyes was killed because his cooperation with the police was disrespectful to the gang and his killing promoted the reputation of the gang. (11RT 2572, 2607.)

Renteria later described the events of June 24 and 25 to Andre Acevedo, her K-Mart coworker. She was later contacted by Fontana sheriff's deputies. (9RT 2219.)

On July 3, 2000, Renteria gave Flores's pager number to police investigators from San Bernardino County. The investigators used the number to page Flores. (9RT 2219.)

F. The Santa Monica Pier Crimes[42]

Around midnight on July 3, 2000, Santa Monica Pier was crowded with people. Santa Monica Police Officer Robert Martinez was on the pier when dispatch advised him that a triple homicide suspect who had also shot at police officers had just made a phone call from one of the pier's public telephones. Martinez went to the location of the pay phones and

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[42] Appellant was charged and convicted in counts 18-24 with the attempted willful, deliberate, and premeditated murders of police officers Christina Coria, James Hirt, Steven Wong, Michael Von Achen, Michael Braaten, Robert Martinez, and Renaldi Thruston. The jury returned true findings to attendant weapon enhancements. (17CT 4553-4559; 14RT 3045-3052.) Appellant was also charged and convicted in counts 28-31, 33, and 48 of the false imprisonment of hostages Bonnie Stone, Mike Lopez, Lorna Cass, Paul Hoffman, Sabino Perez, and Cathy Yang, respectively. (17CT 4562-4566; 14RT 3053-3055.) Appellant was charged and convicted in courts 26 and 27 of the assault with a firearm upon Cathy Yang and Jing Huali. The jury additionally found that appellant inflicted great bodily harm upon Jing Huali. (17CT 4561; 14RT 3053, 3059.) The jury convicted appellant in count 34 of being a felon in the possession of a semiautomatic firearm in the commission of the Santa Monica Pier offenses. (17CT 4567; 14RT 3055.) The trial court dismissed allegations that appellant kidnapped Cathy Yang (Count 25); that appellant falsely imprisoned hostage Jose Lopez Melchor (Count 32); and gang benefit allegations as to these counts (Pen. Code, § 1118.1; 12RT 2766, 2781.)

confirmed the particular pay phone's number with dispatch to verify he was at the right location. (10RT 2366-2367.)

Within minutes, additional officers arrived. Together, the officers began walking toward the end of the pier. Martinez spotted Flores and appellant near the east door of the arcade. Flores matched the description of a small Hispanic male of thin build. Flores continued walking toward the officers, but appellant turned and entered the arcade. (10RT 2371-2372.)

One of the officers began talking to Flores. Martinez circled behind Flores and saw an identifying tattoo on his neck. Martinez put his hands on Flores to pat him down for weapons. Flores turned as if to get away. Martinez wrapped his arms around Flores and both men went to the pier deck. Flores resisted, but after Officer Michael Von Achen had his police dog bite Flores's leg, Flores was subdued, cuffed, and searched. Police removed a 9 millimeter semiautomatic AP9 handgun with a 30-round capacity from the small of Flores's back.[43] (10RT 2373-2376, 2483; 12RT 2714.)

Once Flores was taken into custody, Martinez notified the other officers that Flores had been in the company of a second man, who

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[43] Flores was taken to a hospital for treatment of the dog bite injuries to his leg. In the treatment room, Flores' hands were cuffed to the bedrails on either side. Officer Michael Cabrera saw Flores moving around. Flores stuck his hand into the pocket of his shorts. Cabrera removed Flores' hand and recovered a fully loaded, small caliber, semiautomatic pistol with a live round chambered (count 35). (11RT 2530-2535.) Firearms analysis of the .25 caliber Colt semiautomatic recovered from Flores at the hospital showed the gun had a capacity of six rounds in the magazine and was operable. (12RT 2715.) Asked to identify Flores at trial, Cabrera pointed to appellant. (1RT 2531-2532.)

had walked into the arcade. The officers moved toward the arcade as arcade workers began rolling down the northeast arcade doors in preparation for closing. That left the southern arcade doors as the only point of exit. (10RT 2377.)

Martinez positioned himself to see those exiting the southern arcade doors. After 30 to 40 people left, Martinez saw appellant wearing the same blue jacket he had on earlier. Martinez yelled out that the officers should watch the "bald guy." Appellant's hands suddenly came up and he grabbed a woman later identified as Cathy Yang around the neck and held her in front of him. Appellant had a gun in his hand, which he turned so that it was parallel to the ground. Appellant's gun began tracking Martinez's movement. Martinez heard gunshots. (10RT 2377-2380, 2341.)

Martinez heard Officer Christina Coria yell, "I've been hit," and turned to see her falling down to the pier deck. Martinez picked her up and carried her around the building out of the line of fire. He heard additional gunshots but stayed with Coria until she was transported to the hospital. (10RT 2381-2384.)

Police Sergeant Michael Braaten was standing near Martinez when he saw appellant grab Cathy Yang and hold her in front of him as a shield. (10RT 2338-2341.) Simultaneously, appellant pointed a gun at Braaten. Braaten pivoted and moved behind a pillar. The shooting stopped. Braaten peered around the pillar, saw appellant's handgun, and heard gunshots once more. (10RT 2341-2344.)

Officer James Hirt heard someone yell, "He has a gun," and then saw Coria cradle her left arm and fall to the ground. Hirt moved

behind a trash can and felt a jolt through his leg. He looked down and realized he was bleeding. (10RT 2411-2418.) Hirt looked up and saw appellant standing with an arm around a woman's neck. Appellant pointed a handgun at him and shot. (10RT 2419-2422, 2426.) Hirt sustained a through-and-through shot to his left knee that nicked an artery. (10RT 2423l)

Officer Michael Von Achen was behind a pillar when he saw appellant shooting at officers. Bullet impacts hit the front of the pillar. (10RT 2489.)

Officer Steven Wong heard 10 to 15 gunshots and saw bullet debris bounding off the wall he was behind. (10RT 2500.) Wong ran in the direction of Sergeant Braaten, heard more gunshots, and felt something hit his right hip. Wong looked toward the arcade door and saw a large Hispanic male holding a woman in front of him as a shield. (10RT 2502-2503.)

Officer Renaldi Thruston was standing with Officer Coria before she was shot. Thruston heard gunshots and took cover near the side of the building. When asked at trial to identify the shooter, Thruston identified Flores as the male he saw firing five or six shots at him. He was not hit. (11RT 2524-2528.)

The bullet that struck Coria's arm broke her humerus and radius. At the time of trial, she had had four surgeries and had suffered some permanent loss of movement. (10RT 2472-2475.) She did not see who shot her. (10RT 2478.)

Jing Huali was leaving the arcade when she heard gunshots and felt something in her leg. She saw appellant holding someone with his

left hand and pointing a weapon at her with his right hand. She was treated at the hospital for an injury to her upper left leg. (11RT 2519-2521.)

Lorna Cass and Paul Hoffman were in the arcade with their children when they heard the sound of gunshots and took cover. Cass saw a person holding an Asian woman hostage. The person appeared scared and panicky himself. He asked them to move the arcade machines closer together to form a barricade and asked all of the people to come together so he could see everyone. He repeatedly told Cass that he was not going to hurt her or her children. Neither she nor Paul Hoffman was allowed to leave. (10RT 2428-2431.)

Bonnie Stone and Michael Lopez were also in the arcade when the shooting occurred. Appellant held an Asian woman hostage. He had the men move the vending machines to form a barricade and told people to sit inside the barricaded area. Appellant handed Lopez two magazines and told him to load them with bullets. Appellant never said she and Lopez could not leave, but she assumed they could not because appellant was armed. (10RT 2432-2436, 2438-2442.)

After a while, appellant told the group, "I don't feel right holding you guys here. You guys can leave if you want." Appellant never expressly told them not to leave; they just didn't feel they should. (10RT 2442-2443.) Appellant released a person who was hyperventilating. (10RT 2453.) Lopez did not feel in much danger from appellant. The hostage situation lasted about five hours. (10RT 2446, 3453.)

Sabino Cordova was at work at the arcade counter when he heard gunshots. He looked toward the sound of gunfire and saw a man with his arm around a woman's neck and a gun in his hand. When asked at

trial to identify the man, Cordova pointed to Flores. The man pointed a gun at him and told him to sit down. After about 3 ½ hours, Cordova asked for permission to go to the bathroom. On his way back, Cordova gestured to the police and jumped out through a window. (10RT 2455-2462.)

Twelve expended cartridge cases and three bullet fragments were recovered from the area around the arcade and matched to a nine millimeter Ruger semiautomatic pistol found in an alcove near the arcade vending machines that had been moved to form a barricade. The Ruger was therefore fired at least 12 times on the Santa Monica Pier. (12RT 2697-2699, 2707-2709.) Three magazines, each with a capacity of 15 rounds, were also recovered from the arcade. (12RT 2700.)

G. Custodial Possession of Shank[44]

On January 29, 2001, jailer Armando Meneses searched appellant's cell in Module 2904, Men's Central Jail, and discovered a shank under the rim of the toilet. The shank measured 5 ½ inches long by 1 inch wide. One end was sharpened into a point and the other end covered in cloth. (9RT 2149.) Appellant was the only occupant of the cell, which was searched before appellant was placed in it. (9RT 2150.)

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[44] Appellant was charged with custodial possession of a shank in counts 37 and 41. The jury convicted appellant in count 37 on the evidence described here. (17CT 4568; 14RT 3056.) Count 41 was dismissed by the trial court (Pen. Code, § 1118.1). (12RT 2781.)

H. The Steve Mattson Crimes[45]

On November 2, 2001, Flores and appellant were high security inmates in men's central jail. Because of that status, whenever they left their cells jailers cuffed their hands behind their backs and then hooked the cuffs to chains around their waist. Around 6:00 p.m., Flores and appellant and other inmates on their row were released from their cells so they could be taken to the visitors' area. Both defendants simultaneously managed to free themselves from their restraints. Both ran toward inmate Steve Mattson, who was cuffed and waist-chained in the prescribed manner. Flores was the first to attack Mattson, stabbing him with a shank multiple times in the head and body. (8RT 1989.)

Jailer Fred Jimenez saw a shank in Flores's hand. He did not see a shank in appellant's hand, but did see appellant striking Mattson in a way that led Jimenez to believe appellant had a shank. (8RT 2000.)

Flores and appellant continued to kick and stab Mattson, who was cornered against a wall, for 30 to 60 seconds, despite Jimenez's repeated orders to stop. (8RT 1991-1992.)

Mattson received five stab wounds to the stomach and multiple stab wounds to the left rear shoulder. (8RT 1995.)

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[45] Appellant and Flores were charged with the attempted willful, deliberate, premeditated murder of Steve Mattson in count 38 and with the related custodial possession of a weapon (jailhouse shank) in counts 39 (appellant) and 40 (Flores). Gang and great bodily injury enhancements attended the attempted murder charge. (7CT 1779-1780.) The jury declared a deadlock as to counts 38, 39, and 40, and a mistrial was subsequently declared as to those counts. (14RT 3080-3082.)

I. The Redacted Versions of the Prosecutor's Recorded Interviews with Flores and Appellant Heard by the Jury

During the period when appellant and Flores were pro per defendants, trial prosecutor Darren Levine met with both defendants on several occasions. Prior to the February 21, 2002, interview, Sheriff's Deputy Daniel Beers placed a digital recording device on a note pad Levine carried and turned it on. Levine took the notepad into an attorney-client meeting area in the jail. Approximately one hour later, Levine emerged and gave the note pad to Beers, who turned off the recording device. Beers took the device to the laboratory and downloaded its contents onto a compact disk. (P95; 11RT 2623-2624.) A redacted version of the recorded conversation was played for the jury during the prosecution's case and a transcription (P95a) provided for jurors' use. (11RT 2675.)

During this interview, Flores told Levine about uncharged crimes he had committed between the date of his release from state prison on April 4, 2000, to the date of his arrest on July 4, 2000. In addition to describing events during that time frame for Levine (DPSuppIII, SuppCT 50:21[46]), Flores told Levine he was informing him of a new murder[47] (DPSuppIII, SuppCT 49:2-3) that took place in Baldwin Park (DPSuppIII,

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[46] The citation to DPSuppIII, SuppCT 50:21 is a citation to line 21 of page 50 of the volume marked Death Penalty Supplemental III, Clerk's Transcript, Volume 1 of 1 Volume, Pages 1-263.

[47] When Levine indicated he was unaware of uncharged murders, Flores said, "Have you come close? Okay, uhm, wanna give him another bone. Uhm, uhm – " Appellant replied, "Yeah." (DPSuppIII, SuppCT 49:5-7.) But, when Levine asked, "What are you guys talking about," appellant replied, "Nothing – nothing." (DPSuppIII, SuppCT 49:11-12.)

SuppCT 50:18). The murder victim was "on the handle bars of a bicycle and it was his friend or his brother who was riding him on the bike," and that person "was never shot but the other one's dead." (DPSuppIII, SuppCT 49:20-22, 24.) Flores also told Levine "the first one died. The other one watched it, witnessed the whole thing," and "he could identify because the dude walked up on him after he shot him off the bicycle, bah, bah, bah, two more into him, looked at him. Only wasted five shots with a 9mm, so there's five casings. I mean, obvious." (DPSuppIII, SuppCT 50:9-10, 12-14.)

Later in the interview, Levine asked again about the shooting of the man riding on the handlebars of a bike, and Flores said: "A bike. I'll – I'll give you a bit more. He was wearing, uh, it was either a light gray or a light blue, and he had his legs sticking out because he didn't wrinkle his pants." Flores told Levine that appellant was the driver and added, "[b]ecause as you must know, I don't like drive a [unintelligible], you know. But it takes too much from me, if I have to drive, how do I shoot?" When Flores said that appellant was the driver, appellant laughed and said, "Catch me?" (DPSuppIII, SuppCT 68:5-7, 9-10.)

Flores also offered to give Levine information about another murder after their forthcoming trial was completed (DPSuppIII, SuppCT 51:4-5) and made reference to a murder committed by appellant and himself that had already been filed in Los Angeles County and assigned to another prosecutor (DPSuppIII, SuppCT 53:3-4). When Levine asked, "A murder that you guys did," Flores answered, "Uh-huh," and appellant said, "Yeah." (DPSuppIII, Supp CT 53:5-7.) Flores said, "We did more murders than you would even realize. . . . Seriously." (DPSuppIII, SuppCT

60:5, 7.) Flores also told Levine he was going to send someone to the library to obtain clippings of the other murders. (DPSuppIII, SuppCT 60:12-17.) At this point, appellant said, "Can we talk about restitution?" (DPSuppIII, SuppCT 60:21.) Flores said: "Oh, yeah. See, that's what we wanna do. Okay, we're gonna get a lot of restitution. We'll give you a murder if drop [sic] our restitution, so it'll only be 200 instead of a whole [unintelligible] of restitution, which we'll never be able to pay." (DPSuppIII, SuppCT 60:22-24.) Flores explained that now that he's "going to death row," he didn't "wanna have a lot of restitution because when I buy a TV, they're gonna make me pay to the victims in [unintelligible] or right up front." (DPSuppIII, SuppCT 62:9-11.)

Flores spoke of the Ledford Drive shooting and asked what happened to the individual who was shot on the porch, stating "the porch was tore up." (DPSuppIII, SuppCT 69.)

When Levine said he thought the defendants were a "good shot" and made reference to the shooting of the Tahoe in San Bernardino, Flores responded, "Yeah, it's hard to shoot when you're in a vehicle and both vehicles are moving and one's turning." When Levine remarked that Flores "hit that car a lot of times," Flores said, "I should've used the other gun. 'Cause I had four on me that day, you know." Appellant said he had five. (DPSuppIII, SuppCT 70:2-3, 9.)

Flores said of witness Katrina Barber:[48] "Stupid broad. Her best bet was to just shut it up because she was not there, but she wanted to

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[48] The prosecution called Katrina Barber to testify in connection with the Ledford Drive and Luis Reyes crimes. (Please see subsections D and E, above.)

be there 'cause she decided she was gonna [unintelligible] and be somebody. If you look at her first and second statement, you know, bam." He said at trial he intended to say to her "Yeah, we gave you back your live [sic]. We could've killed you easy. But still, look what you did. You got more time – you got convicted because of your own. If you would've just shut it up, you were never there. But you wanted to place yourself at that scene and do 14 years, that's up to you." (DPSuppIII, SuppCT 71:18-21, 24, 72:1-3.)

In explaining why he wanted to make disclosures regarding the uncharged murders, Flores told Levine that both defendants wanted to talk with him because they wanted him to make sure that a large restitution fine would not be imposed upon them. (DPSuppIII, SuppCT 74:15-24, 75:1-4.)

In discussing the charged counts contained within the pleading, appellant responded "Right" to Levine's statement that appellant "had one [shank] in the toilet." (DPSuppIII, SuppCT 79:20-21.)

Before Levine left them, Flores asked for autopsy photos, stating: "I want the autopsies. Hey, I look 'em all day. Anything with bullet holes – " . . . [¶] "Well, see I wanna see where they got their [unintelligible] and the fuckin' holes run in, where the bullet enters and checked out." (DPSuppIII, SuppCT 80:12-15.)

On March 18, 2002, Detective Thomas Kerfoot was present in the courtroom when Flores and appellant, still appearing in propria persona, asked for a meeting with Levine and Kerfoot to discuss charged and uncharged homicides.

On March 28, 2002, Kerfoot and Levine met at the jail. Deputy Beers provided them with a digital recording device. Kerfoot and Levine then met with Flores and appellant and surreptitiously recorded the conversation, which was later placed on a compact disk. (P96; 11RT 2629-2630.) A redacted version of the recorded conversation was played for the jury during the prosecution's case and a transcription (P96a) provided for jurors' use. (11RT 2677, 12RT 2680.)

At the onset of the interview, Levine advised Flores and appellant that any information they provided could be used against them, that they did not need to talk to him or Kerfoot although they had requested the meeting so they could provide Levine with information about new cases in exchange for the imposition of limited restitution, and that they had a right to have a lawyer present. (DPSuppIII, SuppCT 91:20-22, 92:10-15.) Flores in turn said that in order to avoid being identified as snitches, "Like we said from the beginning, I will only state what I did. He will only state what he did." (DPSuppIII, SuppCT 92:18-19.) Flores also asked how Levine was going to "guarantee" his promises regarding restitution (DPSuppIII, SuppCT 92:17) and asked that Levine leave Katrina Barber, Carina Renteria, and his mother alone (DPSuppIII, SuppCT 93:2-6). Flores stated that they were going to give Levine information on "[t]wo murders that you don't got us for. . . ." (DPSuppIII, SuppCT 93:13.)

In the conversation that followed, Levine repeated his advisement that Flores and appellant had the right to counsel and further advised them that even if the information they provided failed to result in convictions regarding those murders, it could still be used by the

prosecution in its penalty phase case. (DPSuppIII, SuppCT 94:10-16, 97:3-8.)

Appellant asked, "So how much of a guarantee can we have on the restitution though?" (DPSuppIII, SuppCT 99:4.) Levine said he would make his "best efforts" at requesting a $200 restitution for each of them. (DPSuppIII, SuppCT 99:8-16.) Flores hinted they might be willing to provide evidence of more than two murders. When Levine asked why, Flores said, "Well, we're figuring this. When we go up – up there, we might decide to give up another one, you know. And they'll say, 'Well, they were right about the last one, so they good reprises [sic], you know. Try this one, boom. Who investigated this one? Who's been [unintelligible] for it.'" (DPSuppIII, SuppCT 101:1-10.)

Flores then turned to the specifics of the sentence the prosecution was seeking for Katrina Barber. Levine said he would be open to giving her a sentence that would allow her to be out with credit for time-served, but also asked the defendants for assurance that Barber would be safe when she got out. (DPSuppIII, SuppCT 101-104.) Flores said, "We ain't got a problem with her. Even with Co – Corina [Carina Renteria], truthfully, if we wanted to hurt them – ." Appellant interrupted, "We would've done it." Flores resumed, "they'd have been hurt. And her mom would've been hurt in her apartment. Her brother neighbor would've been hurt. Catch me?" (DPSuppIII, SuppCT 104:18-22.)

Flores then provided this description: "Okay, okay. There was a guy that rested in peace. I believe it was on Los Angeles Street in Baldwin Park and Merced. Uh, there's a restaurant on the same side of the street. Uh, three houses from that restaurant I believe there's a brown big

pole." (DPSuppIII, SuppCT 106:13-15.) "There's a brown big pole. Okay, he was coming from the direction of a Circle K. He was on a handlebars of a bicycle, and his gang name is V-A-G-O, Vago, and he's from a gang called Monrovia. (DPSuppIII, SuppCT 106:17-19.) Flores said he did not know Vago before the shooting (DPSuppIII, SuppCT 106:20-21), and then continued with, "Uhm, he had light blue or light gray pants on. Wore a white shirt. And give you action one more time. A 9 millimeter pistol was used, not a revolver. It was a click, right. . . . [¶] [] Uh, I believe you should find five cases, right, there should be five cases, but one might not have landed there, but there's five bullet impacts. Uhm, there should be – one would be on his left side, towards possibly his rib side, like on the side right here – . . . [¶] by his rib. Uh, and he should have one to two there and two to three in his chest area, all chest shots." (DPSuppIII, SuppCT 106:23, 107:1-10.)

Appellant added to this description in Spanish, "In front of his mouth" and "This is the other."[49] (DPSuppIII, SuppCT 107:11, 13.)

Levine asked whether they were walking or driving, and Flores replied, "No, we were driving." (DPSuppIII, SuppCT 107:18.) Levine asked who was driving and appellant replied, "I'm driving." (DPSuppIII, SuppCT 107:20.) Appellant described the vehicle as a "four-runner." (DPSuppIII, SuppCT 108:10.) Flores added, "Okay, it's late night, about – from 10:30 and nowhere past 12:00, within that time." (DPSuppIII, SuppCT 108:12-13.)

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[49] This Spanish translation was included in the transcript provided to the jury. (DPSuppIII, SuppCT 107:11, 13.)

Flores said, "And there was a bunch of candles placed there. Oh, supposedly – suppose – I went back, right. Criminal always goes back to see it. By that pole – that's why I remember the pole so clearly. The pole, there was – candles placed there, but he's from Monrovia and his name is Vago. . . ." (DPSuppIII, SuppCT 108:15-18.) Flores continued, "Vago, right. And, uhm, there was a little dude that was right – he was on the – on the handlebars. The little dude was pedaling him, right. They fell off the bike, boom. And you'll be able to prove this because the little dude had just laid there, didn't run, and – and he see the dude get shot. Later on I found out that per – perhaps that was his brother, the guy went into shock. Okay, that's one. You'll be able to find that. . . ." (DPSuppIII, SuppCT 108:22-23, DPSuppIII, SuppCT 109:1-3.)

Flores continued, "He went into shock. He – I already went to the hospital, and I felt bad for that. I didn't wanna hurt him. He wasn't a gang member. You could tell if was [sic] a gang member or not gang member. I let it off. I thought it perhaps been his brother, but it's not his brother, or it might be, but he was a regular dude [unintelligible]. That's why I saw we – we hurt some – some we don't – there was no reason to hurt him." (DPSuppIII, SuppCT 109:8-12.)

Flores confirmed that he was the shooter, appellant the driver in this incident and that Kerfoot did not have the gun he used, which Flores described as "black, uh, I believe it's five to six – five in the click, one in the hole, which would be a Lawrence weapon, a Lawrence cheap." (DPSuppIII, SuppCT 109:13-20.)

Flores then said, "I'll give you number two. That's why I tell you I like 9 millimeters. Same city, the street called Vinland, V-I-N-L-A-

N-D, Street. . . .[¶] You'll find a blue blazer [sic], right?" Appellant said, "No, primer. It's like a primer – " (DPSuppIII, SuppCT 110:15-19.) Appellant described an "older model blazer" (DPSuppIII, SuppCT 110:21) with a "shell." (DPSuppIII, SuppCT 111:4.)

During a conversation between the defendants about the names of the streets involved, appellant said, "And we – we going south on Vinland, going down on that same street where you made a right. When you made a right on that – on Vinland, and going out Vinland, he made a right. Right when he stopped at the corner, he pulled over at the corner. We're going down south, making a left on the same street that he just turned on." (DPSuppIII, SuppCT 111:5-23.) Flores said he was the shooter. Appellant said, "I'm driving the car." (DPSuppIII, SuppCT 112:15-17.) Flores said, "Right on Vinland, and down Vinland there's a turn. . . . [¶] I'll pull a G right here. He never let the driver see. . . . [¶] One – I believe two to three shots. There was two to three shots. I believe one in the face, one in the neck. Think there's two." Appellant agreed with these statements. (DPSuppIII, SuppCT 112:4-9.) Both appellant and Flores said the passenger jumped out and ran. (DPSuppIII, SuppCT 112:10-13.)

Flores said, "He was holding onto the steering wheel. He was holding on the steering wheel when I left." Appellant said, "And he – and his head hit the – the horn, I believe." (DPSuppIII, SuppCT 112:20-21.) Flores said, "He's dead." (DPSuppIII, SuppCT 113:4.) Flores told Levine he would be able to "prove this because he had a passenger. That's the one that should've called 911." Appellant added, "He ran." (DPSuppIII, SuppCT 113:8-10.)

Levine asked for the reason for the killing. Appellant replied, "He was a gang member, man." Flores said, "He was a gang member in the wrong area. Territorial." Appellant added, "Tribal instincts from a . . . [¶] place in the colonial days, you know." (DPSuppIII, SuppCT 113:17-23.) Appellant said he was driving a light bluish car, a stolen car. Appellant said they were not looking for the victim and described it as "a vandal – it's a – it's a vandal type of thing. You're driving around your neighborhood looking for people to kill." Flores said, "Right." Appellant said, "Main objective." Flores said, "He's not supposed to be in the neighborhood, and we finally seen him driving by on this night, okay." (DPSuppIII, SuppCT 114:10-17.) Flores said he had seen him before and that the victim was "from around here." (DPSuppIII, SuppCT 114: 18-21.)

Flores described the location and the shooting this way. "You go down Vinland, then could go straight towards Foster School, but before you get to Foster School, we turn in, bam, and it's a corner house equals to the corner that we pulled up next to. I domed him, boom, boom. That dude from the passenger side jumps out, runs, goes by the first house, bam. . . ." (DPSuppIII, SuppCT 115:6-10.) Flores said he was the closest to the driver. "Yes. Because he stopped, we stopped, and I go boom, domed him. . . ." (DPSuppIII, SuppCT 116:3-4.)

Flores said he didn't know the driver's gang, "but he – he act stupid one time. You know what I'm saying." When Kerfoot suggested "disrespectful," Flores said, "Yeah. So he – you – nobody got caught for these things, man, smooth as silk." (DPSuppIII, SuppCT 116:8-12.) Appellant said Flores used "a different 9 millimeter." Flores agreed and

said it could have been a Smith and Wesson. He said he was "tight with 9. That's why ti – I – I like 9s." (DPSuppIII, SuppCT 116:15-18.)

Appellant said, "If you have a casing from that big street on Vinland . . . [¶] that same casing will match the one on that same street, where four gang members walked up to a car and shot it with three 9 millimeters." (DPSuppIII, SuppCT 117:12-15.) Flores agreed. (DPSuppIII, SuppCT 117:16.)

Flores spoke again of the shooting involving the bicycle. "I popped him twice. He fell off the handlebars, the bike rolled over, boom. This dude standing closest to me. The other one's by – there's that little driveway right there, bam, and one tried to crawl with his hands like – he was like on his – on his butt with his feet on the ground and his hands on – in back of him, and he was trying to crawl back to me, pow, pow, put the rest to him." (DPSuppIII, SuppCT 122:14-18.) Flores said, "Yeah, the other guy was just in shock, just looking at me like – and I just looked at him like, 'Man, for what?['] He don't look like a gang member." (DPSuppIII, SuppCT 122:23, 123:1.)

Flores told Levine that he had not even found half of the Redlands matters. Appellant said, "You guys didn't even try." (DPSuppIII, SuppCT 123:6-12.)

Appellant then turned to the shooting at Santa Monica Pier, saying, "But I'll tell you one thing, I would've – I would – I make suggestions if police officers at the Santa Monica pier were very lucky." Appellant said, "Let me tell you what I had that day. . . . [¶] I had a fully automatic AK47 with a [unintelligible] and 20-round clip drum." (DPSuppIII, SuppCT 123:16-23.) Appellant and Flores said they had an

"AK47 with four clips, 30-round clips. Some are hollow point and some are not. . . ." Appellant reiterated, "So you guys were lucky." (DPSuppIII, SuppCT 124:4-5, 9.)

Flores and appellant noted that while they had given Levine and Kerfoot information about five murders, there were others. Flores said, "Because, see, the whole thing is you – why give up all our marbles at one time. Catch me?" (DPSuppIII, SuppCT 133:23, 134:1.)

Kerfoot asked Flores and appellant what motivated them to "go out and just start capping - . . . [¶] people that are walking down the street?" Appellant responded, " – what motivates you to go to work?" Flores said, "Yeah. You gotta go to – like it's your job, you know." Flores also said, "I took a job and that's my job." (DPSuppIII, SuppCT 138:23, 139:1-6.) Flores explained, "That's it. That's my neighborhood, man. And it's territorial. Uh, Wolf pees on every spot that's his, and next side of a bar [unintelligible] you enter it, they'll go pee on your spot again and make – because you go in it. . . ." (DPSuppIII, SuppCT 139:23; 140:1-3.) As to the crimes committed outside his area, Flores said, "Well, see, the whole thing is [unintelligible] – let – let – let's – oh, we were trying to better the gang and instill fear to the rest of the gangs." (DPSuppIII, SuppCT 140:8-9.)

Flores explained shooting the driver who he earlier said had been disrespectful in this way. "Yeah. You know, I mean, he was told not to drive in our hood, you know? Drive somewhere else. Go around the block. Take the long way. I caught him taking the short way, you know. The long way would've been get off the freeway, come up off on Merced, boom, by the McDonald's, boom, by La Puente, boom, make that turn and

get to wherever you gotta go. But if they would listen or they don't believe." (DPSuppIII, SuppCT 140:20-23, 141:1.)

When Levine asked again about what Katrina Barber knew, Flores said, "My thing is I'm at peace of whatever I done, however I done it, you know. I'm – I regret not being – you know. And – and – and my thing is the only regret that I have is that three women were involved, my mom, Corina, Katrina, you know?" (DPSuppIII, SuppCT 141:12-14.)

Flores spoke of Paul Ponce, saying, "Vago, Paul Ponce, he – he's a good person. Catch me? A real good person." (DPSuppIII, SuppCT 144:2-3.) Flores also said, "I like him. I like him. You know? I mean, if he's dead. If you're gonna give it to us, if you can charge us for it, charge us to clean your books, that's cool. But don't run him through the mud. That's all we ask you. Yeah, that – that really – that really affects us." (DPSuppIII, SuppCT 144:17-20.) Flores and appellant said they went to the wake for Ponce and walked up to the casket and left within minutes of arrival because they didn't want to get caught there. Flores said there would have been a lot of bloodshed. They both said they had many guns that day. (DPSuppIII, SuppCT 146.)

At a point in the conversation, Kerfoot asked what Flores and appellant had done with their duffle bags of weapons. Flores replied, "Well, we can't tell you that. You know, but if we ever get out – . . . [¶] If we ever get out, will we be able to go get 'em and we'll be able to finish our mission? 'Cause our mission was not completed." Appellant agreed, "Yeah." Flores continued, "But I'll tell you, he had a – he had a – a 120-round drum that, bam, and a Chinese AK, and I took off the stock and put a short stock on it." (DPSuppIII, SuppCT 151:8-15.)

Kerfoot asked, "What was your mission?" Appellant replied, "To kill as much people as I could. . . . [¶] Cops included." (DPSuppIII, SuppCT 151:21-23.) Flores agreed, "Yeah." Appellant said, "Unfortunately, we got cut short." (DPSuppIII, SuppCT 152:1-2.)

Appellant and Flores then began to describe incidents in which they had had opportunities to kill police officers, but did not. In the earlier interview Flores and appellant had with Levine on February 21, 2002, they discussed a time when they had given a "pass" to a Baldwin Park police officer named Koback. They said they waited outside a nursery with two AKs for Koback to emerge, but then decided they had no reason to hurt him. (DPSuppIII, SuppCT 66-67.) Now, during the second recorded interview with Levine and Kerfoot, the defendants discussed again the fact that they did not shoot the officer who stopped in the nursery by the 7-Eleven store off of Benton. They also could have but did not shoot the "detectives in the red car" and also a "Mr. Reynoso," who may have been Baldwin Park detective and prosecution gang expert David Reynoso. (DPSuppIII, SuppCT 152:1-23.)

Flores added, "Yeah. We could've caught them other times, tell 'em don't hang out at Public Taco off of Ramona by the Mobile [sic], because I wanted to get him when they each pulled up next to me, say, 'Hey, [unintelligible],' (whispering) bam, bam, bam, jump on the freeway." Levine asked, "Why do you want cops so bad?" Flores said, "They followed us. I can't go to the goddam eat a taco with him there." Appellant agreed, "Yeah." (DPSuppIII, SuppCT 153:4-13.)

Levine asked Flores about the gun he had in the hospital following his arrest. Flores said, "Yeah, yeah, yeah. I was gonna shoot a

cop. I'm not gonna lie. That's why I kept saying, 'Oh, I'm hurting, I'm hurting.' But they had me handcuffed like this to the bar." Levine asked which cop he intended to shoot. Flores said, "Whichever cop that was closest to me. I was trying to get the gun, but I couldn't reach and it wouldn't fall off, and if it would've fell out, he was gone." Levine pointed out that Flores was handcuffed. Flores said, "And I was [simulating gunfire]. I had five shots, plus one, 'cause I always keep it in the hole. . . ." (DPSuppIII, SuppCT 154:13-23.)

Levine asked the defendants to provide him with the guns from the shootings involving Monrovia and the one that occurred off Vinland. Flores said he would be able to give Levine the Monrovia firearm, a "black Lawrence," a "big ugly, ugly gun." (DPSuppIII, SuppCT 156:2-15.) Flores also said, "Oh, I only shot five times. I only had five shots." (DPSuppIII, SuppCT 156:19.)

Toward the end of the conversation, Flores spoke again about the Blazer shooting. "Well, see, I don't believe – I don't think it was – it was – I'm – I'm telling you, homes, it was two shots. That blazer was two shots. I know what I can do. It was two shots, because I smiled and said, 'Hey, homie, two.' Catch me? And I counted after to top it off [unintelligible]. 'Cause I believe that one carried – that Smith and Western was a old Smith and Western, and I believe it carried eight with one or nine with one. Bad ass, boom. It had four clips [unintelligible]." (DPSuppIII, SuppCT 173:16-21.)

FLORES' DEFENSE[50]

The parties stipulated that Carina Renteria told Andre Acevedo, the security manager at K-Mart where she worked, that she had an unknown person in the front passenger seat and two people in back and they were following a car loaded with guns when a police car got between the two cars. The two males in the back seat told her to catch up with the police car and, when she did, they rolled down their windows and began shooting at the officer. Acevedo then recounted this to the police. (13RT 2852-2853.)

THE PROSECUTION'S PENALTY PHASE EVIDENCE

On March 29, 1995, David Wachtel, Buddy Jacob, and a woman named Karen were talking in a car in Baldwin Park. Flores and a second man jumped over a fence and came up to the car. Flores tapped on the window. Wachtel, who was seated in the rear, opened his door. Flores displayed a gun, asked for money, and told Wachtel to get out of the car. Flores took Wachtel's pager and wallet, Jacob's necklace, and $20 from Karen's purse. After Flores was arrested and charged, Wachtel testified at the preliminary hearing and identified Flores in court. (14RT 3108-3111.)

On May 10, 2001, jailer Dustin Cikcel searched Flores's cell and removed contraband consisting of excess sheets and food while Flores was in the shower two or three cells away. Flores was belligerent and cussing. Later, Flores said, "You will see Cikcel. Maybe not today, but

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[50] Appellant's defense consisted of a stipulation pertaining to the murder charged in count 1. The substance of that stipulation is provided above in subsection C as part of the description of the Paul Ponce crimes, of which appellant was acquitted in counts 1 and 2.

you will see when you are not expecting it." Cikcel took Flores's statement as a serious threat because of Flores's charges, prior convictions, and gang allegations. (14RT 3118-3020.)

On November 19, 2004, jailer Juan Rivera searched appellant's cell and found a shank under a stool. A couple of weeks before he gave this testimony, appellant told Rivera he knew that Rivera was going to find that shank that day. (14RT 3113-3117.)

Maria de Los Angeles Calvo, the mother of George Flores, testified that George was the youngest of her four children and a happy, friendly person who had many friends, liked to study, liked baseball, and was loved by his family. (14RT 3123-3124.) George was a good and loving son who was close to her, watched television with her, and wanted to go into electronics. George had a son who questioned why his father was gone. (14RT 3123-3128.)

Michelle Gerena was a friend of George Flores. Her husband grew up with George. George wanted everyone to be happy. He loved his son. The people at his funeral, not the cemetery personnel, asked for shovels and buried him. (14RT 3134-3137.)

Vivian Gonzales, the mother of John Diaz, testified that she missed her good, funny, caring, and loving son. She missed him very much. Now, her son Paul Gonzales had no siblings. John was killed three days before his 24th birthday. She heard the gunshots and ran. The shots were so loud they scared the whole neighborhood. Then she saw Paul and knew that John had been shot. She could not make herself go to him and see him die. (14RT 3138-3140.) She could not go to his gravesite, so she made a garden for him and found comfort there. She had changed; she was

often angry. Many days she didn't want to get out of bed. John left a daughter Celeste who will never know her father. (14RT 3140-3143.)

Timothy Obregon testified that he lived in Baldwin Park but was never a gang member. On June 13, 2000, around 10:00 at night, Richard Robles, an Eastside Baldwin Parque member asked him to drive his homeboys to their home. Obregon at first refused because he was expecting his girlfriend Alicia Garcia to come over. (14RT 3148-3149.)

But Robles pleaded and Obregon finally agreed. Robles brought Flores and appellant over to Obregon's home and gave Obregon $40 to buy gas and said any leftover monies belonged to Obregon. Garcia decided to go along for the ride. (14RT 3152-3154.)

Either Flores or appellant brought a large black duffle bag with him and put it into the trunk of the gray Nissan that belonged to Obregon's mother Patricia Obregon. Everyone got into the car. Obregon drove; Flores sat behind him. Garcia sat in the front passenger seat and appellant behind her. After Obregon stopped for gas, Flores told Obregon to drive east on Interstate 10. (14RT 3155-3157, 3184.)

After a while, Garcia commented that the trip was taking a long time and asked how much farther they had to go and when they would get there. No one answered. A minute or two later, Obregon heard a lot of popping sounds. He saw bullet holes popping through the windshield and Garcia squirming. He looked around and saw that appellant had a gun. Appellant pulled the magazine out from the gun and put in another. He then moved the gun from one hand to another and began to raise the gun to Garcia's head. Garcia said, "Stop shooting me." Flores told appellant, "No, don't do that." (14RT 3158-3160.)

Garcia turned to Obregon and started to cry. She said, "He shot me, and I am dying." Blood was gushing from a hole in her chin. Obregon felt something in the back of his neck. Appellant said, "Better drive straight, motherfucker, or I will shoot you with this nine." (14RT 3161.)

At Flores' direction, Obregon pulled off at the next exit. He knew of no reason why the shooting had happened. (14RT 3161-3162.)

Garcia was beginning to lose consciousness. Flores told Obregon he would let them go where they could get some help. After they passed by a Circle K store, Flores told Obregon to pull over in a residential neighborhood. When Obregon got out of the car, Flores did too. Flores asked Obregon for money. Obregon gave him the $20 he had left. Flores told Obregon to get Garcia out of the car. Obregon opened Garcia's door and saw a lot of blood and her sad eyes. (14RT 3163-3165.)

When Obregon lifted Garcia, she screamed in pain. There were multiple gunshot wounds in her breast. He was unable to carry her more than a few steps. He put her down and attempted to shield her. Flores asked Obregon, "Do you know me?" Obregon replied he would say they had been carjacked. (14RT 3166, 3170.)

Flores and appellant drove away in the gray Nissan. Obregon ran to the first house and banged on the door. No one answered. Garcia lifted her head and told him to get to a telephone. Obregon ran to the Circle K and called 911 to report a carjacking. (14RT 3168-3170.)

Garcia recovered, but she was no longer able to draw. Her personality had changed; she was a wreck, fearful of everybody and everything. She lived in her car. (14RT 3173.)

Redlands firefighters responded to the call made from Alta and San Bernardino Avenues in Redlands. Garcia had gunshot wounds to her breast, finger, and chin. They made what they called a scoop-and-run call, one in which the priority is to get the person to the hospital. (14RT 3175-3180.) Redlands police recovered Garcia's clothing at the scene. The soot on the clothing indicated the weapon was fired at close range. (14RT 3187-3192.)

At 3:00 a.m. early the next day, Baldwin Park police came upon Patricia Obregon's Nissan fully engulfed in flames. (14RT 3184.)

ARGUMENT

Jury Selection Issues

I.

THE TRIAL COURT ERRED IN REJECTING THE DEFENSE REQUEST THAT THE QUESTIONNAIRE ASK PROSPECTIVE JURORS WHETHER THEY WOULD ALWAYS VOTE FOR DEATH IF APPELLANT WAS CONVICTED OF MULTIPLE MURDERS. THE RULING DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND IMPARTIAL JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The information charged appellant with committing multiple murders. The defense requested that the questionnaire to be completed by prospective jurors include a question asking jurors if they would automatically vote for death if appellant was convicted of multiple murders. Instead of the defense-proffered question, the trial court included a modified version of the question that failed to elicit the information sought by the defense. In so ruling, the trial court deprived appellant of his right to a fair trial and impartial jury as required by the Sixth and Fourteenth Amendments to the United States Constitution.

A. Background

Counsel for Flores, joined by Amezcua (4RT 1166), requested that the following question be included in the jury questionnaire:

> 1. If you find the defendant guilty of five different murders with special circumstances would you always vote

for the death penalty? Yes___ No___ Please Explain. (11CT 2724.)

At the initial hearing regarding the questionnaire, the prosecutor opposed the giving of the question. (4RT 1166:17.) The trial court advised counsel that he was concerned that the question would cause the prospective jurors to prejudge the evidence, but at the same time said he thought the question might be helpful. (4RT 1167:14-17.) The court then recounted this experience.

> I had a trial one time where we were doing voir dire without the benefit of the questionnaire on a case where a man had been accused of killing four women on four separate occasions. And I remember a prospective juror in the back row said, you know, your honor, if the evidence shows he killed four women I'm going to vote for death. And frankly, I commended the juror for the way he was so forthright with his feeling about that. Of course, he was excused from the jury. And that jury later returned a life sentence. (4RT 1167:18-27.)

The court continued:

> The question is, you don't want in a questionnaire or in voir dire to have jurors commit to certain positions based on what you expect the evidence is going to show. I know as an advocate you would like very much to try your case in voir dire. It is my job to keep you from doing so. (4RT 1168:2-7.)
>
> I don't know, I will think about it as to the number of murders. I don't think murder with special circumstance means very much to anybody. Special circumstances means a lot to lay jurors. I will try to fashion a question about the number of murders, perhaps. I will give some thought to it. (4RT 1168:8-13.)

The matter was put over for later resolution. (4RT 1168.)

At the next hearing, the court proposed the defense-proffered question be reworded as follows: "If you found a defendant guilty of five murders, would you always vote for death and refuse to consider mitigating circumstances (his background, etc.)?" (4RT 1174:23-27.)

Both the prosecutor and counsel for Flores agreed to the form of the question and the court ordered the question included within the questionnaire. (4RT 1175-1175.) The record reveals no specific concurrence by counsel for Amezcua, who at that point, in the absence of lead counsel, was represented by second seat defense counsel.[51] (4RT 1173-1175.)

The question, as stated above, was included in the questionnaire. (11CT 2837.)

As appellant explains below, a challenge for cause may be based on a prospective juror's response when informed of facts or circumstances likely to be present in the case being tried. Here, appellant was charged with multiple murders and the defense sought to identify those jurors who would automatically vote for death in the event appellant was convicted of five murders. When the trial court modified the defense-proffered question by tacking on, in the conjunctive, consideration of mitigating circumstances, the court blurred the call of the original question in a way that suggested that only evidence of mitigating circumstances

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[51] On an earlier occasion, the trial court stated that unless counsel stated otherwise, he would presume that both defendants were joining in each other's motion. (3RT 898:7-9.)

would suffice to prevent a death verdict. The question also became compound. Jurors could answer no who will always vote for death (but give consideration to mitigation). For the reasons set forth below, the court's refusal to include the originally requested question in the questionnaire was error.

B. The Relevant Law and Application to This Case

In *Wainwright v. Witt* (1985) 469 U.S. 412, the United States Supreme Court held that a prospective juror may be excluded for cause if the juror's views prevent or substantially impair the juror's performance in accordance with the juror's instructions and oath. (*Id.*, at p. 424.) *Witt* confirmed that this standard for excusing a juror is grounded in the Sixth Amendment's guarantee of an impartial jury. (*Id.*, at p. 423.) In *Lockhart v. McCree* (1986) 476 U.S. 162, the Supreme Court recognized that the time to identify prospective jurors whose views would adversely affect the performance of their duties is during voir dire examination. (*Id.*, at p. 170 fn. 7 (state must be given opportunity to identify at voir dire prospective jurors whose opposition to death penalty would prevent them from performing jurors' duties).)

In *Morgan v. Illinois* (1992) 504 U.S. 719, the Supreme Court noted that the Constitution "does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury." (*Id.*, at p. 729.) The Court then observed: "Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." (*Ibid.*) "*Voir dire* plays a critical function in assuring the criminal defendant that his right to an impartial jury will be honored. Without an

adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.)

In *Morgan*, the trial court, conducting the voir dire examination in accordance with Illinois law, asked each prospective juror whether he or she had moral or religious principles so strong that the juror could not impose the death penalty "regardless of the facts." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 722.) The trial court, however, refused the defense request that the court inquire, "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" on the ground that the court had asked substantially the same question as part of other more general questions. (*Id.*, at p. 723.) *Morgan* held the trial court's refusal of the defendant's request constituted reversible error. (*Id.*, at p. 725, 739.) In so doing, the Court took note that the belief that death should be imposed ipso facto upon conviction of murder reflects on a prospective juror's inability to follow the law. However, that same juror may believe he or she can be fair and impartial and follow the law, and at the same time be unaware that those beliefs prevent him or her from following the law. (*Id.*, at p. 735.) *Morgan* concluded that a defendant is "entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." (*Id.*, at p. 736.)

In *People v. Cash* (2002) 28 Cal.4th 703, this Court recognized that the identification of prospective jurors whose views on the

death penalty would prevent or substantially impair the performance of their duties as jurors encompassed two "real questions." There are whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case, and its corollary, whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case. (*Id.*, at p. 719-720; *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 726-728.)

In *Cash*, a capital homicide prosecution, a general fact or circumstance present in the case was that the defendant had previously murdered his grandparents. The trial court, however, did not permit defense counsel to inquire during voir dire whether prospective jurors would automatically vote for death if the defendant had previously committed a prior murder (*viz.*, the murders of his grandparents). This Court held that the trial court prejudicially erred in prohibiting voir dire on prior murder, "a fact likely to be of great significance to prospective jurors" and one "that could cause some jurors invariably to vote for the death penalty." (*People v. Cash*, *supra*, 28 Cal.4th at p. 721.) *Cash* noted that "such particularized death-qualifying voir dire" had been held to be appropriate in *People v. Pinholster* (1992) 1 Cal.4th 865, 916-917 (felony murder); *People v. Ochoa* (2001) 26 Cal.4th 398, 431 (perpetrator not the actual killer); *People v. Ervin* (2000) 22 Cal.4th 48, 70-71 (hirer in murder-for-hire case); *People v. Livaditis* (1992) 2 Cal.4th 759, 772-773 (young defendant or lack of prior murder); and *People v. Bradford* (1997) 15 Cal.4th 1229, 1320 (for cause excusal proper where prospective juror asked to conceive of circumstances in which he could render a death verdict

provided hypothetical example of specified, particularly extreme cases with more egregious facts than involved in present case.)

In *People v. Kirkpatrick* (1994) 7 Cal.4th 988, this Court held that a challenge for cause may be based on the juror's response when informed of facts or circumstances likely to be present in the case being tried. (*Id.*, at p. 1005, accord *People v. Ervin*, *supra*, 22 Cal.4th at p. 70; *People v. Earp* (1999) 20 Cal.4th 826, 853.) These cases, "affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence. . . ." (*People v. Cash*, *supra*, 28 Cal. 4th at pp. 720-721.)

The foregoing authority thus establishes that the parties are entitled to identify potential jurors who would automatically vote for either life or death based upon a fact or circumstance present in the case and that the time for making the necessary inquiries is during voir dire.

Here, of course, the question originally proffered by the defense was intended to identify jurors who, if they convicted appellant of five murders (a fact or circumstance present in the case), would always vote for death. The question was analogous to the question that *Morgan v. Illinois* held the trial court should have allowed the defense in its case to make, to wit, "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" Additionally, contrary to the trial court's concern that the original defense question impermissibly allowed the jurors to prejudge the case, this Court has determined that court-imposed restrictions on particularized

death-qualifying voir dire based on facts or circumstances present in the case creates reversible error. (*People v. Cash*, *supra*, 28 Cal.4th at p. 723.)

Appellant has asserted above that when the court reframed the question to include a refusal to consider mitigating circumstances ("If you found a defendant guilty of five murders, would you always vote for death and refuse to consider mitigating circumstances (his background, etc.)?"), the question linked a death verdict with a refusal to consider mitigating circumstances and obscured the call of the original question, i.e., what would the jury do in the absence of mitigating evidence? This was particularly germane in this case in which the defense presented no mitigating evidence.

This Court has recognized that California's death penalty sentencing process allows jurors to take into account their own values in weighing aggravating and mitigating factors. (*People v. Kaurish* (1990) 53 Cal.3d 648, 699; *People v. Stewart* (2004) 33 Cal.4th 425, 447.) Accordingly, a juror may vote for life and not death when the penalty phase evidence is limited to aggravating factors alone.

In addition, to the extent the revised question suggests that the lack of mitigating factor(s) may be construed as an aggravating factor, it states an incorrect principle of law. "[T]he absence of a mitigating factor may not be considered as an aggravating factor." (*People v. Siripongs* (1988) 45 Cal.3d 548; *People v. Davenport* (1985) 41 Cal.3d 247, 289.) This Court has held that an instruction indicating that a jury may choose death simply on the basis of a lack of mitigation, without finding that the aggravating circumstances themselves warranted the most severe penalty, is error. (*People v. Brasure* (2008) 42 Cal. 4th 1037, 1065; see also *People v.*

Livaditis (1992)2 Cal.4th 759, 784 (absence of mitigating factor is not itself aggravating is correct statement of law, but specific instruction to that effect is not required.) In addition, the compound nature of the revised question creates an opportunity for confusion because a no answer to the question, "If you found a defendant guilty of five murders, would you always vote for death and refuse to consider mitigating circumstances (his background, etc.)?" does not necessarily mean that the juror would not automatically vote for death.

Appellant further contends that the court's error in restricting death qualification voir dire resulted in a failure to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors.

C. Reversal of the Penalty Judgment Is the Appropriate Remedy because the Trial Court's Restriction of Voir Dire Creates Doubt That Appellant Was Sentenced to Death by a Jury Empanelled in Compliance with the Law

This Court has held that a defendant who establishes that a trial juror was biased against him is entitled to a reversal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 975.) In *People v. Cash*, *supra*, as in the present case, the trial court's ruling prevented the defense from examining prospective jurors on the disqualifying view that the death penalty should be imposed invariably and automatically on the defendant if he had committed one or more murders other than the murder charged in the case. Like appellant, the defendant in *Cash* could not identify a particular biased juror because he was denied an adequate voir dire

regarding convictions for other or multiple murders, "a possibly determinative fact for a juror." (*People v. Cash*, *supra*, 28 Cal.4th at pp. 722-723.) *Cash* noted that when the court restricted voir dire about other murders, it created the risk that a juror who would automatically vote to impose the death penalty upon a defendant who had committed other murders would be seated and that the juror would act upon those views and thereby violate the defendant's due process right to an impartial jury. (*Id.*, at p. 723.) That, in turn, creates doubt the defendant was "sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739; *People v. Cash*, *supra*, 28 Cal.4th at p. 723.) *Cash*, in accord with *Morgan*, held that reversal of the judgment of death was the appropriate remedy. "Because the trial court's error makes it impossible for us to determine from the record whether any of the individuals who were ultimately seated as jurors held the disqualifying view that the death penalty should be imposed invariably and automatically on any defendant who had committed one or more murders other than the murder charged in this case, it cannot be dismissed as harmless. Thus, we must reverse defendant's judgment of death. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739.)" (*People v. Cash*, *supra*, 28 Cal. 4th at p. 723.

Appellant respectfully submits that his case is like that of *Morgan* and *Cash* and that reversal of the judgment of death is similarly warranted here.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCUSING PROSPECTIVE JUROR NO. 74 WHO, DESPITE CONSCIENTIOUS RESERVATIONS ABOUT IMPOSING THE DEATH PENALTY, STATED REPEATEDLY THAT SHE WAS WILLING TO CARRY OUT HER DUTIES AS A JUROR IN ACCORDANCE WITH THE COURT'S INSTRUCTIONS AND HER OATH

The trial court excused for cause Prospective Juror No. 74 who expressed some reservations about imposing the death penalty, but who also explained that she would vote for death if she found "the aggravating was enough, then you know, it would be hard, but I could make the decision." (5RT 1384:28-1385:1.) In excusing a prospective juror for cause despite her willingness to fairly consider imposing the death penalty, the trial court committed reversible error under *Witherspoon v. Illinois* (1968) 391 U.S. 510 and *Wainwright v. Witt* (1985) 469 U.S. 412, violating appellant's rights to a fair trial and impartial jury as guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

A. Jury Selection Procedures

The court employed a questionnaire in selecting a jury. The questionnaire included the following questions, inter alia, pertaining to the death penalty.

> Are you so strongly opposed to the death penalty that you would **always** vote for life in prison without the possibility of parole and never vote for death for a defendant convicted of first degree murder and a special circumstance? (16CT 4201.)
>
> Are you so strongly in favor of the death penalty you would **always** [] vote for death and never vote for life in

prison without the possibility of parole for a defendant convicted of first degree murder and a special circumstance? (16CT 4201.)

Are you so strongly opposed to the death penalty that you would **always** vote against death regardless of what evidence of aggravation or mitigation is presented? (16CT 4202.)

Are you so strongly in favor of the death penalty that you would **always** vote for death regardless of what evidence of aggravation or mitigation is presented? (16CT 4202.)

In a penalty phase, would you want to hear evidence of aggravation and mitigation? (16CT 4202.)

In a penalty phase would you **always** vote for death, regardless of the mitigating evidence? (16CT 4202.)

In a penalty phase would you **always** vote for life, regardless of the aggravating evidence? (16CT 4202.)

Regardless of your views of the death penalty, would you be able to vote for death for a defendant if you believed, after hearing all the evidence, that the death penalty was appropriate? (16CT 4202.)

Will your feelings about the death penalty impair your ability to be a fair and impartial juror in this case? (16CT 4202.)

In his prefatory remarks to the potential jurors before voir dire examination, the trial court continued in the same vein. The court told the jury: "Jurors who would never impose death cannot sit in this case. [¶] Jurors who would never impose life cannot sit on this case." (5RT 1307:7-10.)

The court went on to explain that he and other judges have found that "people kinda break themsel[ves] down into four categories in a case like this." (5RT 1307:16-17.) The court explained further:

> We have the category number one people. These are folks that don't believe in the death penalty. And that's fine. Many of you said you could never impose death and I respect that decision. I am not here to try to change your mind. (5RT 1307:18-22.)
>
> But you are a category one person. You are somebody who would never ever vote to convict or to put to death someone at the hands of the state. And that's fine. I respect that decision. (5RT 1307:23-26.)
>
> We have a category two person. This is the person who's strongly in favor of the death penalty. He is kinda of an eye for an eye guy who says if this person, this defendant, committed murder with special circumstances, he must die. [¶] I don't care about his personal history or background. I don't care about the mitigating evidence. Murder means he should be executed. That is a category number two person. We have some of those in this group. (5RT 1307:27-1308:8.)
>
> Then we have what I call the category three person. And this is the person who says, you know, I believe in the death penalty. But, you know, I know myself. And I don't think I could ever vote to put somebody to death. (5RT 1308:9-14.)

The court went on to describe the anguish experienced by category three jurors who, though they believed in the death penalty, found when faced with making a decision that they could not vote for death. (5RT 1308-1309.) The court then described the category four person.

> Nothing wrong with being a category three person. Nothing wrong with being a category one person. Nothing wrong with being a category two person. (5RT 1310:1-4.)
>
> The reason I bring these up, is because I know some of you are going to fall in these categories. The 4th category, the category four person is the person who says, you know, I can go either way. I want to hear it all. And I was really

> happy to read the questionnaire. Many of you said I want to hear everything that I am entitled to hear before I have to make such a decision. But many of you said I could make such a decision. And that's all we're after. We want people that can make the decision. [¶] I am not sending any messages here. We want people to make a decision based on the evidence. And that's all we want. (5RT 1310:5-17.)

During his voir dire examination of the panel, the court asked each prospective juror to select the category that best fit him or her. For example, the court asked the following representative questions of Prospective Juror No. 1:

> The Court: What would you – How would you categorize yourself; Are you a number one, are you somebody that would never vote for death? (5RT 1314:15-17.)
>
> Are you a number two, are you somebody that would always vote for death if someone committed murder? (5RT 1314:18-19.)
>
> Are you a number [] three, someone who kinda believes in the death penalty but couldn't – could never impose death themselves? (5RT 1314:20-22.)
>
> Or are you a number four, someone who would be able to weigh all the evidence and make an appropriate decision? (5RT 1314:23-25.)

B. Prospective Juror No. 74

In her questionnaire responses, Prospective Juror No. 74 wrote that she had "no opinion one way or the other" about the death penalty, and added: "I just don't want to be the one to decide; I wouldn't choose to kill someone." (16CT 4201.) She considered death to be a more

severe penalty than life without the possibility of parole because it "ends someone's life." (16CT 4201.) On the one hand, she said she was "so strongly opposed to the death penalty that [she] would **always** vote for life in prison without the possibility of parole and never vote for death for a defendant convicted of first degree murder and a special circumstance." (16CT 4201; boldface in original.) On the other hand, she said she was unsure about whether she was "so strongly opposed to the death penalty that [she] would **always** vote against death regardless of what evidence of aggravation or mitigation is presented." (16CT 4202; boldface in original.)

Prospective Juror No. 74 also responded in her questionnaire that she would "want to hear evidence of aggravation and mitigation" in the penalty phase, that she would not "**always** vote for death regardless of the mitigating evidence, and that she would probably "**always** vote for life regardless of the aggravating evidence." (16CT 4202; boldface in original.) However, she also said that she would "be able to vote for death for a defendant if [she] believed, after hearing all the evidence, that the death penalty was appropriate." (16CT 4202.) And, importantly, she stated that her "feelings about the death penalty would not impair [her] ability to be a fair and impartial juror in this case." (16CT 4202.)

In addition, Prospective Juror No. 74 stated that she understood (1) that the charges are not evidence; (2) that the defendants are entitled to the presumption of innocence; (3) that the State must prove the case beyond a reasonable doubt; (4) that the defendants are not required to prove their innocence; (5) that the defendants have a constitutional right not to testify; (6) that she must judge the evidence as to each count separately; and (7) that she must judge the case against each defendant separately. She

also agreed to follow the above legal principles and apply them in this case. (16CT 4200.)

When the court asked during voir dire examination that she select a descriptive category for herself, Prospective Juror No. 74 responded, as "pretty much a three." (5RT 1356:6-7.) The following colloquy ensued.

> The Court: Pretty much a three. Are you a three? (5RT 1356:8-9.)
>
> Prospective Juror No. 74: Yeah, I would say so. It would have to be for me to put someone to death, the aggravating circumstance be a lot and there would be like no mitigating evidence. So it's a good chance that I am a three. (5RT 1356:10-14.)
>
> The Court: Well, but you are saying that you could put somebody to death.? (5RT 1356:15-16.)
>
> Prospective Juror No. 74: It would have to be really harsh circumstances. (5RT 1356:17-18.)
>
> The Court: That is all right. It's up to the People to persuade you. [¶] I am saying that number threes are people who say, Judge, I know myself. I could never, regardless of what the evidence was, put somebody to death. [¶] Are you that person? (5RT 1356:19-24.)
>
> Prospective Juror No. 74: Well, I could be a four with three tendencies. (5RT 1356:25-26.)
>
> The Court: Yes, and we're not allowing that this morning. No four with three tendencies. But I understand what you are saying. [¶] So are you a three or a four? [¶] You sound like you are a four? (5RT 1356:27-1357:3.)
>
> Prospective Juror No. 74: I could be a four. (5RT 1357:4.)
>
> The Court: Yeah, I think you are a four. But the prosecutor is taking a note here. Okay. (5RT 1357:5-6.)

Later, during questioning by counsel for Flores (Mr. Bisnow), Prospective Juror No. 74 reaffirmed that she could carry out her duties as a juror.

> Mr. Bisnow: Number 74? Where are you? Okay. You had some problems, but you think that you could be a neutral juror here? (5RT 1384:20-22.)
>
> Prospective Juror No. 74: Oh, yeah. (5RT 1384:23.)
>
> Mr. Bisnow: Okay. In both not only the guilt phase, but also the penalty phase? (5RT 1384:24-25.)
>
> Prospective Juror No. 74: Like I said before, I would lean towards, you know, like [sic] instead of death, but if I thought the aggravating was enough, then you know it would be hard, but I could make the decision. (5RT 1384:26-1385:1.)

In response to questioning by the prosecutor (Mr. Levine), replete with graphic descriptions of jurors having to return with a death verdict to the courtroom filled with the defendant's family,[52] Prospective Juror No. 74, said, "I don't think I could do it." (5RT 1388:11-12.)

Later, in formulating the list of prospective jurors to be excused for cause, the trial court said: "And in addition to those jurors, I would add Number 74 who has vaccilated [sic] between being a three and a four, and I think Mr. Levine pushed her over or got her to commit to being

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[52] The prosecutor said, for example: "Is there anybody that has listened to what I've said and starting to think, whoa, wait a minute, in front of the defendants, I am going to have to come back and return a verdict of death in front of them. [¶] Maybe with their family sitting out in the audience, I have to tell a mother that her son is going to be put to death?" (5RT 1387:1-17.)

a three." (5RT 1396:17-20.) The court thereupon excused Prospective Juror No. 74 for cause over objection of defense counsel. (3RT 898; 5RT 1396, 1397.)

As appellant explains in the next section, the law is settled that a prospective juror may be challenged for cause based upon her views regarding capital punishment only if those views would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Stewart* (2004) 33 Cal.4th 425.)

As the foregoing shows, Prospective Juror No. 74 expressed both confusion and reservations toward the death penalty, but consistency in her representations that her feelings about the death penalty would not impair her ability to be a fair and impartial juror in the case and that she could weigh aggravating and mitigating evidence and reach a determination about penalty. The trial court therefore erred in excusing Prospective Juror No. 74 for cause.

C. The Relevant Law and Application to This Case

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right of trial by jury to criminal defendants in state courts. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150.) This right is also secured by article I, section 16, of the California Constitution. (Cal. Const., art. I, § 16.)

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the United States Supreme Court held that Illinois infringed a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury

when it excused for cause all those members of the venire who expressed conscientious objections to capital punishment. Under *Witherspoon*'s standard, jurors may be excluded from the jury for cause only if they make it unmistakably clear that they would automatically vote against death without regard to the evidence before them or if their attitude toward the death penalty would prevent them from making an impartial decision as to guilt. (*Id.*, at p. 522 fn. 21.)

In *Adams v. Texas* (1980) 448 U.S. 38, the Court revisited the *Witherspoon* standard and the iterations of that standard in the cases that followed it. *Adams* explained that *Witherspoon* and its progeny established the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the juror's performance of his duties in accordance with his instructions and his oath. (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) One of the potential jurors in *Adams* was excluded based on his statement, "Well, I think it probably would [affect my deliberations] because after all, you're talking about a man's life here. You definitely don't want to take it lightly." (*Id.*, at p. 50 fn. 7.) The Court found that the juror's acknowledgment was meant only to indicate the juror would be more emotionally involved or would view his task with greater seriousness and gravity. It did not demonstrate that the prospective juror was unwilling or unable to follow the law or obey his oath. (*Id.*, at p. 49.) The juror's refusal was thus constitutional error.

In *Wainwright v. Witt* (1985) 469 U.S. 412, the Court reaffirmed the standard articulated in *Adams* was proper and clarified its decision in *Witherspoon*. The standard for excusing a juror for cause based

on death penalty views is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) *Witt* observed that the *Adams* standard is proper because it is "in accord with traditional reasons for excluding jurors and with the circumstances under which such determinations are made." (*Id.*, at p. 423.) "*Witherspoon* is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment. Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of. . . ." (*Ibid.*)

More recently, in *Uttecht v. Brown* (2007) 551 U.S. 551, the United States Supreme Court reiterated the applicable principles as follows: "First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. (*Witherspoon* [*v. Illinois* (1968)], 391 U.S., at 521. . . . Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. [*Wainwright v.*] *Witt*, [*supra*,] 469 U.S., at 416. . . . Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. *Id.*, at 424. . . . Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. *Id.*, at 424-434 . . . ." (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 9.)

This Court's decisions are consistent with the standard articulated by the United States Supreme Court. In *People v. Crittenden* (1994) 9 Cal.4th 83, 121, this Court held that a prospective juror may be challenged for cause based upon his or her views regarding capital punishment only if those views would "prevent or substantially impair" the performance of the juror's duties as defined by the court's instructions and the juror's oath.

In *People v. Kaurish* (1990) 52 Cal.3d 648, 699, this Court recognized that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty.

In *People v. Stewart* (2004) 33 Cal.4th 425, this Court elaborated upon the discussion in *Kaurish*. "Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt*, *supra*, 469 U.S. 412." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447.) *Stewart* further explained, "A juror might find it very difficult to vote to impose *the death penalty*, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow

the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*Ibid.*)

In *People v. Pearson* (S120750; filed January 9, 2012; 2012 Cal.Lexis 2), the trial court, acting in express reliance on *People v. Guzman* (1988) 45 Cal.3d 915, excused a prospective juror after finding the juror held "equivocal views on capital punishment." This Court rejected such a reading of *Guzman*. Citing *Uttrecht, supra*, this Court noted: "*Guzman* does not stand for the idea that a person is substantially impaired for jury service in a capital case because his or her ideas about the death penalty are indefinite, complicated or subject to qualifications, and we do not embrace such a rule. As the high court recently reminded us, 'a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause.' (*Uttecht v. Brown, supra*, 551 U.S. at p. 9.) Personal opposition to the death penalty is not itself disqualifying, since '[a] prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law.' (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.) It follows the mere absence of strong, definite views about the death penalty is not itself disqualifying, since a person without strong general views may also be capable of following his or her oath and the law." (*People v. Pearson, supra*, slip opn., at p. 51; 2012 Cal. LEXIS 2 (Cal. Jan. 9, 2012).)

This Court further observed that the exclusion of prospective jurors holding equivocal views on capital punishment results in an unconstitutionally biased selection process. "To exclude from a capital jury

all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process. So long as a juror's views on the death penalty do not prevent or substantially impair the juror from "conscientiously consider[ing] all of the sentencing alternatives, including the death penalty where appropriate" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146), the juror is not disqualified by his or her failure to enthusiastically support capital punishment." (*People v. Pearson, supra*, slip opn., at p. 53; 2012 Cal. LEXIS 2 (Cal. Jan. 9, 2012).)

Here, Prospective Juror No. 74's questionnaire responses reflected a juror who had no fixed opinion about the death penalty in general, but who had concerns about herself imposing a penalty that would "end someone's life." Juror No. 74 said in her questionnaire that she would be able to vote for death without regard for her views on the death penalty if, after hearing all of the evidence, she thought death was the appropriate penalty. She wanted to hear aggravating and mitigating evidence during the penalty phase. She said she would not always vote for death regardless of the mitigating evidence. She said her feelings about the death penalty would not impair her ability to be a fair and impartial juror in the case. Further, she stated that she understood the legal principles that would govern the trial as they were set forth in the questionnaire and she agreed to follow and apply them in the case.

During voir dire examination by the court and then by defense counsel, Juror No. 74 said, "It would have to be really harsh circumstances," but that she could impose the death penalty. "Like I said before, I would lean towards, you know, like [sic] instead of death, but if I thought the aggravating was enough, then you know it would be hard, but I

could make the decision." Then, in response to the prosecutor's emotionally fraught scenario involving the return of a death verdict before the defendant's mother, Juror No. 74 said, "I don't think I could do it."

In sum, Prospective Juror No. 74 stated a personal conscientious objection to *imposing* the death penalty, but stated and restated that if "the aggravating was enough, . . . it would be hard, but I could make the decision." It was only after the prosecutor had woven a hypothetical aimed at eliciting an emotional rather than a rational response that Juror No. 74 hesitated and said, "I don't think I could do it."

In all other ways, however, Juror No. 74's responses persuasively demonstrated an ability to set aside her personal reservations about imposing the death penalty, to weigh and consider the aggravating and mitigating evidence, and to make an evidence-based determination about whether death is the appropriate penalty. Juror No. 74 affirmed by her questionnaire responses that she understood and agreed to abide by the legal principles that governed the trial and that she would be able to vote for death if, after hearing all of the evidence, she found death to be the appropriate penalty. And, she stated that her feelings about the death penalty would not impair her ability to be a fair and impartial juror in the case.

Decisions of the United States Supreme Court and of this Court, as set forth above, make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person under *Witt*, *supra*. Juror No. 74's comment that "for me to put someone to death, the aggravating circumstance [would need] to be a lot," is not a sufficient basis for exclusion. In *Stewart*, this Court

recognized that "A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*People v. Stewart*, *supra*, 33 Cal. 4th at p. 447; see also *People v. Kaurish*, *supra*, 52 Cal.3d at p. 698.) A review of Juror No. 74's responses reveal a juror whose feelings about the death penalty would not impair her ability to be a fair and impartial juror; who wanted to hear aggravating and mitigating evidence; who would weigh and consider all penalty evidence and who would carry out her obligations to impose a death sentence if the "aggravating was enough."

Under the circumstances present here, Juror No. 74's brief emotional response to the prosecutor's hypothetical, when considered in conjunction with the remainder of Juror No. 74's responses, is not sufficient to establish a basis for exclusion for cause. Accordingly, the trial court's finding that Juror No. 74's views on imposition of the death penalty would prevent or substantially impair the performance or her duties as a juror is not supported by substantial evidence.

D. Reversal of the Penalty Judgment Is the Appropriate Remedy because Execution of the Death Sentence Would Deprive Appellant of His Life without Due Process of Law

By erroneously excusing Juror No. 74 for cause, the trial court denied defendant the impartial jury to which he was entitled under the

Sixth and Fourteenth Amendments to the United States Constitution. (*Uttecht v. Brown*, *supra*, 551 U.S. at pp. 6, 9.)

In *Witherspoon*, the United States Supreme Court held that "a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521, fn. omitted.) *Witherspoon* held that under such circumstances, the death sentence must be reversed. "Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 521-523.) In ordering the reversal, the Court said: "Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law." (*Id.*, at p. 523.)

In *Gray v. Mississippi* (1987) 481 U.S. 648, the Supreme Court said: "Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 416), and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply. We have recognized that 'some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.' *Chapman v. California* (1967) 386 U.S. 18, 23. The right to an

impartial adjudicator, be it judge or jury, is such a right. (*Id.*, at 23, n. 8.)" (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 668; see also *Davis v. Georgia* (1976) 429 U.S. 122, 123; *United States v. Chanthadra* (10th Cir. 2000) 230 F.3d 1237, 1270-1272.)

This Court has recognized that the controlling decisions of the Supreme Court compel the automatic reversal of the death sentence wjem a prospective juror is excused without satisfying the *Witt* standard. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962; *People v. Heard* (2003) 31 Cal.4th 946, 966; *People v. Stewart*, *supra*, 33 Cal.4th at p. 454.) "Furthermore, the governing high court decisions also establish that although such an error does not require reversal of the judgment of guilt or the special circumstance findings, the error does compel the automatic reversal of defendant's death sentence, and in that respect the error is not subject to a harmless-error rule, regardless whether the prosecutor may have had remaining peremptory challenges and could have excused Prospective Juror [74]." (*People v. Heard*, *supra*, 31 Cal.4th at p. 966.)

For the reasons set forth above, appellant respectfully submits that the record does not support the trial court's excusal of Prospective Juror No. 74 for cause under the governing legal standard (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424) and that this error requires reversal of appellant's death sentence without inquiry into prejudice.

Guilt Phase Issues

III.

THE TRIAL COURT COMMITTED FEDERAL CONSTITUTIONAL ERROR WHEN IT ERRONEOUSLY INSTRUCTED THE JURY THAT A PERSON WHO AIDS AND ABETS IS "EQUALLY GUILTY" OF THE CRIME COMMITTED BY A DIRECT PERPETRATOR. IN A PROSECUTION FOR MURDER, AN AIDER AND ABETTOR'S CULPABILITY IS BASED ON THE COMBINED ACTS OF THE PRINCIPALS, BUT THE AIDER AND ABETTOR'S OWN MENS REA AND THEREFORE HIS LEVEL OF GUILT "FLOATS FREE."

A. INTRODUCTION

Appellant was convicted by the jury of the first degree murders of John Diaz (count 42) and Arturo Madrigal (count 45) and of the attempted willful, deliberate, and premeditated murder of Fernando Gutierrez (count 46.)

The prosecution's evidence showed that John Diaz, a member of a Monrovia gang, was shot and killed in Baldwin Park by nine millimeter gunfire while riding on the handlebars of a bicycle pedaled by his brother Paul Gonzales. (6RT 1637-1639.) Gonzales identified codefendant Flores as the shooter and passenger in a black SUV that made two U-turns to drive past Diaz and Gonzales and testified that Flores yelled out "Where you from?" just before shooting. Gonzales made no identification of the vehicle's driver or of appellant. (6RT 1640-1643, 1649-1650, 1667, 1673, 1675, 1684.)

The prosecution also presented Flores's extrajudicial statement confirming that he was the shooter. When Flores and appellant

acted as their own counsel, they met with the prosecutor for jailhouse interviews. At that time, Flores told the prosecutor that he fired five shots from a nine millimeter firearm and killed a male riding on the handlebars of a bicycle. (DPSuppIII, SuppCT 50:9-10, 12-14.) Flores also told Levine that appellant was the driver, at which point the transcript reflects that appellant laughed and said, "Catch me?" (DPSuppIII, SuppCT 68:5-7, 9-10.) The shooting of Diaz was revisited in a subsequent meeting between the prosecutor and the pro per defendants. On this occasion, appellant said he was driving a "four-runner" and said Diaz had suffered a shot "in front of his mouth." (DPSuppIII, SuppCT107:11, 13.) Flores again confirmed that he was the shooter and appellant the driver in this incident. (DPSuppIII, SuppCT 109:13-20.)

The prosecution's evidence regarding the shooting of Arturo Madrigal and Fernando Gutierrez showed that Madrigal was parking his Chevrolet Blazer when a car stopped alongside and someone called out, "Where you from?" Gutierrez, who was Madrigal's passenger, said, "We're not from nowhere." (8RT 2028-2031.) Gutierrez told police there were four male Hispanics with shaved heads in the car and that the passenger fired shots that killed Madrigal. (8RT 2035-2036.) The killing bullet was determined to be a nine millimeter. (12RT 2721.)

During their jailhouse interviews with the prosecutor, Flores and appellant also spoke of a shooting involving a Blazer. Flores said he was the shooter and appellant said he drove the car. (DPSuppIII, SuppCT 110:15-19, 21.) Flores said he shot the driver once in the face, once in the neck and that the passenger ran. Appellant agreed. (DPSuppIII, SuppCT 112:10-13, 20-21; 113:4, 8-10.) Asked for the reason for the shooting,

appellant replied, "He was a gang member, man," and described the act as "a vandal – it's a – it's a vandal type of thing. You're driving around your neighborhood looking for people to kill." (DPSuppIII, SuppCT 14:10-17.) Appellant said Flores used "a different 9 millimeter" in this incident. (DPSuppIII, SuppCT 116:15-18.)

In arguing appellant's culpability for these crimes, the prosecutor described appellant's role as the driver in these cases and said a driver aids and abets in a drive-by shooting and is just as culpable as the shooter. The prosecutor further argued that "[p]rincipals include those who directly and actively commit the act constituting the crime, and those who aid and abet in the commission of the crime." The prosecutor said, "Each principal, regardless of the extent or manner of participation[,] is *equally guilty*." (13RT 2868; italics added.)

The trial court instructed the jury similarly, stating that those who aid and abet a crime and those who directly perpetrate the crime are principals and *equally guilty* of that crime. (CALJIC No. 3.00; 17CT 4515; 13RT 2958.)

That instruction incorrectly stated the law when it said that the actual killer and the aider and abettor are *equally guilty* of the crime. An aider and abettor of a homicide is not always as guilty as the actual killer. Rather, an aider and abettor's guilt in a homicide prosecution, not involving felony murder, is based on the combined acts of all the principals, but on the aider and abettor's own mens rea. An aider and abettor may therefore be culpable for a lesser crime than the direct perpetrator and it is error to instruct the jury to the contrary. (*People v. McCoy* (2001) 25

Cal.4th 1111, 1120; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165; *People v. Nero* (2010) 181 Cal.App.4th 504, 515-518.)

Appellant was entitled to have the jury consider his culpability in light of his own mens rea in deciding his guilt of the crimes of murder or attempted premeditated murder and, if found liable for murder or attempted murder, in determining the degree of murder or attempted murder for which he is liable. (*People v. Concha* (2009) 47 Cal.4th 653, 663.)

Defense counsel did not object with specificity to this instruction, but this failure has no legal consequence. A trial court has an independent duty to correctly instruct the jury regarding applicable legal principles. (Pen. Code, § 1259; *People v. Graham* (1969) 71 Cal.2d 303, 317-318.)

Moreover, because the facts of these crimes demonstrate instances in which the liability of the actual killer may have been greater than the liability of appellant (the prosecution's proof of appellant's acts and mens rea at the time of the individual shootings was sparse and appellant's post-crime statements do not necessarily prove he possessed the joint operation of act and mental state required for proof of culpability), the instructional error may was not harmless beyond a reasonable doubt.

Misinstruction on elements of a crime is federal constitutional error. *(Neder v. United States* (1999) 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) The effect of such violation is measured against the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24, which asks whether it has been

demonstrated beyond a reasonable doubt that the jury verdict would have been the same in the absence of the misinstruction.

B. THE INSTRUCTIONS REGARDING THE LIABILITY OF PRINCIPALS GIVEN TO APPELLANT'S JURY

The trial court instructed the jury in the language of the pattern CALJIC instructions, defining a principal and the liability of a principal (CALJIC No. 3.00) and defining an aider and abettor (CALJIC No. 3.01), as follows:

> Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation[,] is equally guilty. Principals include:
>
> 1. Those who directly and actively commit the act constituting the crime, or
>
> 2. Those who aid and abet the commission of the crime. (CALJIC No. 3.00; 17CT 4515; 13RT 2958.)

> A person aids and abets the commission of a crime when he or she:
>
> (1) With knowledge of the unlawful purpose of the perpetrator, and
>
> (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and
>
> (3) By act or advice aids, promotes, encourages or instigates the commission of the crime.
>
> A person who aids and abets the commission of a crime need not be present at the scene of the crime.
>
> Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.

> Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting. (CALJIC No. 3.01; 17CT 4516; 13RT 2958-2959.)

The directive of these instructions is clear. The prosecution's evidence showed and the prosecutor argued that codefendant Flores shot and killed John Diaz and Arturo Madrigal and attempted to shoot and kill Fernando Gutierrez with premeditation and deliberation or preceded by lying in wait or by discharging a firearm with the specific intent to kill from vehicles driven by appellant. (13RT 2865-2867, 2873-2874.) If the jury found that appellant acted as an aider and abettor, then it was bound by the instructions to find him *equally guilty* of first degree murder without first determining whether appellant acted with the requisite mens rea for murder and the requisite mens rea for the Penal Code section 189 elements for first degree murder, i.e., murder committed with premeditation and deliberation or preceded by lying in wait or by discharging a firearm with the specific intent to kill from a vehicle.

The instructions on an aider and abettor's liability incorrectly stated the law. An aider and abettor's guilt in a murder prosecution is based on the combined acts of the principals, but on the aider and abettor's personal mental state, as appellant explains below. None of the instructions regarding the liability of principals corrects the misinstruction and misdirection.

C. THE *EQUALLY GUILTY* LANGUAGE OF THE AIDER AND ABETTOR INSTRUCTIONS MISDIRECTED THE JURY IN DETERMINING APPELLANT'S CULPABILITY FOR MURDER. AN AIDER AND ABETTOR'S GUILT IN A MURDER PROSECUTION IS BASED ON THE COMBINED ACTS OF THE PRINCIPALS, BUT ON THE MENTAL STATE OF THE AIDER AND ABETTOR.

Recently, in *People v. Concha* (2009) 47 Cal.4th 653, our Supreme Court was asked to determine whether a defendant may be liable for first degree murder when his accomplice is killed by the intended victim in the course of an attempted murder. In concluding that the defendant in such circumstances may be convicted of first degree murder if he personally acted willfully, deliberately, and with premeditation during the attempted murder, the Court relied on the theory of liability known as provocative act murder, which the Court described as "not an independent crime with a fixed level of liability," but rather "simply a type of murder." (*Id.*, at p. 663.) Appellant was not prosecuted on a theory of provocative act murder and does not rely on *Concha* in that respect. What *Concha* does provide is a helpful path to understanding the extent and nature of accomplice liability in the context of a murder prosecution and an analytical framework that, when followed, shows why the trial court's instruction in this case that the actual killer and the aider and abettor are "equally guilty" was legally incorrect. Appellant relies on that particular aspect of *Concha*'s analysis.

Concha, in important part, relied and built upon the Court's earlier decision in *People v. McCoy* (2001) 25 Cal.4th 1111.[53] In *McCoy*, the Court held that in some situations, an aider and abettor may be guilty of

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[53] Both *Concha* and *McCoy* were authored by Chin, J.

a greater homicide-related offense than the actual perpetrator, reasoning that an aider and abettor was liable for the combined acts of the aider and abettor and the direct perpetrator, but that his guilt was based on his own mental state. (*Id.*, at p. 1118.)

Appellant first summarizes *Concha*'s conclusion in the words of the Court and then discusses the analytical framework that resulted in that conclusion.

" . . . [A] defendant is liable for murder when the actus reus and mens rea elements of murder are satisfied. The defendant or an accomplice must proximately cause an unlawful death, and the defendant must personally act with malice. Once liability for murder is established in a provocative act murder case, **or in any other murder case**, the degree of murder liability is determined by examining the defendant's personal mens rea and applying *section 189*. Where the individual defendant personally intends to kill and acts with that intent willfully, deliberately, and with premeditation, the defendant may be liable for first degree murder for each unlawful killing proximately caused by his or her acts, including a provocative act murder. Where malice is implied from the defendant's conduct or where the defendant did not personally act willfully, deliberately, and with premeditation, the defendant cannot be held liable for first degree murder." (*People v. Concha*, *supra*, 47 Cal.4th at pp. 663-664; italics in the original; boldface added.)

The Court began its analysis in *Concha* by defining murder, its required acts and mental states, and the effect of adding accomplice liability to the calculus.

"Murder is the unlawful killing of a person with malice aforethought. ([Pen. Code], § 187.) Murder includes both actus reus and mens rea elements. To satisfy the actus reus element of murder, an act of either the defendant *or an accomplice* must be the proximate cause of death. [Citations omitted.]" (*People v. Concha*, *supra*, 47 Cal.4th at p. 660.)

"For the crime of murder, as for any crime other than strict liability offenses, 'there must exist a union, or joint operation of act and intent, or criminal negligence. ([Pen. Code], § 20.)" (*People v. Concha*, *supra*, 47 Cal.4th at p. 660.) "To satisfy the mens rea element of murder, the defendant must *personally* act with malice aforethought. ([*People v.*] *McCoy* [(2001) 25 Cal.4th 1111,] 1118.)" (*Id.*, at p. 660; italics added.)

In *People v. McCoy*, upon which *Concha* relied, the Court recognized that an aider and abettor may harbor a greater mental state than that of the direct perpetrator and thus be culpable of a greater crime than the actual perpetrator. The Court based this conclusion on the premise that an aider and abettor's mens rea is personal and may be different from that of the direct perpetrator. (*People v. McCoy*, *supra*, at pp. 1117-1118.) "'"[A]lthough joint participants in a crime are tied to a 'single and common *actus reus*,' 'the individual *mentes reae* or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way. If their *mentes reae* are different, their independent levels of guilt . . . will necessarily be different as well.' " ' (Dressler, Understanding Criminal Law [(2d ed. 1995)], § 30.06 [C], p. 450, fns. omitted.)" (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1118-1119.)

McCoy concluded that an aider and abettor's liability is "thus vicarious only in the sense that the aider and abettor is liable for another's actions as well as that person's own actions." (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1118.) "[W]hen an accomplice chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts. . . .'" (Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem (1985) 37 Hastings L.J. 91, 111, fn. omitted.) (*People v. Prettyman* (1996) 14 Cal. 4th 248, 259.) "But that person's own acts are also her acts for which she is also liable. Moreover, that person's mental state is her own; she is liable for her mens rea, not the other person's." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1120.) In sum, "[a]ider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea. If the mens rea of the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator." (*Ibid.*)

In *People v. Samaniego* (2009) 172 Cal.App.4th 1148, which was filed before but in the same year as *Concha*, the Court of Appeal (Second District, Division Two) determined that the legal principles regarding aider and abettor liability set forth in *McCoy* required the finding that "CALCRIM No. 400's direction that '[a] person is equally guilty of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it' (CALCRIM No. 400, italics added), while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified." (*People v. Samaniego*, *supra*, 172 Cal. App. 4th at p. 1165.)

Samaniego said:

> Though *McCoy* concluded that an aider and abettor could be guilty of a greater offense than the direct perpetrator, its reasoning leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state. [Citation.] Consequently, CALCRIM No. 400's direction that "[a] person is equally guilty of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it" . . . , while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified. (*Samaniego*, *supra*, 172 Cal.App.4th at pp. 1164-1165.)

The language of CALCRIM No. 400 in issue in *Samaniego*, like the language of CALJIC No. 3.00 in issue here, provided: " 'A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. . . . Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is *equally guilty* of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it.' " (*People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1162-1163.)

Soon after *Concha* was filed, in *People v. Nero* (2010) 181 Cal.App.4th 504, the Court of Appeal (Second District, Division Three), considered whether an aider and abettor may be less culpable than the direct perpetrator and, in reliance on *McCoy*, concluded that an aider and abettor's liability may be greater or less than the direct perpetrator's. *Nero* concluded that *McCoy*'s principles that aider and abettor liability is "premised on the combined acts of all the principals, but on the aider and

abettor's own mens rea" (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1120) and *McCoy*'s reliance on the notion that each person's mens rea "floats free" (*id.*, at p. 1121) controlled, and that there was therefore no reason for a different outcome when the actual killer was guilty of a lesser crime than the aider and abettor. (*People v. Nero*, *supra*, 181 Cal.App.4th at p. 515.) Because each person's mens rea "floats free," the court reasoned, each person's level of guilt would "float free." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1121.)

As noted, *Samaniego* concluded that the *equally guilty* language of CALCRIM No. 400 was "generally correct in all but the most exceptional circumstances," but misleading in the factual circumstances before it and should have been modified. (*People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1164-1165.) *Samaniego* thus sought to limit the scope of claims of error directed at the instruction. The state of the evidence in *Samaniego* was that there were no eyewitnesses to the actual shooting and therefore no evidence as to which defendant was the direct perpetrator.

In *Nero*, the jury was instructed with the *equally guilty* language of CALJIC No. 3.00, as was appellant's jury. (*People v. Nero*, *supra*, 181 Cal.App.4th 512.) In *Nero*, the evidence was such that the identities and actions of the direct perpetrator and the aider and abettor were clear, but the evidence regarding the aider and abettor's mens rea was not clear. The same is true of appellant's role as the aider and abettor, if in fact he was, and Flores' role as the actual killer in the Diaz and Madrigal killings and in the attempt to kill Gutierrez. Although the *Nero* jury had been given a number of other standard instructions that suggested the aider and abettor's mens rea was not tied to that of the direct perpetrator, the jury

still questioned whether it could find the aider and abettor guilty of a greater or lesser offense than the direct perpetrator. This observation led *Nero* to conclude that the *equally guilty* language of the pattern instructions (CALJIC No. 3.00; CALCRIM No. 400) was misleading even in unexceptional circumstances and required modification.[54] (*Id.*, at p. 518 ["We believe that even in unexceptional circumstances CALJIC No. 3.00 and CALCRIM No. 400 can be misleading."].)

In sum, *McCoy*, *Concha*, *Samaniego*, and *Nero* establish that a defendant charged with murder can be held vicariously liable for the actus reus, but not for the mens reas of an aider and abettor, because, as each of these cases has recognized, the mens rea of the aider and abettor "floats free," with the consequence that the level of guilt of the aider and abettor "floats free." They also establish that appellant's jury was incorrectly and misleadingly instructed under CALJIC No. 3.00 regarding appellant's

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[54] CALJIC No. 3.00 and CALCRIM No. 400 have now been revised to incorporate language reflecting the holdings in *People v. McCoy*; *People v. Samaniego*; and *People v. Nero*.

CALJIC No. 3.00 (Fall 201 Edition), for example, reads in relevant part: "Each principal, regardless of the extent or manner of participation is [equally guilty.] [guilty of a crime.] [] [¶] [When the crime charged is [either] [murder] [or] [attempted murder] [_____], the aider and abettor's guilt is determined by the combined acts of all the participants as well as that person[']s mental state. If the aider and abettor's own mental state is more culpable than that of the actual perpetrator, that person's guilt may be greater than that of the actual perpetrator. Similarly, the aider and abettor's guilt may be less than the perpetrator's, if the aider and abettor has a less culpable mental state.]" The accompanying use note discusses the holdings in *McCoy*, *Samaniego*, and *Nero* and directs that, when appropriate, the alternative bracketed material be used in place of the "equally guilty" language.

liability as an aider and abettor in the murders of Diaz and Madrigal and the attempted premeditated murder of Gutierrez. Reversal of the convictions is required.

D. THE *EQUALLY GUILTY* LANGUAGE OF THE AIDER AND ABETTOR INSTRUCTIONS MISDIRECTED THE JURY IN DETERMINING THE *DEGREE* OF APPELLANT'S MURDER LIABILITY. AN AIDER AND ABETTOR'S MURDER LIABILITY IS DETERMINED BY EXAMINING THE DEFENDANT'S PERSONAL MENS REA AND BY APPLYING PENAL CODE SECTION 189

In *Concha*, four assailants, including the defendants, attempted to murder their intended victim, but during the assault, the intended victim stabbed one of the assailants to death in self-defense. A jury convicted two of the assailants of first degree murder for the death of their accomplice. The Supreme Court held that the trial court correctly allowed the jury to consider returning a verdict of first degree murder against the defendants for the death of their accomplice under the provocative act doctrine, but, in reliance upon *McCoy*, *supra*, reversed the convictions for first degree murder because the instructions given the jury "failed to require that the jury resolve whether each defendant acted willfully, deliberately, and with premeditation," i.e., with the mens rea required by Penal Code section 189 to elevate the degree of murder from second to first degree. (*People v. Concha*, *supra*, 47 Cal.4th at p. 666.) *Concha* observed, " . . . it appears that the trial court did err when instructing on first degree murder . . . by not providing an instruction that explained that for a defendant to be found guilty of *first degree murder*, he *personally* had to have acted willfully, deliberately, and with premeditation

when he committed the attempted murder. (*McCoy*, *supra*, 25 Cal.4th at p. 1118.)" (*People v. Concha*, *supra*, 47 Cal.4th at p. 666.)

Concha explained that murder requires that a defendant or an accomplice proximately cause an unlawful death and that the defendant personally act with the mens rea of malice. The Court found that the defendants were guilty of murder (i.e., murder of the second degree by operation of law) as to any killing either of them proximately caused while acting together pursuant to their intent to kill (the mental state of malice) because although they did not intend to kill their accomplice, they had the intent to kill *a* person when they attacked the intended victim. (*Id.*, at pp. 661, 663.) However, the question regarding the degree of murder liability still remained to be determined.

"Once liability for murder is established in a . . . murder case, the degree of murder liability is determined by examining the defendant's personal mens rea and applying *section 189*. Where the individual defendant personally intends to kill and acts with that intent willfully, deliberately, and with premeditation, the defendant may be liable for first degree murder for each unlawful killing proximately caused by his or her acts. . . . Where malice is implied from the defendant's conduct or where the defendant did not personally act willfully, deliberately, and with premeditation, the defendant cannot be held liable for first degree murder." (*People v. Concha*, *supra*, 47 Cal.4th at pp. 663-664.)

Accordingly, "[o]nce liability for murder 'is otherwise established, section 189 may be invoked to determine its degree.' ([*People v.*] *Gilbert*, [(1965)], 63 Cal.2d [690], 705; see also [*People v. Caldwell* (1984)], 36 Cal.3d [210], 217, fn. 2, quoting *Gilbert* with approval; *People*

v. Cervantes [(2001)] 26 Cal.4th [860], 872–873, fn. 15 ['If proximate causation is established, the defendant's level of culpability for the homicide in turn will vary in accordance with his criminal intent.'].) Section 189 states that if an unlawful killing is 'willful, deliberate, and premeditated,' or is perpetrated by means of 'poison, lying in wait, torture . . . , discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death,' using specific types of weapons, destructive devices, explosives, or ammunition, or in the perpetration of certain enumerated felonies, it is murder of the first degree. ([Pen. Code,] § 189.) 'All other kinds of murders are of the second degree.' (*Ibid.*) Therefore, 'assuming legal causation, a person maliciously intending to kill is guilty of the murder of all persons actually killed. If the intent is premeditated, the murder or murders are first degree.' ([*People v.*] *Bland* [(2002)], 28 Cal.4th [313], 323-324, fn. omitted.) While joint participants involved in proximately causing a murder '"are tied to a 'single and common *actus reus*,' 'the individual *mentes reae* or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way. If their *mentes reae* are different, their independent levels of guilt . . . will necessarily be different as well.'"' (Dressler, Understanding Criminal Law (2d ed. 1995) § 30.06[C], p. 450, fns. omitted, as quoted with approval in *McCoy*, *supra*, 25 Cal.4th at pp. 1118-1119.)" (*People v. Concha*, *supra*, 47 Cal. 4th at pp. 661-662.)

In *Concha*, then, the Court found that each of the defendants shared an intent to kill a person when they attacked the intended victim. Thus, each defendant was liable for the combined attack and each had the requisite mens rea (malice) to be held liable for murder.

However, because Penal Code section 189 states that all murders are of the second degree unless they are one of the murders enumerated in that section, and because the trial court in *Concha* failed to require that the jury resolve whether each defendant acted willfully, deliberately, and with premeditation, the Court reversed the judgment of conviction. (*People v. Concha*, *supra*, 47 Cal.4th at p. 666.)

The identical instructional error in this case compels reversal of appellant's convictions for the murders of Diaz and Madrigal and the attempted premeditated murder of Gutierrez. The jury was incorrectly instructed that all principals are *equally guilty* as to the degree of murder liability.

As Penal Code section 189 provides and *Concha* and *McCoy* establish, a person who maliciously intends to kill is guilty of first degree murder only when he or she *personally* acts willfully, deliberately, and with premeditation or with any other mental state within the contemplation of section 189.

Here, the prosecution primarily contended that Diaz and Madrigal were intentionally killed willfully, deliberately, and with premeditation and that Flores premeditated the shooting of Gutierrez. Accordingly, the trial court instructed on murder perpetrated by means of a willful, deliberate, and premeditated killing with express malice. (CALJIC No. 8.20; 17CT 4520-4521; 13RT 2966-2967.) The jury was additionally instructed, however, on other alternate theories of liability for first degree murder – murder preceded by lying in wait and murder perpetrated by means of discharging a firearm from a motor vehicle where the perpetrator specifically intended to inflict death. (CALJIC Nos. 8.25, 8.25.1; 17CT

4521, 4522; 13RT 2967, 2968) Appellant was entitled to have his jury correctly instructed regarding whether he personally had the requisite mens rea for first degree murder before returning first degree murder verdicts.

For the first degree murders identified in section 189, other than murder committed with premeditation and deliberation, the prosecution need not prove premeditation and deliberation (*People v. Ruiz* (1988) 44 Cal.3d 589, 614 [murder by lying in wait does not require independent proof of premeditation, deliberation, or intent to kill]; *People v. Laws* (1993) 12 Cal.App.4th 786, 792-793 [prosecution need not prove intent to kill for first degree murder based on lying in wait]), but the prosecution must show that the defendant had a specific intent to do the underlying act that resulted in the killing (*People v. Steger* (1976) 16 Cal.3d 539, 546 [intent to inflict pain required for murder by torture]).

Steger is instructive. In *Steger*, our Supreme Court pointed out that because Penal Code section 189 defines certain specific types of unlawful killing as first degree murder and designates most other types of unlawful killing as second degree murder, "the prosecution is required to prove not only the elements of murder, but also the aggravating elements of first degree murder." (*People v. Steger, supra*, 16 Cal.3d at p. 545.) *Steger* reasoned: "In this perspective the phrasing of section 189 becomes clearer: 'All murder which is perpetrated by means of . . . torture, or *by any other kind* of willful, deliberate, and premeditated killing . . . is murder of the first degree . . . .' In labeling torture as a 'kind' of premeditated killing, the Legislature requires the same proof of deliberation and premeditation for first degree torture murder that it does for other types of first degree murder." (*Id.*, at pp. 545-546.)

The Court explained: "The element of calculated deliberation is required for a torture murder conviction for the same reasons that it is required for most other kinds of first degree murder. It is not the amount of pain inflicted which distinguishes a torturer from another murderer, as most killings involve significant pain. [Citation.] Rather, it is the *state of mind* of the torturer – the cold-blooded intent to inflict pain for personal gain or satisfaction – which society condemns. Such a crime is more susceptible to the deterrence of first degree murder sanctions and comparatively more deplorable than lesser categories of murder. [¶] Accordingly, we hold that murder by means of torture under section 189 is murder committed with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain." (*Id.*, at p. 546; italics added.)

Thus, in order to prove appellant culpable of first degree murder committed either with premeditation and deliberation or by means of lying in wait or by discharging a firearm from a motor vehicle when the perpetrator specifically intended to inflict death, the prosecution was required to prove both that appellant's mens rea satisfied the mens rea element to hold him liable for murder and that appellant had the requisite mental state for first degree murder, i.e., premeditation and deliberation, a specific intent to commit murder after lying in wait for the victim, or a specific intent to inflict death by shooting from a motor vehicle.

In *People v. Ruiz* (1988) 44 Cal.3d 589, the Court concluded that the lying-in-wait provision of Penal Code section 189 required proof that defendant "exhibited a state of mind which is 'equivalent to' . . . premeditation or deliberation." (*Id.*, 44 Cal.3d at p. 615.) In *People v. Poindexter* (2006) 144 Cal.App.4th 572, the court reiterated that first

degree murder lying in wait requires (1) a concealment of purpose; (2) a substantial period of watching and waiting for an opportune time to act; and (3) a surprise attack from a position of advantage following immediately. (*Id.*, at p. 580; citing *People v. Morales* (1989) 48 Cal.3d 527, 557.) *Poindexter* defined a "substantial period" of watching and waiting as a period "long enough to demonstrate a state of mind equivalent to premeditation or deliberation." (*People v. Poindexter*, *supra*, 144 Cal.App.4th at p. 581; citing *People v. Ceja* (1993) 4 Cal.4th 1139.)

Murder committed by a drive-by shooting is first degree murder for which the prosecution need not prove premeditation and deliberation if it is perpetrated by means of (1) discharging a firearm from a motor vehicle; (2) intentionally at another person outside of the vehicle; (3) with the intent to inflict death. (Pen. Code, § 189.) As noted, murder committed by drive-by shooting requires a specific intent to kill. If the intent is to inflict only great bodily injury, rather than death, the crime is not statutory first degree murder but could be second degree murder based on an implied malice theory. (See *People v. Chun* (2009) 45 Cal.4th 1172 (underlying felony merges with felony murder so as to preclude application of second degree felony murder rule, but evidence showed implied malice from willful shooting with conscious disregard for human life).)

Accordingly, in order to convict appellant of first degree murder committed willfully, deliberately, and with premeditation or by means of lying in wait or by drive-by shooting, the prosecution was required by *McCoy* and *Concha* to prove appellant had the personal mens rea for guilt based on one of these theories of culpability. Appellant was entitled to have the jury correctly instructed that his liability for first degree

murder rested on his personal mens rea. The instruction given to appellant's jury stated the contrary when it instructed that an aider and abettor was necessarily guilty of whatever crime the direct perpetrator committed.

E. A TRIAL COURT IS OBLIGATED TO CORRECTLY INSTRUCT THE JURY ON THE APPLICABLE LAW

As appellant has indicated above, defense counsel did not object to the incorrect instruction. Counsel's failure to specify the error claimed here does not, however, act as a bar to appellant's claim.

A trial court has an independent duty to correctly instruct the jury regarding applicable legal principles. Penal Code section 1259 provides:

> Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

In *People v. Graham* (1969) 71 Cal.2d 303, the trial court erred in failing to instruct on involuntary manslaughter due to diminished capacity. Not only was no defense request for such instruction made, but all three defense counsel acquiesced in the court's statement that "'everyone agrees that there is no evidence from which involuntary

manslaughter could be found; the only type of manslaughter that could be found here would be voluntary.'" (*Id.*, at p. 317.) Despite this, this Court concluded in *Graham* that there is placed upon the trial court an "affirmative duty to instruct the jury on its own motion on the general principles of law relevant to the issues of the case [which] can [not] be nullified by waiver of defense counsel." (*Id.*, at pp. 317-318.) An exception exists where "defense counsel deliberately and expressly, as a matter of trial tactics, objected to the rendition of a [correct] instruction." (*Id.*, at p. 318; *People v. Wickersham* (1982) 32 Cal.3d 307, 331.) In all other cases, instructions which misstate the elements of a crime or theory of criminal liability may be reviewed on appeal without an objection having been made in the trial court.

Inasmuch as there is no evidence here that defense counsel invited the jury to be misdirected as a matter of trial tactics, the erroneous instruction regarding accomplice liability may be reviewed on appeal without need for an objection in the trial court.

F. THE FAILURE TO INSTRUCT CORRECTLY ON THE ELEMENTS OF AIDING AND ABETTING WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

The failure to instruct correctly on the elements of aiding and abetting is assessed under the harmless beyond a reasonable doubt standard. (*People v. Hardy* (1992) 2 Cal.4th 86, 185-186; *People v. Dyer* (1988) 45 Cal.3d 26, 64.) Misinstruction on elements of a crime is federal constitutional error. *(Neder v. United States* (1999) 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

Here, no percipient witness identified appellant as either participating in, or even being present during the murders of Diaz and Madrigal and the attempted premeditated murder of Gutierrez. Instead, the prosecution presented evidence of appellant's role as the driver in both events through statements made primarily by Flores, but also by appellant, during their recorded jailhouse interviews with the prosecutor. These interviews were conducted a few years after the charged crimes were committed and while they may serve as circumstantial evidence of appellant's mental state at the time of the commission of the various crimes, appellant was entitled to have the jury consider such evidence in the context of the presence or absence of other evidence of his mental state at the times the crimes were committed in determining his culpability. Penal Code section 20 requires a joint operation of actus reus and mens rea at the time of the commission of the crime. (*People v. Concha*, *supra*, 47 Cal.4th at p. 660.) The instruction stating that principals in the commission of the crime are *equally guilty* manifestly directs the jury away from an evaluation of appellant's individual mens rea.

The case for first degree murder committed with express malice, premeditation, and deliberation or by means of lying-in-wait or by shooting from a motor vehicle with the intent to kill may have been strong, but it should and must be distinguished from the determination of appellant's own culpability. The case for first degree murder was strong for any person identified as the actual killer, but the evidence did not identify appellant as the actual killer. As to any aider and abettor, there is an inherent reasonable doubt as to the personal mens rea of that individual.

Without proof that appellant possessed the requisite mens rea, it is not possible to state beyond a reasonable doubt that absent the misinstruction, the jury verdict would have been the same – that appellant would have been found guilty of the first degree murders of Diaz and Madrigal and the attempted willful, deliberate, premeditated murder of Guiterrez. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

For these reasons, the error was not harmless beyond a reasonable doubt and reversal of both first degree murder convictions and the attempted premeditated murder conviction is warranted.

IV.

APPELLANT WAS DENIED HIS RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT WHEN THE RESULTS OF ARTURO MADRIGAL'S AUTOPSY WERE ENTERED INTO EVIDENCE THROUGH THE IN-COURT TESTIMONY OF A FORENSIC PATHOLOGIST WHO DID NOT PERFORM THE AUTOPSY

A. Introduction

Appellant was convicted in count 45 of committing the first degree murder of Arturo Madrigal (Pen. Code, § 187, subd. (a)) during a drive-by shooting (Pen. Code, § 190.2, subd. (a)(21)) for the benefit of a criminal street gang (Pen. Code, § 186.22). (17CT 4570; 14RT 3057-3058.)

In the course of prosecuting and convicting appellant of the murder of Madrigal, the prosecution introduced evidence of the results of Madrigal's autopsy, which was conducted in the Los Angeles County Coroner's Office by deputy medical examiner Dr. Juan Carrillo. (1CT 86-87; 7RT 1736.) At trial, Dr. Carrillo did not testify regarding the results of his autopsy. Instead, a *different* deputy medical examiner in the Coroner's Office, Dr. Lisa Scheinin, testified about the results of the autopsy performed by Dr. Carrillo. (7RT 1736.)

As a result of this procedure, Dr. Scheinin testified that Dr. Carrillo's autopsy report attributed the cause of Madrigal's death to "a gunshot wound of the head," and characterized the death as a homicide. (7RT 1739, 1744.) Dr. Scheinin testified that Dr. Carrillo described the wound "as entering the left side of the face just in front of the ear, then traveling left to right upward, and front to back through the head causing a

severe brain injury that consisted of going through the cerebellum, and more importantly, severing the brain stem and hitting the inside of the skull on the right side, and [that Dr. Carrillo further reported that] a bullet was recovered from that area." (7RT 1739.) Dr. Scheinin also testified that renderings of the wound within the skull prepared by Dr. Carrillo accurately depicted the location of the gunshot wound suffered by Madrigal and that Dr. Carrillo was able to determine the path of the bullet. (7RT 1741-1742.) Dr. Scheinin further testified that Dr. Carrillo also found a second, nonfatal, grazing gunshot wound to the knee and that he had located a corresponding hole in the left knee area of a pair of blue jeans. (7RT 1743-1744.) Dr. Scheinin was asked on cross-examination if Dr. Carrillo had determined the age of the grazing wound to the knee. Dr. Scheinin noted that Dr. Carrillo had made no specific statement about the age of the wound, but then offered her opinion that because Dr. Carrillo had failed to mention any crusting the wound was fresh, inflicted within a few hours of death or close to the time of death. (7RT 1745.)

The prosecution violated the Confrontation Clause by introducing one deputy medical examiner's testimonial statements in a forensic autopsy report through the testimony of a different deputy medical examiner who had neither performed nor observed any of the tasks or analyses described in the statements.

The Sixth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment (*Pointer v. Texas* (1965) 380 U.S. 400, 401, provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In *Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*), the United States Supreme Court held that under the Sixth Amendment, a witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. Later, in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527; 174 L.Ed.2d 314] (*Melendez-Diaz*), the Court held that forensic laboratory reports made for the purpose of producing evidence for litigation, like the autopsy report in issue here, are testimonial evidence. (*Id.*, 129 S.Ct. at p. 2532.) Then, in *Bullcoming v. New Mexico* (2011) ___ U.S. ___ [131 S.Ct. 2705; ___ L.Ed.2d ___] (*Bullcoming*), the Court held that the prosecution violates the Confrontation Clause when it introduces a forensic laboratory report containing a testimonial certification prepared by one scientist through the in-court testimony of a scientist who neither signed the certification or performed or observed the test reported in the certification.

The United States Supreme Court has repeatedly held that the prosecution violates the Confrontation Clause when it introduces one witness's testimonial statements through the in-court testimony of a second or surrogate witness. In *Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*), for example, the Court found a Confrontation Clause violation because "the State admitted Sylvia's statement against petitioner, despite the fact that he had no opportunity to cross-examine *her*" [italics added]. In *Davis v. Washington* (2006) 547 U.S. 813, 826 (*Davis*), the Court found a Confrontation Clause violation when "a note-taking policeman recite[d] the unsworn hearsay testimony of the declarant." In *Melendez-Diaz*, *supra*, Justice Kennedy in his dissent commented, "The Court made clear in *Davis*

that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2546.) In *Bullcoming*, the Court held that the admission into evidence of the defendant's blood alcohol level through the testimony of a substitute analyst from the same laboratory as the forensic analyst who prepared the report violated the defendant's right to confront the analyst who prepared the report. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2716.)

As the United States Supreme Court has explained, the Confrontation Clause "ensur[es] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." (*Maryland v. Craig* (1990) 497 U.S. 836, 846.) There are four "elements of confrontation." Confrontation (1) enables cross-examination concerning the witness's factual assertions, his believability, and his character; (2) guarantees that the witness gives his testimony under oath; (3) allows the trier of fact to observe the witness's demeanor; and (4) ensures that the witness testifies in the presence of the defendant. (*Ibid.*)

These elements of confrontation are only served when the forensic pathologist who conducted the autopsy testifies to his or her observations and analyses in the forensic autopsy report. They are not served when the testimonial statements are allowed into evidence through the in-court testimony of a surrogate witness who neither performed nor observed the autopsy.

Here, the record shows that neither the court nor the parties specified the evidentiary rule under which admission of this hearsay

evidence was sought and admitted. The record also shows that defense counsel made no objection to the admission of the autopsy evidence under the Sixth Amendment or on any other basis. (7RT 1732-1735.) This court may, however, review appellant's claim in the absence of objection below because, in failing to object to this prejudicial evidence, defense counsel provided appellant with ineffective assistance in violation of appellant's constitutional rights. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685; *People v. Pope* (1979) 23 Cal.3d 412, 422.)

As appellant will further explain below, the erroneous admission of this evidence was not harmless beyond a reasonable doubt and he is entitled to have his conviction of this count reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

B. The Record Fails to Establish That Dr. Carrillo Was Unavailable or That Appellant Had a Prior Opportunity to Cross-Examine Him

The record shows that on March 2, 2005, the prosecutor informed the court and counsel that the coroner he had intended to call that morning was unavailable because the coroner's wife had had a baby and that another coroner would be available "in his place to testify off of the autopsy report" later in the day.[55] (7RT 1732-1733.)

Accordingly, Dr. Carrillo's unavailability was of a temporary nature, event-driven by the birth of a child and the prosecution's witness

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[55] "Mr. Levine [the prosecutor]: . . . 'But also I had a problem – I was notified from the Coroner's Office that the coroner that was going to testify this morning, his wife had a baby. [] And they have to send a coroner in his place to testify off of the autopsy report and they won't be available until this afternoon.'" (7RT 1732:23-28, 1733:1-2.

schedule. Although Dr. Carrillo was not available to testify on March 2nd, nothing in the record indicates that Dr. Carrillo would not be available to testify for the prosecution in the remaining days of trial.

Crawford held that when a witness is unavailable the Sixth Amendment requires that the defendant must have had a prior opportunity for cross-examination before the witness's testimonial statements may be admitted into evidence. Here, the record shows that Dr. Carrillo may have been temporarily unavailable, but fails to establish that Dr. Carrillo was unavailable for the remainder of the trial. The record also fails to establish that appellant had a prior opportunity to cross-examine Dr. Carrillo regarding the Madrigal autopsy. Instead, the record shows only that the prosecution called Dr. Carrillo to testify about his autopsy of Madrigal's body at a grand jury proceeding held on November 25, 2002. At that proceeding, only 21 grand jurors, the trial prosecutor Mr. Darren Levine, and the grand jury's legal adviser Ms. Priver were present. No cross-examination of Dr. Carrillo by counsel representing appellant took place. (1CT 7-11, 84-86.)

Thus, there was no adequate demonstration at trial that Dr. Carrillo was both unavailable to testify and that the defense had a prior opportunity to cross-examine him on the subject of the Madrigal autopsy.

C. *Bullcoming* and *Melendez-Diaz* Establish That the Results of the Forensic Autopsy Performed by Dr. Carrillo Are Testimonial Evidence and Together with *Crawford* and *Davis* Present a Clear Iteration That the Confrontation Clause Does Not Permit the Testimonial Statement of One Witness to Enter into Evidence through the In-Court Testimony of a Second

In *Crawford*, the United States Supreme Court held that if the prosecution decides to introduce testimonial evidence, the Confrontation Clause guarantees the defendant the right to confront the declarant. (*Crawford*, *supra*, 541 U.S. at p. 68.) The Court explained that the "ultimate goal" of the Confrontation Clause "is to ensure reliability of evidence." (*Id.*, at p. 61.) The Court stated that the Confrontation Clause ensures reliability through a procedural rather than a substantive guarantee. The Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent) but about how reliability can best be determined." (*Ibid.*)

In further expressions, the Court has repeatedly held that the prosecution violates a defendant's Confrontation Clause rights when it introduces a witness's testimonial statement through the in-court testimony of someone other than the maker or creator of the testimonial statement.[56] In *Crawford*, in *Davis*, and in *Melendez-Diaz*, for example, the Court found confrontation violations in allowing police officers to testify to the

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[56] See *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2552, Kennedy, J., dissenting, "The Court today . . . [holds] that anyone who makes a formal statement for the purpose of later prosecution – no matter how removed from the crime – must be considered a 'witness against' the defendant."

testimonial statements others made in response to police questioning and in the admission of certificates containing forensic analysts' assertions regarding drug test results of substances found by police during their investigation. (*Crawford*, *supra*, 541 U.S. at p. 68; *Davis*, *supra*, 547 U.S. at p. 826; *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.) In *Bullcoming*, the Court found a confrontation violation in allowing one scientist to testify to forensic laboratory results reached by another scientist in the same laboratory in procedures the surrogate witness had neither performed nor observed. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2710.) But for the forensic specialties involved, the salient facts underlying appellant's claim of error echo those of the defendant in *Bullcoming*.

The clear implication of these holdings is that, absent unavailability and the prior opportunity for cross-examination, the declarant must testify regarding his or her own extrajudicial testimonial statements. ("The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2710); see also *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2546, Kennedy, J., dissenting, "The Court made it clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second. . . .")[57]

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[57] Justice Kennedy supported this observation by quoting, and by making the bracketed annotations included here, from *Davis*: "[W]e do not think it conceivable that the protections of the *Confrontation Clause* can readily be evaded by having a note-taking policeman [here, the laboratory employee who signs the certificate] *recite* the unsworn hearsay testimony of the declarant [here, the analyst who performs the actual test],

Other expressions by the Court lend credence to this assertion. For example, the Court has adhered to a literal reading of the constitutional text in formulating the principle that the Constitution ensures reliability of the evidence only through the procedural safeguard of confrontation. In keeping with that principle, *Crawford* overruled *Ohio v. Roberts* (1980) 448 U.S. 56, in which it had previously held that the Confrontation Clause did not bar testimonial statements that either fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. The Court said: "Where testimonial statements are involved, we do not think the Framers meant to leave the *Sixth Amendment*'s protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" (*Crawford, supra*, 541 U.S. at p. 61.)

Crawford further observed that where reliability is concerned, "replacing categorical constitutional guarantees [*viz.*, the cross-examination of the declarant prescribed by the Confrontation Clause] with open-ended balancing tests [*viz.*, assessing reliability through surrogate testimony]" does "violence" to the Framers' design because "[v]ague standards are manipulable." (*Crawford, supra*, 541 U.S. at pp. 67-68.)

Crawford continued:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such

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instead of having the declarant sign a deposition. Indeed, if there is one point for which no case – English or early American, state or federal – can be cited, that is it." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2546, Kennedy, J., dissenting, quoting from *Davis, supra*, 547 U.S. at p. 826.)

> statements from *Confrontation Clause* scrutiny altogether. **Where testimonial evidence is at issue, however, the *Sixth Amendment* demands what the common law required: unavailability and a prior opportunity for cross-examination.** (*Crawford*, *supra*, 541 U.S. at p. 68; boldface emphasis added.)

Crawford concluded: **"Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."** (*Id.*, at pp. 68-69; boldface emphasis added.)

In *Davis*, the Court adhered once more to the principle that the Confrontation Clause ensures the reliability of testimonial evidence only through the guarantee of confrontation, by stating that the requirement of confrontation is compelled even in circumstances where precluding testimonial evidence results in a "windfall" for the criminal defendant. The Court rejected contentions that the Confrontation Clause should be construed to allow "greater flexibility in the use of testimonial evidence" in domestic violence cases where the crime victims are more susceptible to coercion or intimidation and therefore more likely not to testify. The Court recognized that when the domestic violence victim does not testify the Confrontation Clause gives the criminal defendant a "windfall," but said: "We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." (*Davis*, *supra*, 547 U.S. at p. 833.) Indeed, the Court explained it would only compromise the defendant's confrontation right, "on essentially equitable grounds" pursuant to the rule of forfeiture by wrongdoing, under the extraordinary

circumstance when the defendant obtained the absence of a witness by wrongdoing. (*Ibid.*, quoting from *Crawford*, *supra*, 541 U.S. at p. 62.)

In *Melendez-Diaz*, the Court repeatedly explained that it is the maker or creator of the testimonial statement the defendant is entitled to confront. In circumstances analogous to those in appellant's case, the Court explained it is the analyst who made the assertions in the report who must testify. For example, the Court expressly and specifically said the Confrontation Clause required that the defendant be able to confront the forensic analysts who performed the drug tests and whose testimonial statements were in issue.

> In short, under our decision in *Crawford* the **analysts'** affidavits were testimonial statements, and the **analysts** were "witnesses" for the purposes of the *Sixth Amendment*. Absent a showing that the **analysts** were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "'be confronted with'" the **analysts** at trial. [Citation.] (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532; boldface emphasis added.)

In yet another demonstration that Confrontation Clause jurisprudence must adhere to the literal language of the constitutional text by compelling confrontation,[58] the Court rejected the contention that analysts are not subject to confrontation because they do not directly accuse the defendant of wrongdoing. The Court reasoned that the analysts

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[58] See criticism by the *Melendez-Diaz* dissent, Kennedy J., that the Court's adherence to the literal language of the constitutional text is "wooden" and "formalistic." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2547 ["the Court is driven by nothing more than a wooden application of the *Crawford* and *Davis* definition of 'testimonial. . . ."]; ["the formalistic and pointless nature of the Court's reading of the *Clause*"].)

provided testimony against the petitioner by proving one fact necessary for his conviction – that the substance he possessed was cocaine. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2533.)

As part of this discussion, the Court explained that the Sixth Amendment contemplates two classes of witnesses – those against a defendant and those in his favor. The Confrontation Clause of the Sixth Amendment guarantees a defendant the right to be confronted with witnesses "against him," and the Compulsory Process Clause guarantees a defendant the right to call witnesses "in his favor."

The Court then spoke directly to the question in issue here: "Contrary to respondent's assertion [that the defendant is not entitled to confront the analysts themselves], there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." (*Id.*, at p. 2534.)

Melendez-Diaz also rejected contentions that the analysts should not be subject to confrontation because forensic analysts are not "conventional" witnesses in that: (1) the analyst's report contains "near-contemporaneous observations," whereas a conventional witness recalls events observed in the past; (2) the analyst neither observed the crime nor any human action related to the crime; and (3) the analyst's statements were not provided in response to interrogation. (*Id.*, at pp. 2534-2535.)

In rejecting the first of these points – the notion that contemporaneous observations are a requisite for testimonial statements – the Court pointed out that its decision in *Davis* disproved the contention that contemporaneity of the reporting determined whether a statement is testimonial and its maker a witness within the meaning of the Confrontation

Clause. In *Davis*, the domestic battery victim's report was so fresh the trial court admitted it as a present sense impression. (*Id.*, at p. 2535, citing *Davis*, *supra*, 547 U.S. at p. 820.)

The Court rejected the second point – that the forensic analyst was not a conventional witness because the analyst had neither observed the crime nor any human action connected with it – because the contention was patently unsupported by authority. The Court also reasoned that if the Confrontation Clause were held to exempt those who did not observe the crime or human action connected with it, the anticipated result would be that all expert witnesses would conceivably be exempted from confrontation and a police crime scene report would be admissible without the authoring police officer being subjected to cross-examination. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535.)

The Court rejected the third contention – that the forensic analysts should not be subjected to confrontation because their statements were not provided in response to interrogation – again on the ground the contention was unsupported by authority, and also because the analysts' affidavits were in fact, as was the autopsy report in appellant's case, prepared in response to a police request. The Court referred once more to its holding in *Davis* and pointed out that there it was the wife's affidavit regarding a domestic battery that was prepared in response to a police officer's request that triggered the Sixth Amendment's protection (*Davis*, *supra*, 547 U.S. at pp. 819-820). The Court analogized that circumstance to the circumstance in the case before it – where the analysts' affidavits were also prepared pursuant to a police request – and concluded that the analogous circumstances required that "the analysts' testimony should be

subject to confrontation as well." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535.) In appellant's circumstance, Dr. Carrillo's autopsy findings identified a gunshot wound to the head as the cause of Madrigal's death and characterized the death as a homicide, necessary elements in the investigation and eventual prosecution of appellant. The analogy to the circumstances in *Davis* and *Melendez-Diaz* is apparent.

The United States Supreme Court also demonstrated its adherence to the literal language of the constitutional text in rejecting contentions that testimonial evidence produced by forensic laboratory analysts did not require confrontation to guarantee its reliability. *Melendez-Diaz* considered and systematically rejected arguments claiming that the scientific nature of the work of forensic analysts should cause them to be exempt from the requirements of the Confrontation Clause.

The Court, thus, rejected the contention that the Confrontation Clause should be construed to exempt "neutral, scientific testing," which, unlike testimony recounting historical events, is not "prone to distortion or manipulation," and the related contention that confrontation of forensic analysts would be of little value because the analyst is not likely to feel differently about the results of his testing when looking at the defendant. In the Court's view, these contentions harkened back to the rationale of *Roberts*, which the Court had overruled, and *Roberts*' reliance on indicia of trustworthiness. The Court reiterated the language it had set forth in *Crawford* – stating that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Melendez-Diaz*,

supra, 129 S.Ct. at p. 2536, quoting *Crawford*, *supra*, 541 U.S. at pp. 61-62.)

Again demonstrating its adherence to the constitutional text, the Court stated that while there may be better or more effective ways to challenge the results of forensic testing, the Confrontation Clause guaranteed only one way: confrontation. The Court then echoed its statement in *Davis* when it rejected arguments that domestic violence victims should be exempted from the confrontation requirement of the Confrontation Clause[59]: "We do not have license to suspend the *Confrontation Clause* when a preferable trial strategy is available." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2536.)

The Court explained that confrontation is required because "[f]orensic evidence is not uniquely immune from the risk of manipulation," and pointed to publications citing examples of convictions based on discredited forensic evidence. The Court noted that "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2537.) As part of this discussion, the Court dispensed with a dissent suggestion that the majority had relied on the published data in resolving the constitutional question before it with this simply stated, straightforward comment: "The analysts who swore the affidavits provided testimony

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[59] In *Davis*, the Court acknowledged that when the Confrontation Clause operates to bar testimonial statements of domestic violence victims who do not testify the Confrontation Clause gives criminal defendants a "windfall." As appellant discussed above, the Court adhered to the literal guarantee of the Confrontation Clause and explained: "We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." (*Davis*, *supra*, 547 U.S. at p. 833.)

against Melendez-Diaz, and they are therefore subject to confrontation. . . ." (*Id.*, *supra*, 129 S.Ct. at p. 2537 fn. 6.)

The Court also demonstrated its adherence to the literal language of the constitutional text by rejecting the following contentions that the analysts' testimonial statements were admissible through substituted or surrogate means, without confrontation.

Melendez-Diaz rejected the contention that the analysts' affidavits satisfied the confrontation requirement because they were the equivalent of "official and business records admissible at common law." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2538.) The Court found that the forensic analysts' affidavits did not qualify as traditional official or business records because the regular course of the business was the production of evidence for use at trial, but also said that even if the affidavits did qualify for admission as a business record, their authors would still be subject to confrontation. (*Ibid.*) The Court made it clear in the following elaboration that it was the analysts' role as creators of the testimonial evidence that subjected them to confrontation:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here – prepared specifically for use at petitioner's trial – were testimony against petitioner, and the analysts were subject to confrontation under the *Sixth Amendment*. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2539-2540.)

As part of this discussion concerning business and official records, the Court considered the dissent's reliance on a class of evidence – a clerk's certificate authenticating an official record – that was both produced for use at trial and traditionally admissible. The Court noted that the clerk could by affidavit authenticate a copy of an otherwise admissible record, but the clerk "could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant." (*Id.*, at pp. 2538-2539, fn. omitted.)

This distinction drawn by the Court is particularly illuminating with regard to the issue of surrogate testimony discussed in this argument. The clerk in the illustration above was by way of affidavit able to authenticate an otherwise admissible document, but the clerk was not able to create it. In much the same way, a deputy medical examiner may be able to authenticate the procedures followed in the forensic protocol of an autopsy performed by another deputy medical examiner, but he or she can never be the creator of the testimonial evidence prepared by another.

Melendez-Diaz also rejected the contention that a defendant's ability to subpoena the analysts is a substitute for the right of confrontation.

> More fundamentally, the *Confrontation Clause* imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2540.)

Finally, the Court rejected a request that the requirements of the Confrontation Clause be relaxed to accommodate the needs of the judicial process. "The *Confrontation Clause* – like ["the right to trial by

jury and the privilege against self-incrimination"] – is binding, and we may not disregard it at our convenience." (*Id.*, at pp. 2541; see similar judicial declarations discussed above, from *Davis*, *supra*, 547 U.S. at p. 833; and from *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2536.)

The Court reinforced its adherence to the principles set forth above in *Bullcoming*, in which the defendant's blood was drawn pursuant to warrant after he refused to take a breath test following his arrest for driving under the influence of alcohol. The police sent the sample to the Scientific Laboratory Division of the New Mexico Department of Health to determine the defendant's blood-alcohol concentration. (*Bullcoming*, *supra*, 131 S.Ct, at p. 2710.) At trial, the State did not call Curtis Caylor, the analyst who performed the test who, according to the prosecution, had recently been put on unpaid leave. Instead, the prosecution called Gerasimos Razatos, an analyst who was familiar with the laboratory's testing procedures, but who had neither participated in nor observed the test on the defendant's sample. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2712.)

On review, New Mexico's Supreme Court concluded in light of *Melendez-Diaz* that the blood-alcohol analysis was "testimonial," but that the Confrontation Clause did not require the in-court testimony of the scientist who performed the analysis for two reasons. First, the New Mexico court said the analyst who performed the testing was a "mere scrivener" who "simply transcribed the results generated by the gas chromatograph machine. [Citation.]" Second, the New Mexico court found the surrogate witness qualified as an expert witness on the gas chromatograph machine and thus was available for cross-examination regarding its operation. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2713.)

On certiorari to the United States Supreme Court, New Mexico contended that surrogate testimony adequately satisfied the Confrontation Clause because the "true accuser" was the gas chromatograph machine and not the testing scientist who simply transcribed the results produced by the machine and, alternatively, that the forensic report was nontestimonial and therefore not subject to the Confrontation Clause. (*Bullcoming*, *supra*, 131 S. Ct. at p. 2714.)

Bullcoming pointed to representations in Caylor's report concerning the particular test and testing process he employed – foundational issues surrounding the blood sample testing, the particular testing done, and the precise protocol followed – that involved more than machine-generated numbers. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2714.) Further, *Bullcoming* noted that the "comparative reliability of an analyst's testimonial report drawn from machine-produced data" is not constitutionally adequate because the Confrontation Clause commands that reliability be tested in the "crucible of cross-examination." (*Bullcoming*, *supra*, 131 S.Ct. at p.2714.)

The Court observed that surrogate testimony could never convey what Caylor knew or observed about the particular test and testing process he employed. Lapses or lies on the part of the certifying analyst would not be reachable through the testimony of a surrogate. Caylor had been placed on unpaid leave, but Razatos had no knowledge regarding why that had been done, and defense counsel was precluded from asking questions designed to reveal whether incompetence or dishonesty was the reason for Caylor's removal. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2715.)

Bullcoming concluded: "[T]he Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2716.)

Finally, *Bullcoming* concluded that the laboratory report in its case resembled those in *Melendez-Diaz* in all material respects and so were testimonial statements for the reasons the reports in *Melendez-Diaz* were testimonial statements. In *Melendez-Diaz* and in *Bullcoming*, police provided seized evidence to a police-related laboratory for testing related to a police investigation. The analysts in both cases tested the materials and prepared certificates reporting the results of their testing. The certificates were "formalized" in a signed document. The "certificates of analysis" in *Melendez-Diaz* were sworn to before a notary public by the analysts at the state laboratory. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2531.) The reports in *Bullcoming* were "unsworn." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2717.) *Bullcoming* held the absence of a notarization from the New Mexico certificate did not remove that certificate from Confrontation Clause governance. *Bullcoming* concluded that the certificate in issue before it fell within the "core class of testimonial statements," described in *Melendez-Diaz*, *Davis*, and *Crawford*. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2717.)

The foregoing discussion shows that the United States Supreme Court has consistently rejected any and all contentions that would compromise or dilute the guarantee of the Confrontation Clause that the reliability of evidence is assessed only through confrontation. The Court's recognition in *Bullcoming* that when New Mexico elected to introduce the

results of Caylor's testing, Caylor became the witness that the defendant had the right to confront is consistent with the precedent established in *Melendez-Diaz*, *Davis*, and *Crawford*. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2715.) The Court's express statement in *Melendez-Diaz* that the Confrontation Clause required that the forensic analysts themselves testify[60] and the Court's consistent adherence to the principle that confrontation is the only method of assessing the reliability of evidence lead inescapably to the conclusion that appellant was denied his right of confrontation under the Sixth Amendment when Dr. Scheinin testified to the results of the autopsy performed by Dr. Carrillo.

D. Permitting the Testimonial Statement of One Witness to Enter into Evidence through the In-Court Testimony of a Second Thwarts All Four Elements of Confrontation Identified in *Maryland v. Craig*

In *Maryland v. Craig*, *supra*, the Supreme Court identified the "elements of confrontation" to be (1) "cross-examination"; (2) the giving of testimony under oath; (3) "observation of [the declarant's] demeanor by the trier of fact"; and (4) "physical presence" of the defendant during the witness's testimony. (*Maryland v. Craig*, *supra*, 497 U.S. at p. 846.)

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[60] The Court stated: "In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the *Sixth Amendment*. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to ' "be confronted with"' the analysts at trial. (*Crawford*, *supra*, 541 U.S. at p. 54.)" (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

1. Cross-examination enables the defendant to "test the recollection of the witness" and to inquire into the circumstances underlying any of his prior recorded recollections introduced into evidence. (*Dowdell v. United States* (1911) 221 U.S. 325, 330.) A surrogate would not be able to testify to the recollection of a declarant. Here, for example, because Dr. Carrillo's findings were allowed into evidence through the testimony of Dr. Scheinin, the defense was unable to test the accuracy of either Dr. Carrillo's written autopsy findings, including his diagrams, or to confront him with his prior testimony to the grand jury. In another example, Dr. Scheinin observed, when questioned about the age of the wound to the knee, that Dr. Carrillo had not made a specific notation about the wound's age, but then proceeded to offer her own opinion of the wound's age based on what Dr. Carrillo had written and what he had omitted to say about the wound. (7RT 1745.) The defense was unable to question Dr. Carrillo regarding his findings concerning the wound to the knee.

Cross-examination promotes truthful testimony at trial by allowing the defendant to "sift[] the conscience of the witness" testifying against him for the truth. (*Mattox v. United States* (1895) 156 U.S. 237, 242.) In addition, before trial, the prospect of facing cross-examination deters witnesses from making false testimonial statements. Allowing surrogate witnesses to testify to the declarant's testimonial statements eviscerates the deterrent effect of cross-examination by shielding the declarant from cross-examination.

Cross-examination further allows the defendant to "force the declarant to clarify ambiguous phrases and coded references" made in prior

statements by the declarant the prosecution wishes to introduce into evidence. The defendant may seek clarification of any "inconsisten[cies]" between the prior statements and the witness's in-court testimony. (*United States v. Inadi* (1986) 475 U.S. 387, 407 (Marshall, J., dissenting.) Here, again, Dr. Scheinin's efforts to attest to the accuracy of Dr. Carrillo's diagrams or to testify to the age of the knee wound by supplementing Dr. Carrillo's descriptions with her own opinion testimony illustrate the point that the use of a surrogate thwarts the truth-finding purpose of cross-examination.

Finally, cross-examination enables a defendant to attack the credibility of a witness by probing into his personal history, experience, sensory perceptions, and motives. (See *Davis v. Alaska* (1974) 415 U.S. 308, 316.) Information of this nature, including a declarant's job performance or history of substance abuse, is not information typically known by a surrogate witness.

2. The Confrontation Clause requires witnesses to provide their testimony under oath, "impressing [them] with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury." (*Maryland v. Craig*, *supra*, 497 U.S. at pp. 845-846.) The Supreme Court has made clear that while a "trial by sworn *ex parte* affidavit" is offensive to the Confrontation Clause, a system of "trial by *unsworn ex parte* affidavit" would be worse. (*Crawford*, *supra*, 541 U.S. at pp. 52-53 fn. 3; accord *Davis*, *supra*, 547 U.S. at p. 826.)

3. Confrontation of the declarant ensures that the jury has the chance to observe the witness who made the testimonial statement and to "judge by his demeanor upon the stand and the manner in which he gives

his testimony whether he is worthy of belief." (*Mattox*, *supra*, 156 U.S. at pp. 242-243.) Here, when Dr. Scheinin testified in place of Dr. Carrillo, it was Dr. Scheinin whose qualifications and credentials the jury heard and Dr. Scheinin whom the jury listened to and observed. It is therefore reasonable to expect that it was Dr. Scheinin's credibility the jury likely assigned to the testimonial statements actually made by Dr. Carrillo.

4. Confrontation traditionally guarantees a "face-to-face encounter between witness and accused." (*Coy v. Iowa* (1988) 487 U.S. 1012, 1017.) "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" (*Ibid.*, quoting *Pointer v. Texas* (1965) 380 U.S. 400, 404.) The employment of a surrogate witness eliminates the face-to-face encounter between the defendant and the declarant and deprives the defendant of the opportunity to have the negligent or careless or intentionally malperforming declarant realize the import of his testimonial statements. A system that requires a face-to-face encounter between the witness who made the testimonial statement and a defendant facing death, as in this case, helps ensure that the declarant fully realizes the import of his testimony.

Moreover, the use of a surrogate witness, even an expert surrogate witness, is no more than an attempt to establish the reliability of the testimonial evidence, as *Bullcoming* recognized. As that Court stated: "[T]he Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2716.)

E. The Erroneous Admission of Dr. Carrillo's Testimonial Statements through the In-Court Testimony of Dr. Scheinin Was Not Harmless beyond a Reasonable Doubt

Confrontation Clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.) "Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall*, *supra*, at p. 681.) The harmless error inquiry asks: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Neder v. United States* (1999) 527 U.S. 1, 18.)

The autopsy evidence, particularly evidence that Madrigal suffered a fatal gunshot wound to the head, was important to the prosecution's proof that Flores and appellant committed Madrigal's intentional premeditated murder. The prosecutor argued that Flores and appellant stalked Madrigal and Gutierrez and that Flores confessed that he shot Madrigal in the head by stating in the audiotaped interview, "I domed him." (13RT 2873.) The jury was required to find proof of the corpus delicti independent of a defendant's admissions or confessions, as the court properly instructed it. (*People v. Beagle* (1972) 6 Cal.3d 441, 455; CALJIC No. 2.72; 17CT 4513.) The forensic autopsy evidence that Madrigal was killed by a fatal gunshot wound to the head corroborated Flores's statement upon which the prosecution relied.

The admission of the autopsy evidence thus cannot be said to have been harmless beyond a reasonable doubt with regard to proving that Madrigal's death was a premeditated murder. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

F. Appellant's Claim of Error Was Not Procedurally Defaulted because Counsel Rendered Ineffective Assistance in Failing to Object to the Confrontation Clause Violation

In anticipation of respondent's claim that appellant's failure to object to Dr. Scheinin's testimony regarding the results of an autopsy she did not herself perform renders appellant's claim procedurally defaulted for appeal purposes, appellant here claims that trial counsel rendered ineffective assistance in failing to object to that testimony on Sixth Amendment grounds.

Appellant has the burden of proving ineffective assistance of counsel. (*People v. Malone* (1988) 47 Cal.3d 1, 33.) To prevail on his claim, appellant must establish that counsel's representation fell below an objective standard of reasonableness and that he consequently suffered prejudice. (*People v. Hart* (1999) 20 Cal.4th 546, 623.) A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 689.)

Tactical errors are generally not deemed reversible and counsel's decision-making must be evaluated in the context of the available facts. (*Id.*, at p. 690.) The reviewing court will affirm the judgment to the extent the record on appeal fails to disclose why counsel acted or failed to

act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Further, prejudice must be affirmatively proved. The record must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *People v. Maury* (2003) 30 Cal.4th 342, 389.)

In appellant's case, there can be no satisfactory explanation for counsel's failure to recognize and assert a Confrontation Clause violation when the prosecution had Dr. Scheinin testify about the results of an autopsy she did not perform. The United States Supreme Court issued its opinion in *Crawford* in 2004. Appellant's trial was held in 2005. *Crawford* by then had been recognized as a significant case in recent criminal defense jurisprudence. (See, e.g., *People v. Pantoja* (2004) 122 Cal.App.4th 1, 9, in which *Crawford* is described as "what may fairly be characterized as a revolutionary decision in the law of evidence.")

A standard of reasonable competence requires defense counsel to diligently investigate the case and research the law. (*People v. Thimmes* (2006) 138 Cal.App.4th 1207, 1212-1213; *cf.*, *People v. Pope*, *supra*, 23 Cal.3d at p. 425.) There can be no dispute that *Crawford* is an important case in Confrontation Clause jurisprudence and, in particular, to the defense bar. Counsel failed to object to the admission of autopsy results and thus to the admission of evidence regarding gunshot wounds, including the trajectory and age of wounds, cause of death, and the assignment of

death as a homicide, all indisputably a critical part of the prosecution's case. The failure clearly fell below a standard of reasonable competence. (*People v. Thimmes*, *supra*, 138 Cal.App.4th at pp. 1212-1213.)

Appellant has addressed in the preceding section the remaining question of whether counsel's performance was prejudicial. The prosecution used evidence of the autopsy results as "science," as objective "corroboration" in arguing appellant was guilty of premeditated murder. The admission of the autopsy evidence cannot be said to have been harmless beyond a reasonable doubt with regard to proving that Madrigal's death was a premeditated murder. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

V.

THE TRIAL COURT ERRED IN ADMITTING THE JAILHOUSE INTERVIEW OF APPELLANTS; EVIDENCE CODE SECTION 1153, PENAL CODE SECTION 1192.4, AND PUBLIC POLICY RENDER STATEMENTS REGARDING CRIMINAL CONDUCT MADE IN THE COURSE OF PLEA NEGOTIATIONS INADMISSIBLE

A. Introduction

On February 8, 2002, Deputy District Attorney and trial prosecutor Darren Levine interviewed Flores and appellant[61] in the Los Angeles County Jail. Later, on February 21 and March 28, 2002, the prosecutor and his investigator met again with Flores and appellant. Because Levine received incriminating information from appellants during the first (February 8) interview, he and his investigator surreptitiously audiotaped the February 21 and March 28 interviews.

Over multiple defense objections, the trial court allowed the jury to hear redacted versions of the taped interviews as part of the prosecution's case-in-chief. Because appellant's statements were made during plea negotiations, their admission was prohibited by statute and public policy, as appellant explains below. (Evid. Code, § 1153; Pen. Code, § 1192.4; *Bryan v. Superior Court* (1972) 7 Cal.3d 575, 588 (policy favoring settlement of criminal cases underlies the exclusionary rule).

The introduction of appellant's jailhouse interview statements, which comprised admissions, confessions, and specific details

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[61] Flores and appellant were pro se defendants at the times they were interviewed by the trial prosecutor.

regarding both mens rea and actus reus elements of charged crimes, created prejudicial error.

B. Procedural Background

Flores, joined by appellant (3RT 871; 11RT 2636), objected to the admission of appellant's audiotaped jailhouse statements on a number of grounds,[62] including that the statements were the product of the appellant's attempt to negotiate a reduced restitution amount. (8CT 1840-1841; 9CT 2203-2204.)

The trial court found that appellant's statements to the prosecutor were volunteered and spontaneous; that appellants had a clear interest in sharing their information with the prosecutor; that appellants were experienced in the criminal justice system and well aware of their rights; that appellants were acting in propria persona and that the admonition of rights given appellants during the March 28 interview was more than sufficient. The court ruled that, subject to appropriate redacting, statements made by appellants during the February 21 and March 28 taped interviews were admissible as part of the prosecution's case-in-chief. The court also admitted statements made by appellants to the prosecutor during the February 8 interview, with the understanding that the prosecutor had agreed not to use these statements in the prosecution's case-in-chief. (3RT 871-874.)

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[62] Appellants objected, inter alia, on the grounds that the statements were obtained in violation of appellants' right to counsel; right to remain silent; and the failure to provide advisements pursuant to *Miranda v. Arizona* (1966)384 U.S. 436. (8CT 1835-1842; 9CT 2201-2204.)

The redacted audiotapes were played for the jury during the prosecution's case over renewed defense objection. (People's 95 and 96 (transcripts, respectively, People's 95A and 96A); 11RT 2675-2677.) The renewed defense objections, as stated by counsel for Flores and joined in by counsel for Amezcua, were: "It would be on the 5th and 6th Amendment[s], that there was no *Miranda*. That the statement was coerced. That the statement was given through threats and promises. That the statement violated their rights as pro per and actually the second statement they may not have even been pro per anymore because they were held to answer at prelim. [¶] If there was a conflict between Mr. Levine and the District Attorney's Office and his prosecution of this case, the D.A. should be recused and for all of those reasons and all the reasons stated in argument. We would be objecting to the tape as violative of our client's due process and constitutional rights."[63] (11RT 2635:24-2636:8.)

Following an investigation into the information provided by appellants, Deputy District Attorney Levine convened a grand jury proceeding on November 25, 2002. (1CT 6.) Investigator Thomas Kerfoot testified that he and Levine met with Flores and appellant on March 28, 2002, at which time they discussed the heretofore uncharged murders of John Diaz and Arturo Madrigal and the heretofore uncharged attempted

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[63] Flores, joined by appellant, unsuccessfully moved to recuse the Office of the District Attorney pursuant to Penal Code section 1424; *People v. Conner* (1983) 34 Cal.3d 141; the Due Process Clause of the Fifth and Fourteenth Amendments; and on the ground that the personal participation of prosecutor Levine had created a conflict of interest for the District Attorney's Office that rendered it unlikely that appellants would receive a fair trial and due process of law. (9CT 2234-2238, 2285-2290; 10CT 2701-2703; 3RT 703.) The motion was denied. (4RT 1148-1149.)

murders of Paul Gonzales and Fernando Gutierrez. Kerfoot further testified that he later provided the information to local law enforcement agencies whose investigations into the crimes were at that time still open. (1CT 13, 20-26.) On November 26, 2002, the grand jury returned an indictment charging the appellants with the murders of Diaz and Madrigal and the attempted murders of Gonzales and Gutierrez attended by numerous weapons, gang, and special circumstance allegations. (1CT 155-162.) These charges and allegations were subsequently folded into the Amended Information filed January 22, 2003, on which the case went to trial. (7CT 1751-1792.) Appellants were convicted of the first degree murders of Diaz and Madrigal and the premeditated attempted murder of Gutierrez and related enhancements and special circumstances. (17CT 4569, 4570, 4571; 14RT 3056-3057, 3057-3058, 3059.)

As appellant explains below, appellant's statements regarding their criminal conduct, viewed in context, were offered by and ultimately provided by them during settlement negotiations directed at the amount of restitution to be imposed. Appellants had argued the statements should be excluded, albeit without specific reference to Evidence Code section 1153 and Penal Code section 1192.4, though with the same reasoning underlying the exclusionary rule propounded by those statutes, *viz.*, because they were made while appellants were bargaining to avoid restitution. (8CT 1840-1841; 9CT 2203-2204.)

C. Appellant's Jailhouse Statements to the District Attorney and His Investigator, When Viewed Contextually, Establish That They Were Made during Appellant's Efforts at Plea Negotiations

The jury heard the redacted, taped February 21, 2002, interview of appellants by Levine and his investigator (People's 95).

Early in this interview, in the context of a discussion in which Flores and appellant offered to provide information about additional murders, Levine reminded Flores about a previous conversation regarding plea negotiations. Levine said: "When you came to me – remember last time you said to me 'give me – give me 50 years'. . . [¶] And with – without the 'L.'" (DPSuppIII, SuppCT 52:11-12, 14.) Flores explained the earlier request in this way: "If you give me 50 years without the 'L,' I can get married and get a bone yard visit. . . . [¶] But if you give me the 'L,' I have no sex." (DPSuppIII, SuppCT 51:21-22, 24.) Flores continued: "If you give me 50 years, I guarantee you I won't live 50 years. If you give me 85%, which I have to get it – " (DPSuppIII, SuppCT 52:8-9.) The conversation on this topic ended when Levine said, "it's not a personal thing but if it – if there's a death penalty, this is the case that – that warrants it. You know what I mean?" (DPSuppIII, SuppCT 52:17-18.)

The parties discussed other topics for a while, including Flores' instructions on how to make pruno, before Flores and appellant brought the conversation back to negotiations regarding sentencing issues, specifically, to the issue of restitution. Appellant asked: "Okay, if we talk about these murders, right, that we did." (DPSuppIII, SuppCT 59:22.) Levine responded: "Are you talking about the murders that are charged or additional ones?" (DPSuppIII, SuppCT 60:1-2.) Flores and appellant both

replied, "new ones." (DPSuppIII, SuppCT 60:3-4.) Once more, the conversation wandered, until appellant said, "Can we talk about restitution?" (DPSuppIII, SuppCT 60:20.) Flores said: "Oh, yeah. See, that's what we wanna do. Okay, we're gonna get a lot of restitution. We'll give you a murder if drop our restitution, so it'll only be 200 instead of a whole (*unintelligible*) of restitution, which we'll never be able to pay." (DPSuppIII, SuppCT 60:22-24.)

Flores and appellant explained to Levine that as inmates on death row, they would still be eligible to have money placed on their books, but that some of that money would then be taken in payment of the restitution amount imposed by the court. (DPSuppIII, SuppCT 61:1-17.) Flores explained: "So, now I'm going to death row, something different, something new, right? And I don't wanna have a lot of restitution because when I buy a TV, they're gonna make me pay to the victims in (*unintelligible*) or right up front." (DPSuppIII, SuppCT 62:9-11.)

Flores proposed giving Levine "a murder, . . . and, it's our own murder. We'll – I'll tell you everything I did and he'll tell you everything that he did. . . ." (DPSuppIII, SuppCT 62:17-19.)

The defendants went on to describe different incidents involving shootings (DPSuppIII, SuppCT 63-74.) Flores assured Levine that Levine would get a death penalty conviction. (DPSuppIII, SuppCT 70:18.) Levine asked whether Flores and appellant preferred to talk to his investigator or to him about the "other murders." (DPSuppIII, SuppCT 74:15-16.) Flores replied they preferred to speak with Levine. "We (*unintelligible*) with him. But see, you gotta make sure we don't get no re – we can get – see, there's a customary $200 fine for restitution." DPSuppIII,

SuppCT 74:21-22.) Corrected by Levine that restitution ranges in dollar amount from $200 to $10,000, Flores said: "Okay, So, my thing is this, you can get $200 but if you – you tell – you can just say, hey – hey Ray ain't got the means to pay the money, it's so outrageous, we're gonna get it reducted or whatever, $200 bucks each we're happy with that (*unintelligible*)." (DPSuppIII, SuppCT 74:23; 75:2-4.)

Levine replied, "Alright, we'll see." And, also, "How many – how many of these deals are you gonna, uh – . . . try to make with me?" (DPSuppIII, SuppCT 75:5, 9, 11.) Flores replied that in addition to the three murders with which they were charged at the time, "We can give you two more with the wink of an eye, right? Plus not counting the other one we already got – " (DPSuppIII, SuppCT 75:24-76:1.)

Flores said that he and appellant understood that Levine would use any information they provided about new murders against them, but explained that they did not care because they accepted, wanted, death as their penalty. "We don't care. The whole thing is, we want death, right? The whole thing, we want death before, uhm, - when you're incarcerated, we do a lot of weird things. More than likely we're going to get hepatitis. . . [¶] We're gonna die in what, 20 years? We ain't gonna even make it to that chair, or that, uh, bed. . . ." (DPSuppIII, SuppCT 76:12-14, 16-18.)

The jury also heard the redacted, taped March 28, 2002, interview of appellants by Levine and his investigator (People's 96).

Levine began this interview by reminding Flores and appellant that they had previously talked to him about "work[ing] out something" regarding restitution, that he had been asked by them " – to come see you. This is in court, and also a number of times in court you

guys have said that you wanted us to come talk to you about some cases and maybe work out something, either with regard to, uh, restitution issue – ." (DPSuppIII, SuppCT 91:20-22.)

Flores told Levine that he and appellant were willing to give Levine information about two additional murders he could not otherwise link to them if Levine promised not to "go after" Flores' mother, Katrina Barber, and Carina Renteria. (DPSuppIII, SuppCT 93.) Flores explained: "So our whole main thing is to go to another county jail, meet new people, kick back, enjoy ourselves, spend like two years out there, boom, and then go to death row." (DPSuppIII, SuppCT 95:21-23-96:1)

Flores renewed the offer to provide information about other murders, prompting appellant to ask, "So how much of a guarantee can we have on the restitution though?" (DPSuppIII, SuppCT 99:4.) Levine said: "I don't – personally, I don't think that's such a major issue, but I don't wear the black robe []. I'm not a judge. But I – I can't imagine me going to a judge and saying, 'Hey, you know, they talked to us about two cases, alright. Here's our reports on that. One of the things we told them was we could do everything we could to get 'em a $200 restitution instead of a $10,000 restitution.' And so all I can tell you is I'll make my best efforts to do it. Now, if – if – if we tell him, 'Hey, their conversations helped us solve two murders and we – they're good for it. I mean, we have independent evidence that says they're good for it,' and all that, and I don't see a judge balking at that at all, because what he's – what does it – what – what does it cost any judge really? Nothing. It's – ." (DPSuppIII, SuppCT 99:8-16.)

The talk returned to the fate of Katrina Barber, who was then in custody for her role in some of the charged crimes. Flores asked whether Barber would be allowed to go home at some reasonable time. Levine said his office tended to listen to his recommendations in a case like this and that he would push for a sentence that would allow Barber to be sentenced to state prison and then released right away as the result of earned custody credits. (DPSuppIII, SuppCT 101-104.)

Having resolved sentencing/restitution issues for themselves and for Barber, Flores and appellant began to give Levine and Kerfoot specific and detailed information about the murder of John Louis Diaz and the attempted murder of Paul Gonzalez on April 13, 2000 (counts 42, 43) (DPSuppIII, SuppCT 106-110, 122-123, 134-136); and the murder of Arturo Madrigal and attempted murder of Fernando Gutierrez on May 25, 2000 (counts 45, 46). (D DPSuppIII, SuppCT 110-117, 173.) Flores and appellant also provided specific and detailed information about firearms used in the commission of the charged crimes (DPSuppIII, SuppCT 117-121, 123, 155-156, 173) and about Flores's intention to use his firearm while in the hospital following his arrest on Santa Monica Pier (DPSuppIII, SuppCT 154).

Viewed in their proper context, the foregoing remarks lead inexorably to the conclusion that Flores and appellant had anticipated and accepted that they each would receive a death sentence and that they were focused in these interviews on negotiating a deal with Levine that would net them what they perceived to be valuable life-long benefits – the imposition of a reduced restitution sum – as well as lenity for Flores's mother, Katrina Barber, and Carina Renteria. As Flores and appellant

explained, a reduced restitution sum would allow them to have more money while on Death Row. The record shows that Flores and appellant were persistent in seeking meetings with Levine for the purpose of negotiating issues pertaining to restitution. They proposed to and did provide Levine with information, some of it otherwise unavailable to him, about charged and uncharged murders and attempted murders that, when used by the prosecution against them would ensure that death would be the resulting penalty. In exchange for this information, appellant and Flores were to receive a reduced restitution amount and promised leniency regarding the prosecution of the three women.

The record also shows that Levine recognized that appellants were negotiating a "deal" with him and that it was only after he basically agreed to their requests regarding restitution and lenity for the women that Flores and appellant provided information regarding criminal conduct.

As appellant next explains, Evidence Code section 1153, Penal Code section 1192.4, and public policy render statements regarding criminal conduct made in the course of plea negotiations inadmissible.

D. Admissions of Criminal Conduct Made in the Course of Plea Negotiations Are Inadmissible

Evidence Code section 1153 provides: "Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals."

Penal Code section 1192.4 provides: "If the defendant's plea of guilty pursuant to Section 1192.1 or 1192.2 is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available. The plea so withdrawn may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals."

While these statutes do not expressly render inadmissible all statements made during plea negotiations, the Court of Appeal, in *People v. Tanner* (1975) 45 Cal.App.3d 345, did. In *Tanner*, a criminal defendant wrote letters to the district attorney and deputy district attorney in charge of his case. In the letters, he admitted his involvement in the crime, but complained he had not been offered a fair plea bargain because his codefendants were more culpable than he. At trial, the prosecution was allowed to introduce the defendant's letters as part of its case-in-chief. (*Id.*, at p. 348.) On appeal, the defendant argued that his letters were part of the plea bargaining process and therefore inadmissible under Evidence Code section 1153 and Penal Code section 1192.4. The Court of Appeal agreed and reversed the judgment.

Tanner recognized that exclusion of admissions made in the course of plea negotiations is important to the proper functioning of the criminal justice system. A district attorney's ability to assess the defendant's culpability is an important factor in the prosecution's decision on whether to settle a criminal case. Thus, if the court wished to encourage negotiated guilty pleas, the defendant could not be penalized for discussing

his guilt during negotiations. Moreover, the exclusion at trial of admissions during negotiations would promote candor and facilitate settlements, while the failure to exclude such admissions would hamper settlements. (*People v. Tanner*, *supra*, 45 Cal.App.3d at pp. 350-352.) In short, because public policy favored settlements, and because the chances of achieving settlements were greatest when the defense was candid with the prosecution, *Tanner* construed the exclusion rule of Penal Code section 1192.4 and Evidence Code section 1153 to extend to admissions made in the course of plea bargaining negotiations. (*Id.*, at pp. 351-352; *People v. Crow* (2006) 28 Cal.App.4th 440, 450.)

Tanner also rejected the Attorney General's contention that the statutes should be limited to offers to plead guilty, i.e., to the plea offer itself. Under that interpretation, any incidental statements made in the course of plea negotiations, particularly admissions of guilt, would be admissible. (*Id.*, at p. 350.) *Tanner* rejected this argument: "In order to effectuate the purpose of Evidence Code section 1153 and Penal Code section 1192.4 as interpreted by our high court, we construe those sections to include admissions made in the course of bona fide plea bargaining negotiations." (*Id.*, at pp. 351-352.) The court noted: "Although most defendants understand what plea bargaining is and how it works, the Attorney General's proffered distinction between an offer to plead guilty and an admission of guilt is not one that those untrained in the law should be expected to make spontaneously or to appreciate the reasons for making. In short, such a distinction would be a trap for the unsophisticated, which we decline to read into the law." (*Id.*, at p. 352.)

Thus, *Tanner*'s "rule of inadmissibility applies, not merely to admissions of guilt, but also to 'any incidental statements made in the course of plea negotiations. . . .' [*People v. Tanner*, *supra*, 45 Cal.App.3d at p. 350.] That construction promotes candor, because '[t]he accused and defense counsel are assured that anything said will not be used against them if the negotiations are unsuccessful.' (*People v. Magana* (1993) 17 Cal. App. 4th 1371, 1377.)" (*People v. Crow*, *supra*, 28 Cal.App.4th at p. 450.)

Our Supreme Court has explained that public policy favoring the settlement of criminal cases underlies the exclusionary rule discussed here. (*Bryan v. Superior Court*, *supra*, 7 Cal.3d at p. 588; *People v. Quinn* (1964) 61 Cal. 2d 551, 555.) *Bryan* noted that such settlements benefit both the state and the defendant. (*Bryan v. Superior Court*, *supra*, 7 Cal.3d at p. 588; *People v. West* (1970) 3 Cal. 3d 595, 604-605.)

Other cases, as appellant shows below, have carved the contours of the *Tanner* rule to establish that it prohibits the prosecution's use of such statements in its case-in-chief, but allows the statements to be used to impeach a testifying defendant. Thus, in *Crow*, *supra*, the defendant made statements, assertedly inadmissible under *Tanner*, to a psychologist, who included them in a psychological evaluation. The defense counsel then forwarded the psychological evaluation to the prosecutor in the course of plea negotiations. (*People v. Crow*, *supra*, 28 Cal.App.4th at p. 448.) At trial, the prosecutor used the defendant's statements to the psychologist to impeach the defendant's credibility after he first made contrary statements on direct examination. *Crow* distinguished the use of defendant's statements to impeach and held that "the rule of Tanner – that evidence of statements made or revealed during

plea negotiations may not be introduced by the People – must be limited to those situations in which those statements are offered as substantive evidence of guilt, either in the prosecution's case-in-chief or otherwise. That rule does not prevent the prosecution from using evidence of those statements for the limited purpose of impeaching the defendant regarding testimony which was elicited either during the direct examination of the defendant or during cross-examination which is plainly within the scope of the defendant's direct examination." (*Id.*, at p. 452.)

Crow, however, also found no distinction between statements originally made in the course of plea negotiations and statements made in the context of another purpose (psychological evaluation), but tendered to the prosecution in the course of plea negotiations, because in either event the statements were given to the prosecution in order to achieve a settlement. (*People v. Crow*, *supra*, 28 Cal.App.4th at p. 450 fn. 6.) Under neither scenario were the defendant's statements admissible in the prosecution's case-in-chief.

E. Appellant's Admissions of Criminal Conduct Were Made in the Course of Negotiations with Levine Regarding Restitution and Should Have Been Excluded under the *Tanner* Rule; The Failure to Do So Created Prejudicial Error

As appellant has shown in subsection three above, review of the exchanges between Levine, his investigator, and appellants establish that the parties were in negotiations to exchange information about charged and uncharged crimes committed by appellants for both a reduced restitution amount and leniency regarding other participants. As such,

appellant's statements, made in the course of bona fide plea bargaining negotiations, should have been excluded.

Here, Flores and appellant made clear that they expected sentences of death for themselves. They had an interest in negotiating a restitution amount that would not drain their inmate accounts while incarcerated. They also had an interest in leniency for the other suspected participants. The rule of inadmissibility applies not only to admissions of guilt, but also to any incidental statements made in the course of plea negotiations. (*People v. Tanner*, *supra*, 45 Cal.App.3d at p. 350.)

Accordingly, the trial court erred in allowing the jury to hear, as part of the prosecution's case-in-chief, the admissions of criminal conduct made by appellants in the jailhouse interviews with the prosecutor.

Moreover, the error was prejudicial to appellant. In the Procedural Background above, appellant explained that the Diaz and Madrigal murder convictions and the Gutierrez attempted premeditated murder conviction were the direct product of information provided to Levine and his investigator during these jailhouse interviews. Investigator Kerfoot testified at the grand jury, convened to hear evidence related to these crimes, that he provided the information obtained during the interviews to the law enforcement agencies. These agencies, in turn, obtained the evidence presented to the grand jury. The grand jury returned an indictment based on the evidence it heard. The indictment was later folded into the amended information on which the case went to trial. Appellants were convicted.

In addition to these counts of conviction, appellants provided incriminating evidence about firearms and their mental states relating to other originally charged crimes, enhancements, and special circumstances.

It is undisputed there was some evidence against appellants, but the additional evidence contained in the redacted jailhouse interviews rendered the case against appellants overwhelming. Nor can it be said that the prejudice was limited to the Diaz, Madrigal, and Gutierrez counts because the specific details provided during these jailhouse interviews were so manifestly egregious that it would not have been possible to contain the prejudice to these few counts.

Under these circumstances, the admission of these jailhouse statements was so prejudicial as to distort the prosecution's evidence and cause a miscarriage of justice. It is therefore reasonably probable that a result more favorable to appellant would have been reached in the absence of the above error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Collins* (1975) 68 Cal.2d 319, 322.) Accordingly, reversal of the judgment is warranted.

VI.

APPELLANT'S RIGHTS TO A FAIR TRIAL, TO PRESENT A DEFENSE, AND TO THE PRESUMPTION OF INNOCENCE WERE PREJUDICED BY HEIGHTENED COURTROOM SECURITY; THE TRIAL COURT DID NOT BASE ITS SECURITY ORDER EXCLUSIVELY ON CASE-SPECIFIC REASONS AND DID NOT STATE ON THE RECORD WHY THE NEED FOR THE HEIGHTENED SECURITY MEASURES OUTWEIGHED POTENTIAL PREJUDICE TO THE DEFENDANTS

A. Background

At the start of jury selection, eight uniformed deputy sheriffs guarded the courtroom. Both defendants objected to the visibly heightened level of security and to the resulting impression such security would have upon the jurors and the trial. (5RT 1201-1202; defendants' joinder at p. 1202.)

Specifically, defense counsel objected that having eight uniformed deputies in the courtroom was excessive because each defendant was belted to his chair and had one hand cuffed to his belt. Neither defendant was able to stand up (5RT 1203); neither defendant had previously "acted up in court." (5RT 1202.)

Counsel stated:

> [T]here [are] 7 bailiffs [later corrected to eight bailiffs] sitting in the room. My understanding is that there will be 7 deputy sheriffs in uniform sitting in this room throughout the trial and I would object to that. I think that it's onerous. I think that this is a difficult enough case without having the impression that would be left by having so many sheriff[']s deputies sitting in the courtroom throughout this trial, so I would object to the number of sheriffs that are here.

> My understanding is that neither of these gentlemen, Mr. Amezcua or Mr. Flores, have acted up in court and that at this point, there is no reason for that kind of a security detail to be present in front of the jury. So I would object to the number of bailiffs that are sitting here. (5RT 1201:21-1202:7.)

The trial court took note of counsel's objection for purposes of the record, but declined to make any changes in the courtroom security measures. The trial judge indicated that his standard practice was to leave security issues to the "experts," i.e., to the bailiffs, and remarked that the trial involved two defendants who, though they had always acted appropriately within the courtroom, had been involved in a number of incidents in the county jail where they were housed. The court observed that the sheriff might at a later point in time reduce the number of bailiffs within the courtroom if the defendants conducted themselves appropriately during the trial's progress. (5RT 1202:22-1203:10.)

The court stated:

> Well, I think that I *normally leave security issues up to the bailiffs, to the experts*. I feel that in this case, given that there have been a number of incidents at the jail, that there is understandably some concern above that present in most cases. I will watch the issue.
>
> I feel that I am going to allow the number of bailiffs to remain for today. I feel that this is going to be very quick. The jurors are going to be in and out in a matter of minutes. I will give some additional thought to the number of bailiffs that are necessary, but given the fact that we have two defendants, we have had a number of incidents at the jail. I think it's important for us to have what the security people call a show of force.
>
> My thought is that once we get going with the trial, and I do expect that there will be no problems. I think that

> Mr. Amezcua and Mr. Flores have conducted themselves in a very appropriate manner at all times with this court, and I think that once we get going, that *the sheriff will see that there is probably not the need to have such a number of bailiffs,* but your objection is noted for the record. (5RT 1202:16-1203:10; italics added.)

Counsel for appellant responded with a description of the shackles worn by appellant.

> Just to flesh that out, I note and ask the court to note for the record that both Mr. Flores and Mr. Amezcua are belted to their chairs. In addition, they are cuffed one hand to their belt, and again that – I don't believe under this system either one them [sic] can even stand up.
>
> So I want the record to reflect that's the situation that they are in now. (5RT 1203:11-18.)

The court observed that each defendant's restrained hand was concealed by a drape and reiterated that he would not consider any changes in the heightened level of security until a later time.

> Yes. And again, it has to do with security concerns. They – we have put a drape over the table so that the fact that one of their hands is handcuffed to the chair will not be known at this point.
>
> And again, I want to see how we go. Let's get into the trial and let's get going and see how it works out. (5RT 1203:19-25.)

The defendants then objected to the shackling. (5RT 1204.) Counsel for Mr. Flores pointed out that while the draping might prevent the jurors from seeing either the handcuff or the belt restraints, the jury was likely to infer the defendants were restrained by the limitations in the

defendants' movements. Counsel made the following objection to the shackling.

> Although because of the drape, the jury probably won't be able to see the handcuffs or the belt, they will see that only their left hand will be up, and no other hands at all times. So they probably are going to be able to infer that they are shackled.
>
> So we would have objection to that. (5RT 1204:3-8.)

The trial court disagreed and reiterated that precautions had to be taken in the case, but did not state why precautions were necessary. The court said:

> Well, I don't think it's a big deal, frankly. I think that precautions have to be taken in this case. (5RT 1204:9-11.)

The record does not indicate that the number of courtroom bailiffs was subsequently reduced to fewer than eight or that the shackles binding appellant were either eliminated or reduced in severity.

What the record does plainly show, however, is that although the trial court made generic references to the defendants' jail incidents while acknowledging that the defendants had always acted appropriately within the courtroom, the court's ruling was but a continuation of its standard practice of leaving "security issues up to the bailiffs, to the experts." Moreover, when speaking of possibly revisiting the matter later, the court once again indicated the outcome would be subject to the sheriff's discretion – "that the sheriff will see that there is probably not the need to have such a number of bailiffs." (5RT 1202-1203.)

The court abused its discretion in so ruling because a trial court must exercise its own discretion when ordering heightened security procedures and may not defer decision-making authority to law enforcement officers. (*Holbrook v. Flynn* (1986) 475 U.S. 560; *People v. Stevens* (2009) 47 Cal.4th 625, 644.) The court must balance the need for heightened security against the risk that the increased security will prejudice the defendant in the eyes of the jury (*Holbrook v. Flynn*, *supra*, 475 U.S. at p. 570), precisely the concern voiced here by counsel for appellant. In addition, the court must base its decision on case-specific reasons and must state the reasons for its decision on the record. (*People v. Hernandez* (2011) 51 Cal.4th 733, 742, 744.)

Because it is reasonably probable that appellant would have obtained a more favorable result in the absence of the shackling and the presence of eight courtroom deputies, the collective effect of which was to convey to the jury that he must be separated from the community at large because he is especially dangerous or culpable, or is the cause of some official concern or alarm, the judgment of conviction must be reversed. (*People v. Watson* (1956) 46 Cal.2d 818, 837.)

B. A Trial Court's Decision Regarding Heightened Courtroom Security Must Be Based on a Thoughtful, Case-Specific Consideration of the Need for Heightened Security and the Potential Prejudice to the Defendant

Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of

evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." (*Taylor v. Kentucky* (1978) 436 U.S. 478, 485; *Holbrook v. Flynn* (1986) 475 U.S. 560, 567.)

Courts have long recognized that "some security practices inordinately risk prejudice to a defendant's right to a fair trial and must be justified by a higher showing of need. For example, visible physical restraints like handcuffs or leg irons may erode the presumption of innocence because they suggest to the jury that the defendant is a dangerous person who must be separated from the rest of the community. (*Deck v. Missouri* (2005) 544 U.S. 622, 630; [*People v.*] *Duran* [(1976)] 16 Cal.3d [282], 290-291.) Because physical restraints carry such risks, their use is considered inherently prejudicial and must be justified by a particularized showing of manifest need. (*Duran*, at pp. 290-291; see *Deck v. Missouri*, at pp. 626-629; *Illinois v. Allen* (1970) 397 U.S. 337, 343-344; see also [*People v.*] *Stevens* (2009) [47 Cal.4th 625,] 643-644.)" (*People v. Hernandez* (2011) 51 Cal. 4th 733, 742.) "Similarly, the federal 'Constitution forbids the use of visible shackles . . . unless that use is "justified by an essential state interest" – such as the interest in courtroom security – specific to the defendant on trial.' (*Deck v. Missouri*, *supra*, 544 U.S. at p. 624, italics omitted.)" (*People v. Virgil* (2011) 51 Cal. 4th 1210, 1270.)

In *People v. Stevens*, *supra*, 47 Cal.4th at p. 638, this Court held that the stationing of a courtroom deputy next to a testifying defendant is not an inherently prejudicial practice that must be justified by a showing of manifest need. *Stevens* explained, however, that the trial court must

exercise its own discretion and determine on a case-by-case basis whether such heightened security is appropriate. (*Id.*, at p. 642.) The defendant in *Stevens* analogized to physical restraint cases and likened the deputy sheriff to a "human shackle" because the deputy sat or stood next to him while the defendant testified. (*Id.*, at p. 636.)

Recently, in *Hernandez*, *supra*, our Supreme Court considered a circumstance similar to that in *Stevens* in which a courtroom deputy followed the defendant to the stand and stood behind him while he testified. At a break in the defendant's testimony, defense counsel objected to the deputy's stationing and pointed out that the defendant was the only witness who had an armed guard behind him when he testified. The trial court explained that the deputy's location was done for security of the jury and this practice was followed in all of the court's trials. The court also refused the defense request for case-specific reasons for the heightened security, pointing to the defendant's 18-page rap sheet, which contained restraining order violations arising from the defendant's relationship with his ex-wife, as justification. The court viewed these violations as examples of the defendant's inability to comply with the orders of the court. (*People v. Hernandez*, *supra*, 51Cal.4th at p. 740.)

This Court made the following findings from this record. The trial court did not base its decision to station the deputy behind the testifying defendant on a "thoughtful, case-specific consideration of the need for heightened security, or of the potential prejudice that might result." (*People v. Hernandez*, *supra*, 51 Cal.4th at p. 743.) Rather, the court's remarks showed the court was following a standard policy of stationing a deputy behind any defendant who testified, "regardless of

specific facts about the defendant or the nature of the alleged crime." (*Ibid.*)

Although the trial court had referred briefly to some case-specific reasons for heightened security, this Court concluded after consideration of the entire record "that the [trial] court elevated a standard policy above those individualized concerns and based its decision on the general policy. For example, the court mentioned that defendant was accused of inflicting a 'very bad injury' and had a long rap sheet with several restraining order violations, but these brief statements were made in response to defense counsel's observations after the court had twice ruled that the deputy would remain at the witness stand. The court then refused counsel's request that it determine whether any of the restraining order incidents involved violence. The discussion as a whole reveals that the court perceived this to be a routine order, and the court's scattered references to individualized facts constituted, at most, an effort to construct a post hoc justification for a security measure the court had already decided to employ pursuant to its standard policy. While the court did characterize the order as 'a discretionary call,' it made clear that the deputy's placement at the witness stand was 'just what happens *in every case that I've ever tried.*' (Italics added.)" (*Ibid.*)

Hernandez made clear that a court abuses its discretion when it fails to engage in a fact-specific analysis of whether heightened security measures are necessary. "Where it is clear that a heightened security measure was ordered based on a standing practice, the order constitutes an abuse of discretion, and an appellate court will not examine the record in search of valid, case-specific reasons to support the order. Trial judges

should be mindful of their duty to state the reasons for their decisions on the record. As we have explained in the context of sentencing decisions, 'a requirement of articulated reasons to support a given decision serves a number of interests: it is frequently essential to meaningful review; it acts as an inherent guard against careless decisions, insuring that the judge himself analyzes the problem and recognizes the grounds for his decision; and it aids in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the decision-making is careful, reasoned and equitable.' (*People v. Martin* (1986) 42 Cal.3d 437, 449-450; see also *People v. Penoli* (1996) 46 Cal.App.4th 298, 303.) Here, the colloquy between the court and counsel shows that the court did not base its security order on case-specific reasons because it believed stationing a deputy at the witness stand during a defendant's testimony was an acceptable routine practice. The court's reliance on this standard practice, instead of on individualized facts showing that defendant posed a safety risk or flight risk, or a risk of otherwise disrupting the proceedings, was an abuse of discretion." (*People v. Hernandez*, *supra*, 51 Cal. 4th at p. 744.)

The presence of eight uniformed and armed deputy sheriffs in the physical confines of a single courtroom is, as counsel for appellant observed, onerous and arguably by virtue of numbers alone akin to the "human shackling" described in *Stevens*, *supra*, 47 Cal.4th at p. 636. Almost 150 years ago, in *People v. Harrington* (1871) 42 Cal.165, this Court held it was prejudicial error for a trial court to allow a defendant to appear before the jury with physical restraints unless there was "evident necessity" for the restraints. (*Id.*, at p. 168.) Over 100 years after

Harrington, this Court, in *People v. Duran*, *supra*, reaffirmed the *Harrington* rule that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints. In doing so, *Duran* stated: "We believe that possible prejudice in the minds of the jurors, the affront to human dignity, the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints, as well as the effect such restraints have upon a defendant's decision to take the stand, all support our continued adherence to the *Harrington* rule." (*People v. Duran*, *supra*, 16 Cal.3d at p. 290.) At the same time, *Duran*, voicing the Court's recognition that the presence of too many armed guards in the courtroom, like the use of physical restraints, affected the jury's perception of the defendant, stated that its opinion was not concerned with the use of armed guards in the courtroom, "*[u]nless they are present in unreasonable numbers.*" Appellant's complaint is, and was at trial, of course just that – the armed guards in his courtroom were present in unreasonable numbers. It is the number of guards that deflates the distinction between shackling and monitoring recognized in *People v. Marks* (2003) 31 Cal.4th 197, 223-224, to wit, that "courtroom monitoring by security personnel does not necessarily create the prejudice created by shackling."

In *Holbrook v. Flynn*, *supra*, the United States Supreme Court declined to find that four uniformed state troopers sitting in the first row of the spectators' section of a trial of six defendants was so inherently prejudicial that it compromised the defendants' presumption of innocence and right to a fair trial. (*Holbrook v. Flynn*, *supra*, 475 U.S. at pp. 570-572.) The Court commented that it "[did] not minimize the threat that a

roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial," but said also, " . . . we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section." (*Id.*, at pp. 570-571.) *Holbrook* further reasoned: "Four troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings. Indeed, any juror who for some other reason believed defendants particularly dangerous might well have wondered why there were only four armed troopers for the six defendants." (*Ibid.*)

In *People v. Ainsworth* (1988) 45 Cal.3d 984, a two-defendant case, the defendant objected to the number and placement of armed uniformed sheriff's deputies in the courtroom. The number of deputies fluctuated between four and six. The record showed that when six guards were present, two of them were posted near the doorway. (*Id.*, at p. 1003.) *Ainsworth* concluded the heightened security measures were not unreasonable. This Court noted that the guards were primarily concerned with security *outside* the courtroom and were strategically placed inside the courtroom. (*Ibid.*)

Appellant's case, in contrast, presented the prejudicial spectacle of eight deputies guarding two defendants and thus is distinguishable from the controlling fact pattern and the holdings in *Holbrook* and in *Ainsworth.* Rather, the disproportionate security presence in appellant's case falls within the boundaries of the other concern expressed in *Holbrook*, the "threat" to a defendant's chances of receiving a

fair trial created by having too many uniformed policemen in the courtroom. (*Ibid.*)

Ainsworth is distinguishable because there the guards were primarily concerned with security outside the courtroom, as reflected in the stationing of two of the six guards near the courtroom door. In appellant's case, by contrast, the jury could only have viewed the codefendants as the security concern of the uniformed deputies.

In *Duran*, the defendant, a life-term prisoner, appealed jury convictions of assault with a deadly weapon and possession of a dirk or dagger in prison. During trial, the defendant was physically restrained with wrist and ankle shackles and, on appeal, argued the heightened security measures constituted an abuse of the trial court's discretion. (*People v. Duran*, *supra*, 16 Cal.3d 287-288, 293.) This Court made it clear that a defendant's prior record of violent conduct in and of itself is insufficient to justify heightened courtroom security measures. Instead, *Duran* found that a showing of nonconforming conduct within the courtroom, or the reasonable anticipation of such misconduct, was integral to the imposition of heightened courtroom security measures: "We do not mean to imply that restraints are justified only on a record showing that the accused is a violent person. An accused may be restrained, for instance, on a showing that he plans an escape from the courtroom or that he plans to disrupt proceedings by nonviolent means. Evidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained may warrant the imposition of reasonable restraints if, in the sound discretion of the court, such restraints are necessary." (*People v. Duran*, *supra*, 16 Cal.3d at pp. 292-293, fn. 11.)

C. The Trial Court Abused Its Discretion When It Failed to Engage in a Fact-Specific Analysis of the Need for Heightened Courtroom Security

Here, as the colloquy between court and counsel set forth in Subsection A, *supra*, establishes, appellant and codefendant Flores were belted to their respective chairs and unable to stand up at the time counsel objected to the security procedures. Each defendant also had one hand cuffed to his belt. A drape over the table was intended to prevent the jury from seeing the restraints, but counsel opined the jury would infer that each defendant was physically restrained by the defendant's repetitive use of only one hand.

To the extent the court relied on the expertise of the deputies to determine the security measures, that reliance was improper because, in doing so, the court substituted the bailiffs' exercise of discretion for its own. To the extent the court justified the presence of eight uniformed deputies to guard two defendants by pointing to the defendants' involvement in county jail incidents, the court abused its discretion because the defendants had at all times acted appropriately within the courtroom.

Hernandez made clear that a trial court abuses its discretion when it fails to engage in a fact-specific analysis of the need for heightened courtroom security. (*People v. Hernandez*, *supra*, 51 Cal.4th at p. 744.) In *Stevens*, this Court said a trial court "may not defer decision-making authority to law enforcement officers, but must exercise its own discretion to determine whether a given security measure is appropriate on a case-by-case basis. (*People v. Stevens*, *supra*, 47 Cal.4th at p. 642; *People v. Hill* (1998) 17 Cal.4th 800, 841 [it is the function of the court, not the prosecutor or law enforcement personnel, to determine whether manifest

need supports use of physical restraints in courtroom].) Accordingly, the trial court abused its discretion when it yielded the determination of courtroom security "to the bailiffs, to the experts."

In addition, the trial court abused its discretion when it relied upon the defendants' conduct in the county jail to justify the heightened courtroom security measures. In *Duran*, *supra*, this Court stated: "Evidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt *the judicial process* if unrestrained may warrant the imposition of reasonable restraints if, in the sound discretion of the court, such restraints are necessary." (*People v. Duran*, *supra*, 16 Cal.3d at p. 292 fn. 11; emphasis added.) This Court made clear that the trial court is vested, upon a proper showing, to order appropriate physical restraints for the defendant "[i]n the interest of minimizing the likelihood of *courtroom* violence or other disruption." (*Id.*, at p. 291; emphasis added.) Thus, as noted above, heightened courtroom security measures may be appropriately taken when there is "[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained." (*People v. Duran*, *supra*, 16 Cal.3d at p. 292 fn. 11.) In the present case, the court expressly found that "Mr. Amezcua and Mr. Flores have conducted themselves in a very appropriate manner at all times with this court." (5RT 1203:5-7.) Accordingly, the court had before it no evidence of nonconforming conduct or planned nonconforming conduct within the courtroom.

In *People v. Mar* (2002) 28 Cal.4th 1201, this Court stated that when the alleged prior conduct of the defendant relied upon as a basis for shackling occurred outside the courtroom, sufficient evidence of the

conduct must be presented on the record so that the trial court may make its own determination. *Mar* reiterated that the court may not simply rely upon the judgment of law enforcement or bailiffs. (*Id.*, at p. 1202; see also *People v. Lomax* (2010) 49 Cal.4th 530, 559; *People v. Howard* (2010) 51 Cal.4th 15, 28.) In appellant's case, the trial court failed to conduct a formal hearing and no other evidence was before the court supporting the need for heightened courtroom security measures. Instead, the court simply deferred to the recommendation of the bailiffs. In doing so, the trial court abused its discretion.

In *People v. McDaniel* (2008) 159 Cal.App.4th 736, the Court of Appeal concluded that a defendant who was shackled during trial *without a finding of cause* had been denied due process. It reversed the judgment, concluding that this Court's decision in *Duran*, *supra*, compelled the finding that the trial court had abused its discretion. (*Id.*, at pp. 740, 745.) On appeal, the Attorney General argued that the shackling was justified because the defendant's probation report revealed that he had committed a number of violent acts outside the courtroom, including an incident in which he beat, kicked, and slashed the throat of a fellow prison inmate who did not try to fight back. *McDaniel* declined to accept such information, disclosed after trial, as an adequate substitute for the pretrial, on-the-record determination required of the trial court by *Duran*. (*Id.*, at p. 745.)

These cases make clear that the trial court's failure to make its own determination whether the heightened courtroom security measures complained of here were necessary and to make findings on the record justifying the procedures constituted error.

D. Appellant Was Prejudiced by the Unconstitutional Security Measures Imposed at His Trial

This Court has determined that "[d]ecisions to employ security measures in the courtroom are reviewed on appeal for abuse of discretion." (*People v. Hernandez*, *supra*, 51 Cal.4th at p. 741; see also *People v. Stevens*, *supra*, 47 Cal.4th at p. 632; *People v. Duran*, *supra*, 16 Cal.3d 282, 293 fn. 12.)

Trial courts have a constitutional responsibility to balance the need for heightened security during a criminal trial against the risk that the additional precautions will prejudice the defendant in the eyes of the jury. "It is that judicial reconciliation of the competing interests of the person standing trial and of the state providing for the security of the community that . . . provides the appropriate guarantee of fundamental fairness." (*Lopez v. Thurmer* (2009) 573 F.3d 484; citing *Illinois v. Allen* (1970) 397 U.S. 337; *Estelle v. Williams* (1976) 425 U.S. 501, 506; *Holbrook v. Flynn*, *supra*, 475 U.S. 560.)

In *Illinois v. Allen* (1970) 397 U.S. 337, the Supreme Court held that the Constitution might permit, under some circumstances, a trial court to order that an obstreperous defendant be bound and gagged in the courtroom during his trial. The Court expressed reservations about this method of control; it acknowledged that "even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort." (*Id.*, at p. 344.) The Court also recognized the possibility "that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant." (*Ibid.*) Thus, although the Court refused to rule out the possibility that

binding and gagging might be the most reasonable way to deal with a disruptive defendant under certain circumstances, it made clear that such a measure would be appropriate only in the most extreme cases.

In *Estelle v. Williams*, *supra*, the Court held that requiring a defendant to wear "identifiable prison clothes" violated his due process right to a fair trial. The Court wrote: "The constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play." (*Estelle v. Williams*, *supra*, 425 U.S. at pp. 504-505.)

There can be no gainsaying that the presence of eight uniformed and armed deputies in the courtroom served as a constant reminder in appellant's trial that the community and by implication those within the courtroom needed to be safeguarded from him. There can be no gainsaying that the pronounced limitations on appellant's ability to move necessarily produced by the physical restraints, and which no drapery could have successfully concealed, served as a constant reminder in appellant's trial that he was perceived by the court authorities as posing a danger to others. The combination of these two factors was so likely to have been a continuing influence throughout the trial that there is a reasonable probability that impermissible factors affected the outcome of the trial. (*People v. Hernandez*, *supra*, 51 Cal.4th at p. 746; *People v. Watson* (1956) 46 Cal.2d 818, 837.)

In both *Dyas v. Poole* (9th Cir. 2002) 309 F.3d 586 and *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, the Ninth Circuit

identified factors that increased the likelihood the defendant was prejudiced by the unconstitutional security measures. The first of these was that the respective defendants were charged with violent crimes. The second factor was that the cases against the defendants were not overwhelming, a fact reflected by the length of the jury deliberations. (*Dyas v. Poole*, *supra*, 309 F.3d at p. 588; *Rhoden v. Rowland*, *supra*, 172 F.3d at p. 637.)

Here, appellant's propensity for violence was a critical issue in both the guilt and penalty phases. Appellant was charged with serious crimes of violence, which he disputed. His propensity for violence was clearly a factor that was likely to influence the jury in determining whether he was culpable for the crimes. The presence of eight deputies strongly suggested to the jury that the trial judge believed that appellant was a danger to the community and therefore had the character of someone who would have committed the crimes charged. As a result, in finding appellant guilty, the jury was likely to have relied upon the improper inference that appellant had a violent nature sourced in the presence of eight armed deputies within the courtroom.

In the penalty phase of a capital trial, the jury knows that the defendant is a convicted murderer. "But the extent to which he continues to be dangerous is a central issue the jury must decide in determining his sentence." (*Duckett v. Godinez* (9th Cir. 1994) 67 F.3d 734, 748.) If the jury is led to believe that the defendant is so dangerous that eight deputies are required to secure the courtroom against his actions, it is likely to conclude that the safety of other inmates and the prison staff can only be ensured by executing him. In a case involving heightened security in the form of a shackled defendant, the court observed "[A] jury might view the

shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision." (*Elledge v. Dugger* (11th Cir. 1987) 823 F.2d 1439, 1450.) The jurors here were likely to have viewed appellant in the very same way due to the presence of the eight armed deputies, and relied upon that improper inference in reaching a death verdict.

In finding prejudice, both *Dyas* and *Rhoden* observed that the prosecution's case was disputed, and that the jury deliberations were lengthy, indicating that the jurors did not find the case to be clear cut. Here, in the guilt phase appellant disputed his guilt and the jury deliberated for approximately five days before convicting appellant (see Procedural History, *supra*). In the penalty phase, in which appellant presented no defense, the jury returned death verdicts the day after it received the case.

Under all of the circumstances described above, a finding of prejudice is virtually compelled by *Deck*, *Dyas*, and *Rhoden* as is the conclusion that the presence of eight deputies within the courtroom compromised the presumption of innocence to which appellant is entitled. Reversal of the judgment of conviction is warranted as there is a reasonable probability that impermissible factors affected the outcome of the trial. (*People v. Hernandez*, *supra*, 51 Cal.4th at p. 746; *People v. Watson* (1956) 46 Cal.2d 818, 837.)

VII.

THE PROSECUTOR COMMITTED MISCONDUCT AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW WHEN HE INVITED THE JURY TO DEPART FROM THEIR DUTY TO VIEW THE EVIDENCE OBJECTIVELY AND INSTEAD TO VIEW THE CASE THROUGH THE EYES OF THE VICTIMS

During his guilt phase argument, the prosecutor invited the jury to "remember what it must have been like to be one of their victims." (13RT 2862:3-4.) His argument was an appeal to the jurors to permit sympathy for the victim to influence their verdict and, as such, constituted misconduct and a violation of appellant's right to a fair trial and due process of law.

A. The Prosecutor's Invitation to View the Case through the Eyes of the Victims Was an Improper Appeal to Use Sympathy for the Victims in Deciding the Case

In the early stage of his argument, the prosecutor told the jury of his concern that they the jurors would be benumbed by the evidence of so many murders. "My concern, and I will just tell you right now here my concern is okay, you see one murder. You look at that, wow. You see two murders, wow. [¶] Three, wow. [¶] Four, then the fifth murder you see and you start to think, wow, people really do this. This isn't a movie. This is not a movie. This is not a television show, but what worries me is over time, you can get what? More pictures you look at it, the more you can get numb to it." (13RT 2861:18-27.)

The prosecutor reminded the jurors they had promised to do their best and exhorted them to "remember what justice is." (13RT 2862:2.)

The prosecutor continued: "REMEMBER WHAT IT MUST HAVE BEEN LIKE TO BE ONE OF THEIR VICTIMS BEING SHOT AND CHOKING AND TRYING TO GET YOUR LAST BREATH OUT WHILE YOUR BLOOD IS GURGLING IN YOUR LUNGS. WHAT IT MUST BE LIKE TO BE ONE OF THOSE PEOPLE. [¶] That's what this case is about. The infliction of that kind of pain and cold hearted killing for what?" (13RT 2862:2-9; emphasis added.)

Later, in his argument, the prosecutor turned to appellant's actions on the Santa Monica Pier and, specifically, to the assault with a firearm involving Jing Huali (count 27).[64] The prosecutor argued: "What do we know? Jing Huali, while she was laying down, the defendant shot her. An assault with a firearm. I POINT A LOADED GUN AT YOUR HEAD, THE ASSAULT IS COMPLETE. THAT'S IT; IT'S DONE. YOU DO NOT HAVE TO FIRE. [¶] I PUT MY LEFT ARM AROUND AND I PUT A GUN TO YOUR HEAD, A LOADED GUN, COMPLETED, DONE, PROVEN. I BET YOU WOULD FEEL ASSAULTED IF SOMEONE HAD A LOADED GUN POINTED AT YOUR HEAD. [¶] She was shot." (13RT 2894:28-2895:9; emphasis added.)

B. It Has Long Been Settled That Appeals to the Sympathy or Passions or Fears of the Jury Are Inappropriate at the Guilt Phase of a Trial

In *People v. Pensinger* (1991) 52 Cal.3d 1210, the jury convicted the defendant of kidnapping a five-month-old baby and her five-year-old brother and of beating, mutilating, and murdering the younger child. During closing argument, the prosecutor said to the jurors:

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[64] The jury convicted appellant of assault with a firearm of Jing Huali and found the great bodily injury enhancement to be true. (17CT 4561.)

"Suppose instead of being Vickie Melander's kid this had happened to one of your children." The Supreme Court condemned the argument: "Such appeals to the sympathy or passion of the jury are misconduct at the guilt phase of trial." (*People v. Pensinger*, *supra*, 52 Cal.3d at p. 1250; citing *People v. Fields* (1983) 35 Cal.3d 329, 362-363.)

In *Fields*, the prosecutor described the murder to the jurors from the victim's perspective, including: "Now, think of yourself as Rosemary [C.]. A young librarian from the University of Southern California; a quiet girl, not outgoing. You haven't been seen with a boyfriend. You take the bus to work. You are either a virgin, or you have had very minimal sexual activity in your lifetime. . . . [¶] [The] defendant demands that you write him out a check payable to his sister, Gail Fields. The defendant threatens to kill you unless you give him the money. You are now naked and tied to the bed rails of the defendant's bed. You are forced to write several checks. The defendant looks at your checkbook and figures out certain amounts of money on paper. You finally write out a check to Gail Fields for $ 222.81. . . . [¶] The defendant directs Gail to drive onto the Santa Monica Freeway, and all of a sudden the defendant shoots you on the side and you yell, 'Oh, God.' You hear Gail beg the defendant not to shoot you again, and the defendant shoots you again. . . . [¶] Do you wonder about heaven, about God? You know there is no escape. The defendant shoots you more times. He states that you are not dead, and he has to make sure you are dead, and he hits you with an object on your head leaving triangular marks, probably the gun. And there are now four lacerations on your head. And it takes 10 or 15 minutes for you

to die. Blood meanwhile spatters on your face." (*People v. Fields*, *supra*, 35 Cal. 3d at pp. 361-362.)

This Court determined that the district attorney's argument was improper. "The prosecutor invited the jury to depart from their duty to view the evidence objectively, and instead to view the case through the eyes of the victim. His argument was an appeal to the jurors to permit sympathy for the victim to influence their verdict." (*Id.*, at p. 362.) *Fields* acknowledged that a prosecutor has the right to vigorously argue his case, but stated "the bounds of vigorous argument do not permit appeals to sympathy or passion such as that presented here." (*Id.*, at p. 363.)

In *People v. Stansbury* (1993) 4 Cal.4th 1017, this court found prosecutorial misconduct in the following argument: "Under what we are dealing with here, we are dealing with a 10-year old child who was taken from her home, taken to a place she had never been, experiencing things she had no idea how to deal with. [¶] She was degraded, violated, raped, evidence of oral sex. [¶] Think what she must have been thinking in her last moments of consciousness during the assault. [¶] Think of how she might have begged or pleaded or cried. All of those falling on deaf ears, deaf ears for one purpose and one purpose only, the pleasure of the perpetrator." (*Id.*, at p. 1057.)

Once again, this Court reiterated that a prosecutor's appeal for sympathy for the victim is improper when the jury is obligated to make an objective determination of guilt. (*Ibid.*)

In *People v. Leonard* (2007) 40 Cal.4th 1370, this Court found prosecutorial misconduct in the following improper appeal to the jurors' passions and fears during closing argument: "You know, Ms. Lange

talk [sic] about in connection with the Round Table Pizza, imagine yourself, put yourself there. I ask you to put yourself there, also. [¶] Imagine in that last millisecond before the lights go out, when you hear the report of the gun, when you feel the wetness, which they do not know but we would know, the small vapor of blood that is blown out the back or the side of their head and they fall to the floor, and in their last moment of consciousness, they think, I misjudged this man." (*Id.*, at p. 1407.)

Here, the prosecutor's remarks are no less graphic and objectionable than the remarks illustrated above that this Court has determined to be improper. The prosecutor invited the jurors to imagine themselves as one of appellant's victims – being shot and choking on one's own blood and trying to get a last breath while blood is gurgling in one's lungs. The prosecutor also asked the jurors to imagine the experience of Jing Huali, of being encircled and held with a loaded gun to the head.

The authorities above set forth the settled law that a prosecutor may not appeal to the jury's sympathy or passions or fears by viewing the crimes through the experiences of the victim. In making the arguments challenged above, the prosecutor improperly argued the case and committed misconduct.

C. The Improper Argument Denied Appellant a Fair Trial and Due Process of Law; Trial Counsel Failed to Provide Effective Legal Assistance When Counsel Failed to Timely Object to the Argument

A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct. Such actions require reversal under the federal Constitution when they infect the trial with such unfairness as to

make the resulting conviction a denial of due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; see *People v. Cash* (2002) 28 Cal.4th 703, 733.) Under state law, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial. (*People v. Cook* (2006) 39 Cal.4th 566, 606; *People v. Hoyos* (2007) 41 Cal.4th 872, 923; *People v. Ledesma* (2006) 39 Cal.4th 641, 726.)

1. Trial Counsel Failed to Provide Effective Legal Assistance Guaranteed by the Sixth Amendment to the Federal Constitution When Counsel Failed to Timely Object to the Argument

Trial counsel failed to timely object to the prosecutor's arguments challenged here. "A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety." (*People v. Thornton* (2007) 41 Cal.4th 391, 454.)

Here, however, because there can be no satisfactory explanation for counsel's failure to timely object, counsel failed to provide effective legal assistance guaranteed by the Sixth Amendment to the Federal Constitution, and this Court may reach appellant's claim of error. (*People v. Wilson* (1992) 3 Cal.4th 926, 936.)

In order to establish a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing norms. (*Strickland v. Washington* (1984) 466 U.S. 668,

688.) If the record sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Pope* (1979) 23 Cal.3d 412, 426.) If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Strickland, supra*, 466 U.S. at p. 694; *People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

Here, in the preceding section, appellant has shown that the prosecutor specifically asked the jurors to view the case through the victims' eyes and that this Court has repeatedly recognized that such an appeal constitutes misconduct because to do so appeals to the jury's sympathy or passions or fears. (See *People v. Lopez* (2008) 42 Cal.4th 960, 969-970.)

There can be no satisfactory explanation for counsel's failure to object to the prosecutor's invitation to the jury to substitute an appeal for sympathy for the victims in place of an objective determination of guilt. (*People v. Stansbury, supra*, 4 Cal.4th at p. 1057.) There was no tactical advantage to the defense to have the jurors view the case from the perspective of victims of the charged murders and assaults. The prosecutor's comments were not reasonable inferences to be drawn from the evidence (*cf., People v. Dennis* (1998) 17 Cal.4th 468, 522). The prosecutor's comments were not premised in appropriate hypotheticals (*cf.*, *People v. Lopez, supra*, 42 Cal.4th at p. 970), nor were they made as part of

a reasoned rebuttal to a defense argument (*cf.*, *People v. Leonard*, *supra*, 40 Cal.4th at p. 1406.) The arguments challenged here constituted an open invitation to the jurors to substitute emotions for objectivity in reaching guilt phase verdicts, a tactic this Court has characterized as reprehensible misconduct and to which trial counsel should have objected.

2. The Improper Argument Denied Appellant a Fair Trial and Due Process of Law

"A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. [Citations.] In other words, the misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial. [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citations.]" (*People v. Clark* (2011) 52 Cal. 4th 856, 960-961.)

"When the issue 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on another point in *People v. Hill* [(1998)] 17 Cal.4th 800, 822-823; accord, *People v. Clair* (1992) 2 Cal.4th 629, 663.) Moreover, prosecutors 'have wide latitude to discuss and draw inferences from the evidence at trial,' and whether 'the inferences the prosecutor

draws are reasonable is for the jury to decide.' (*People v. Dennis* [(1998)] 17 Cal.4th 468, 522.)" (*People v. Cole* (2004) 33 Cal. 4th 1158, 1202-1203.)

Here, the prosecutor's invitation to the jury to decide appellant's guilt of the charged crimes on the basis of sympathy, fear, and passions in lieu of a reasonable objectiveness was "of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs* (1976) 427 U.S. 97, 108.) When the prosecutor invited the jurors to "remember what it must have been like to be one of their victims being shot and choking and trying to get your last breath out while your blood is gurgling in your lungs, the prosecutor was not drawing reasonable inferences from the evidence at trial. Instead, he was trying to incite their passions against appellant.

While the prosecutor's misconduct was not repeated frequently during his argument, it was egregious in scope because the prosecutor asked the jurors to remember the experiences of *all* of the victims. As a result, the improper argument affected the outcome of all of the charged assaultive crimes. Moreover, the particularly graphic nature of the prosecutor's argument exacerbated the prejudicial effect. It provided a personal and bloody overlay to the prosecution's case. The argument complained of here, which was directed at eliciting an emotional response to, rather than an objective evaluation of, the evidence, misdirected the jury's attention from its important function of properly assessing appellant's guilt or innocence of the charged crimes based on relevant evidence of his conduct and mental state. It instead caused the jurors to focus instead on the irrelevant evidence pertaining to the victim's pain.

The improper argument was thus of sufficient significance to deny appellant a fair trial.

The prosecutor's argument also violated California law because it involved the use of reprehensible methods to attempt to persuade the jury. (*People v. Strickland* (1995) 11 Cal.3d 946, 955; accord, *People v. Farnam* (2002) 28 Cal.4th 107, 167.) As discussed above, the law is well settled that a prosecutor commits misconduct when he invites the jury to substitute its sympathy, fears, or passions in lieu of an objective determination of guilt. (*People v. Pensinger*, *supra*, 52 Cal.3d at p. 1250; *People v. Fields* (1983) 35 Cal.3d 329, 362-363.)

Here, again, the prosecutor's comments were intentionally framed to encompass all the assaultive crimes and denied appellant a fair trial.

Penalty Phase Issues

VIII.

THE FAILURE TO PRESENT A PENALTY PHASE DEFENSE, APPELLANT'S EXPRESS REQUESTS AND THE TRIAL COURT'S CONSENT NOTWITHSTANDING, VIOLATED APPELLANT'S RIGHT TO A RELIABLE DETERMINATION OF THE JUDGMENT OF DEATH

A. Appellant's Request That Counsel Present No Mitigating Evidence, Nor Cross-Examine Witnesses, Nor Present Argument during the Penalty Phase

Toward the end of the guilt phase trial, counsel for appellant requested a hearing during which he advised the court that appellant did not want him to call any witnesses, including his family members, to make any reference to his family, or otherwise put on any defense during the penalty phase trial. (12RT 2816:24-28- 2817:1-4.)

Counsel represented that he had prepared appellant's penalty phase presentation, had witnesses he intended to call, and had discussed his penalty presentation with appellant. (12RT 2817:9-12.) Counsel said he had advised appellant that the failure to present any mitigating evidence would substantially increase the likelihood the jury would sentence him to death and would greatly diminish if not eliminate any chance he had to receive a life without parole verdict. (12RT 2817:16-21.) Counsel said appellant indicated he understood the consequences, but still did not want mitigating evidence presented on his behalf. (12RT 2817:22-24.)

Counsel specified that he had planned to call between seven and ten family members to testify about incidents of abuse by the police upon appellant and various members of his family. These family members,

along with a psychologist and a social historian, would also testify regarding various topics outlined for the court by Flores's counsel (12RT 2820:23-2821:6), including, e.g., parental drug use, family instability, parental rejection and neglect, exposure to domestic violence, learning disabilities in elementary school, poverty, head injuries, and substance abuse (12RT 2819-2820). Counsel said he had also intended to play the tape-recording of the hostage negotiations between appellant and the police during the Santa Monica Pier incident to counter the prosecutor's portrayal of appellant. The recording depicted a softer and friendlier side of appellant as he dealt with the hostages. (12RT 2821:7-17.)

Counsel for Flores informed the court that Flores also did not want mitigating evidence presented during his penalty phase trial, even though counsel had explained such evidence would give him a better chance to avoid the death penalty. (12RT 2819:1-6.)

The court then addressed both Flores and appellant, stating that it intended to speak with both men jointly and separately in order to determine whether their individual decisions were knowingly and voluntarily made. In addition, the court informed the defendants that it was charged with the responsibility of persuading them to change their minds and to discuss the matter further with their counsel before making a final decision. The court further advised both defendants that their decision not to put on mitigating evidence would not be a lawful basis for reversal of a death verdict on appeal. (12RT 2821:19-2822:1.)

During the colloquy that followed, the court invited appellant to explain his thinking on the matter. Appellant said: "To the same effect that I don't want to have nobody up there crying on my behalf when I

didn't think about them when I was out there. And it doesn't change the fact that I care about them, but that's my own personal thing; that it doesn't matter if 12 people know it or not. I know it. I don't have to show it to them. Whether I live or die does not really matter to me. [¶] But the thing is I am not going to be up there and have all these people try to portray me out like I am an idiot or something. I'd rather choose not to." (12RT 2824:5-15.)

The court asked if appellant understood that the jury may very well impose the death penalty if counsel followed his request. Appellant said: "I mean that I fully understand; right? And Mr. Perlo and Mr. Miller have done a great job in defending me in the guilt phase and in the penalty phase. I talked to them and to his investigators, whoever, right? And to tell you the truth, I feel bad for not letting him do his job to the extent I hog-tied him the whole way. I never let them do anything that he chose to do because I would want to fight him all along the way. If he would have done that, I would have gone pro per." (12RT 2824:19-2825:1.)

The court asked if appellant understood that both trial counsel had done a lot of work in preparation for the penalty phase, "if there is one." (12RT 2825:2-5.) Appellant replied: "I mean there will be one. It's just – the only thing is I don't want to see that. I mean more likely, I mean I would be accused of murder. I don't want to be in the circumstance that I took a life, I deserve to give a life back, and that's my life. It doesn't mean I am a religious person, because I am not religious. You know what I mean? But the only thing is I accept what I got coming." (12RT 2825:7-14.)

The court expressed its concern that both Flores and appellant were committing something like "suicide by cop," which the court explained as: "that means somebody decides, okay, I am giving it up and he goes out and he puts himself in a position where police shoot and kill him. . . ." (12RT 2827:5-8.)

When asked if it was his intention to commit "suicide by cop," appellant responded: "No, because I will tell you the reason why it's not. Because the day that I got arrested, I had three choices: Either take my own life, get arrested, or either let them do it themselves. [¶] And I knew by me taking my life was a coward way out. I will let them do it, but also, I want a fair fight. I never was going to get one, so might as well give my family an opportunity to say good-bye to me and I say good-bye to them, also, and let them understand that it's not their fault, because they blame themselves and I don't want to have them up there saying the same thing that I just said." (12RT 25-2828:1-8.)

Later, when the court addressed appellant in the absence of Flores, the court said it wanted to make sure that appellant's decision was not being influenced by anyone else, including Flores. The court also said it did not want appellant to make a decision that he would come to regret in five or ten years' time. (12RT 2838.) Appellant replied he had personally thought about this very question for the past five years. (12RT 2838-2839.)

In a later hearing, the court revisited the matter of the penalty phase defense with Flores and appellant. Trial counsel informed the court that appellant had expanded his earlier request and now did not want any cross-examination of any victim impact witness. Appellant confirmed trial

counsel's statement. "I don't want my attorney asking the victims from the families. To ask any questions of them, nothing." (13RT 3016:10-12.)

The court asked appellant: "And Mr. Amezcua, does it continue to be your position that you do not wish your counsel to ask any questions nor present any evidence in this penalty phase of the trial?" (13RT 3020:9-12.) Appellant answered, "Yes." (13RT 3020:13.) Flores made the same reply to the same question. (13RT 3020:4-8.)

The court inquired of all counsel for both defendants whether each believed his client to be "sincere in his belief that he does not want you or in his stated position, that he doesn't want you to present evidence?" (13RT 3020:14-17.) Both lead and *Keenan*[65] counsel for appellant stated that appellant had always had this position and counsel believed appellant was sincere. (13RT 3020:21-24.)

After the prosecution rested its penalty phase case, the court inquired in the presence of the jury whether there would be evidence offered on behalf of appellant. Counsel replied: "We will waive opening, and there will be no evidence offered." (14RT 3194:14-15.) Counsel for Flores replied similarly. (14RT 3194:20.)

No penalty phase argument was made on behalf of either appellant. (14RT 3218:19-22.) No argument was made on appellant's behalf regarding the automatic motion for modification of the death verdict (Pen. Code, § 190.4, subd. (e)), which the court denied. (14RT 3247-3249.)

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[65] *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430 (trial court has discretion under statutes governing appointment of counsel to appoint a second defense attorney to assist in defense of a capital case).

B. Appellant's Related Request That the Court Not Give Defense-Proffered Penalty Phase Instructions

Counsel for Flores, joined by counsel for appellant, submitted the penalty phase instructions set forth below to the court. Flores and appellant informed the court they did not want the instructions to be given. The trial court acquiesced to that request. There is no indication in the record the instructions were rejected because they either incorrectly stated the law or were in any way unsupported by the authorities cited in connection with them. (14RT 3195-3196.)

The instructions, requested but not given, and the supporting case authorities cited by counsel, were:

1. Nothing in these instructions requires any juror to vote for the death penalty unless, upon completion of the "weighing" process, he or she decides that death is the appropriate penalty under all the circumstances. (*People v. Brown* (1985) 40 Cal.3d 512, 538-541; *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1007.) (18CT 4740.)

2. In this part of the trial, the law does not forbid you from being influenced by sympathy or pity for a defendant. If any of the mitigating evidence or any aspect of the case, arouses in you compassion, mercy, or pity for the defendant, you may consider this response in you in deciding the appropriate penalty to impose in this case. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1244; *People v. Fauber* (1992) 2 Cal.4th 792, 865; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1263; *People v. Cooper* (1991) 53 Cal.3d 771, 844; *People v. Taylor* (1990) 52 Cal.3d 719, 747; *People v. Wright* (1990) 52 Cal.3d 367, 441-443; *People v. Gallego* (1990) 52 Cal.3d 115,

199; *People v. Taylor* (1990) 52 Cal.3d 719, 747; *People v. Lamphear* (1984) 36 Cal.3d 163, 167.) (18CT 4741.)

3. If you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty of life in prison without the possibility of parole. (*People v. Morris* (1991) 53 Cal.3d 152, 227-228; *People v. Cancino* (1937) 10 Cal.2d 223, 230.) (18CT 4742.)

4. If you have any lingering doubt concerning the degree of guilt of the defendant as to the charge of which he was found guilty, or if you have any lingering doubt concerning the truthfulness of any of the special circumstance allegations which were found to be true, or if you have any lingering doubt concerning your finding of the defendant's sanity, you may consider that lingering doubt as a mitigating factor or circumstance. [¶] A "lingering doubt" is defined as any doubt, however, slight, which is not sufficient to create in the minds of the juror a reasonable doubt. (*People v. Cain* (1995) 10 Cal.4th 1, 64-68; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1235-1240; *People v. Cox* (1991) 53 Cal.3d 618, 678, fn. 20; *People v. Gonzales* (1990) 51 Cal.3d 1179-1234-1236; *People v. Kaurish* (1990) 52 Cal.3d 648, *People v. Cooper* (1991) 53 Cal.3d 771, 846; *People v. Morris* (1991) 53 Cal.3d 152, 218; *People v. Terry* (1964) 61 Cal.2d 137.) (18CT 4743.)

5. Within the broad categories of aggravation and mitigation, the law of this state does not place any specific weight or numerical value on any particular aggravating or mitigating circumstance. It is

entirely up to you to determine whether in your independent opinion one or more factors outweigh others, no matter what the number. (*People v. Pinholster* (1992) 1 Cal.4th 865, 968 fn. 25; *People v. Breaux* (1991) 1 Cal.4th 281, 314-315; *Tuilaepa v. California* (1994) 512 U.S. 967, 971-973.) (18CT 4744.)

6. Even if the aggravating factors substantially outweigh the mitigating factors, it is within your discretion to return a verdict of death or life imprisonment without the possibility of parole. (*People v. Noguera* (1992) 4 Cal. 4th 599, 642; *People v. Danielson* (1992) 3 Cal.4th 691, 717; *People v. Duncan* (1991) 53 Cal.43d 955, 978.) (18CT 4745.)

7. You may spare defendant's life for any reasons you deem satisfactory, including humanitarian considerations or mercy, if you choose to do so. (*People v. Pride* (1992) 3 Cal.4th 195, 262; *Penry v. Lynaugh* (1989) 492 U.S. 302, 327.) (18CT 4746.)

As a result of the foregoing requests by Flores and appellant, the defense made no penalty phase presentation and the jury was not given the instructions submitted by defense counsel.

C. The Relevant Law and Application to This Case

This Court has previously addressed the question of whether the failure to present a penalty phase defense, at the defendant's request, violates the Sixth Amendment's guarantee of effective assistance of

counsel and the Eighth Amendment's guarantee of a reliable penalty determination.

In *People v. Deere* (1985) 41 Cal.3d 353 (*Deere I*), the defendant, with his counsel's consent, pleaded guilty to one count of first degree murder and two counts of second degree murder and admitted a special circumstance allegation. The defendant then waived jury trial on the issue of penalty, again with the concurrence of counsel, presented no mitigating evidence in the court trial, and requested a verdict of death. This Court reversed the resulting death judgment, holding that a defense attorney's failure to present any mitigating evidence in the penalty phase of a capital trial deprives the defendant of effective assistance of counsel under the Sixth Amendment to the United States Constitution. This Court further held that counsel's failure to present mitigating evidence defeated the state's independent interest in assuring a reliable penalty determination under the Eighth Amendment. *Deere I* reasoned that allowing a defendant to bar his counsel from introducing mitigating evidence because he wants to die violates the fundamental public policy against "misusing the judicial system to commit a state-aided suicide" and also prevents this Court from fulfilling its duty to review a judgment of death upon the complete record of the case "because a significant portion of the evidence of the appropriateness of the penalty would be missing." (*Id.*, at pp. 363-364; see also *People v. Burgener* (1986) 41 Cal.3d 505, 541-542.)

Then, in *People v. Bloom* (1989) 48 Cal.3d 1194, this Court again considered the issue of whether the Eighth Amendment is violated when no mitigation evidence is presented in the penalty phase by a defendant. In *Bloom*, the defendant chose to represent himself during the

penalty phase and to have his former guilt phase counsel act as advisory penalty phase counsel. The defendant presented no mitigating evidence and, in his closing argument, urged the jury to impose the death penalty, stating not only that he had taken a life and deserved to die, but that he wanted to die. (*Id.*, at p. 1216.) The jury imposed a death sentence.

On appeal, the defense argued that the failure to present mitigating evidence made the death judgment unreliable under the Eighth Amendment. *Bloom* rejected this argument, holding that the reliability required by the Eighth Amendment in death penalty cases "is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present." (*Id.*, at p. 1228.) *Bloom* disapproved *Deere I* to the extent *Deere I* suggested that a defendant's failure to present mitigating evidence, in and of itself, is sufficient to make a judgment of death constitutionally unreliable. In short, *Bloom* found the death judgment was constitutionally reliable, i.e., that the defendant cannot be found to have "misus[ed] the judicial system to commit a state-aided suicide," because the proper trial procedures had been appropriately carried out.

Next, in *People v. Lang* (1989) 49 Cal.3d 991, 1030, this Court rejected a capital defendant's contention that his trial counsel rendered ineffective assistance in violation of the Sixth Amendment by agreeing to his demand that his grandmother not be called to testify as a defense penalty phase witness. *Lang* further stated that even if counsel had

acted improperly by acquiescing to the defendant's request, the impropriety would not result in reversal because the doctrine of invited error operated "to estop a defendant from claiming ineffective assistance of counsel based on counsel's acts or omissions in conformance with the defendant's own request." (*People v. Lang*, *supra*, 49 Cal.3d at p. 1032.) *Lang* also noted that the defendant had predicated his Sixth Amendment claim on his trial counsel's acquiescence to his demand rather than on "any antecedent act or omission of counsel," such as the failure to adequately investigate the availability of mitigating evidence and advise the defendant of its significance. (*Id.*, at p. 1033.)

In addition to claiming his counsel was ineffective, the defendant in *Lang* also argued that the failure to present his grandmother's mitigating testimony defeated the state's independent interest in assuring a reliable penalty determination. This Court relied on its holding in *Bloom* regarding the reliability required by the Eighth Amendment and *Bloom*'s disapproval of *Deere I* in holding the death judgment was not unreliable merely because defense counsel had not called defendant's grandmother. (*People v. Lang*, *supra*, 49 Cal.3d at p. 1030.)

In *People v. Sanders* (1990) 51 Cal.3d 471, upon which the trial court here relied in acquiescing to appellant's request that no penalty phase defense be presented on his behalf (13RT 3020-3021), this Court held that a defendant's "knowing and voluntary decision to forgo his right to present mitigating evidence, cross-examine adverse witnesses, and present closing argument at the penalty phase estops him" from claiming on review that counsel's performance was constitutionally inadequate. In so

doing, *Sanders* relied on the holding in *Lang*, *supra*, and the prior disapproval of *Deere I*, *supra*. (*Id.*, at pp. 526-527.)

As to the state's independent interest in achieving a reliable penalty verdict, *Sanders* relied on the decisions in *Lang* and *Bloom* in holding that the failure to present mitigating evidence did not compromise the judgment of death on this ground. In *Sanders*, as was true in appellant's case, there was no mitigating evidence presented, no cross-examination of prosecution witnesses, and no defense closing argument. The defendant argued that as a result of the absence of mitigation evidence the jury had nothing to "weigh" against the prosecution's penalty phase evidence, thereby effectively foreclosing a verdict of life without the possibility of parole. *Sanders* concluded that in light of the decisions disapproving the reasoning of *Deere I*, the defendant's knowing and voluntary decision to forgo his right to present mitigating evidence, cross-examine witnesses, and present argument at the penalty phase of his trial estopped him from claiming reversible error. (*People v. Sanders*, *supra*, 51 Cal.3d at p. 527, citing *People v. Lang*, *supra*, 49 Cal.3d at pp. 1031-1032.)

The defendant in *Deere I*, whose penalty judgment was reversed by this Court, was again sentenced to death following a retrial of the penalty phase. On appeal, this Court affirmed the death judgment in *People v. Deere* (1991) 53 Cal.3d 705 (*Deere II*). The defendant contended in *Deere II* that his trial counsel rendered ineffective assistance in failing to present evidence in mitigation. This Court reiterated its disapproval in *Bloom* and *Lang* of *Deere I* to the extent *Deere I* suggested the failure to present mitigating evidence per se rendered a judgment of death constitutionally unreliable and endorsed *Lang*'s use of the invited-error

doctrine to estop the defendant's claim that counsel was ineffective because counsel acted or omitted to act in conformance with the defendant's own requests. (*People v. Deere* (*Deere II*), *supra*, 53 Cal. 3d at p. 717.)

The opinion in *Deere I* was authored by Mosk, J. First, in *Bloom*, and then again in *Deere II*, Justice Mosk wrote separately regarding this Court's disapproval of *Deere I* and its holding in *Bloom* that the "reliability [required by the Eighth Amendment in death penalty cases] is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present." (*Deere II*, *supra*, 53 Cal. 3d at p. 728; quoting from *People v. Bloom*, *supra*, 48 Cal.3d at p. 1228.)

In *Deere I*, Justice Mosk wrote that defense counsel's failure to present mitigating evidence introduced error into the penalty proceeding. He reiterated that view in *Deere II*. "To permit a defendant convicted of a potentially capital crime to bar his counsel from introducing mitigating evidence at the penalty phase . . . would . . . prevent this court from discharging its constitutional and statutory duty to review a judgment of death upon the complete record of the case, because a significant portion of the evidence of the appropriateness of the penalty would be missing. [¶] This deficiency of the record implicates [a] paramount concern of the state: in capital cases . . . the state has a strong interest in reducing the risk of mistaken judgment. . . . [T]he United States Supreme Court has repeatedly recognized that the qualitative difference between death and all other

penalties demands a correspondingly higher degree of reliability in the determination that death is the appropriate punishment. . . . [T]he high court has insisted that the sentencer must be permitted to consider any aspect of the defendant's character and record as an independently mitigating factor. [¶] To allow a capital defendant to prevent the introduction of mitigating evidence on his behalf withholds from the trier of fact potentially crucial information bearing on the penalty decision no less than if the defendant was himself prevented from introducing such evidence by statute or judicial ruling. In either case the state's interest in a reliable penalty determination is defeated." (*People v. Deere* (*Deere II*), *supra*, 53 Cal.3d at p. 727, conc.opn., Mosk, J., quoting from *People v. Deere* (*Deere I*), *supra*, 41 Cal.3d at pp. 363-364, citations and internal quotations omitted.)

"*Deere I* also held that so long as the record . . . demonstrates the possibility that at least *someone* might have been called to testify on [the] defendant's behalf and to urge that his life be spared[] (41 Cal.3d at p. 367, italics in original), the error cannot be deemed harmless. When the sentencer in a capital case is deprived of all or a substantial part of the available evidence in mitigation, the potential for prejudice is too obvious to require proof. Indeed, short of substituting a verdict of its own, there is no way for a reviewing court to determine what effect unpresented mitigating evidence might have had on the sentencer's decision. We have no doubt that a judgment of death imposed in such circumstances constitutes a miscarriage of justice: not only [would the] defendant not have [had] a fair penalty trial -- in effect he [would have] had no penalty trial at all. (*People v. Deere* (*Deere I*), *supra*, 41 Cal.3d at p. 368, citations and internal quotations omitted.) [¶] But in *People v. Bloom*, *supra*, 48 Cal.3d

1194, a majority of this court disapproved the analysis of *Deere I.* They stated that the reliability [required by the Eighth Amendment in death penalty cases] is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1228; internal quotations omitted.)" (*People v. Deere* (*Deere II*), *supra*, 53 Cal. 3d at pp. 727-728.)

Justice Mosk explained, in an analysis and argument appellant herein adopts, that finding the reliability required by the Eighth Amendment in the procedural safeguards described in *Bloom* impermissibly allows "form to prevail over substance" in a circumstance in which "a person's life is at stake." (*People v. Deere* (*Deere II*), *supra*, 53 Cal. 3d at p. 728.)

"Manifestly, the penalty phase of a capital trial in this state is an adversary process. The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective of punishment in accordance with deserts. In other words, the system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. It follows that the system requires meaningful adversarial testing. When such testing is absent, the process breaks down and hence its result must be deemed unreliable as a matter of law. [¶] Further, as the United States Supreme Court has repeatedly emphasized, the 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. (*People v. Bloom*, *supra*, 48 Cal.3d at pp. 1236-1237, citations and internal quotations omitted (conc. & dis. opn. of Mosk, J.).)" (*People v. Deere* (*Deere II*), *supra*, 53 Cal. 3d at p. 728.)

"Thus, contrary to the *Bloom* assertion, the reliability required by the Eighth Amendment in death penalty cases can be assured only when the record on which the verdict is based is complete, i.e., when it does not lack any significant portion of the evidence of the appropriateness of the penalty that counsel reasonably concludes . . . makes the most compelling case in mitigation. (*People v. Deere* (*Deere I*), *supra*, 41 Cal.3d at pp. 363, 364, fn. 3.)" (*People v. Deere* (*Deere II*), *supra*, 53 Cal. 3d at pp. 728-729, internal quotations omitted.)

Here, of course, the record was not "complete" in that it lacked a penalty phase defense in its entirety. Defense counsel did not cross-examine the prosecution's witnesses. Counsel also did not call the seven to ten family members who were prepared to testify about incidents of abuse by the police upon appellant and various members of his family. In the guilt phase, the jury heard evidence that appellant had shot at and wounded police officers on the Santa Monica Pier just before his arrest. Evidence that appellant and members of his family had suffered prior abuses at the hands of law enforcement personnel may have been pertinent to the jury's understanding of appellant's state of mind.

Counsel had also prepared other mitigating evidence that included the testimonies of appellant's family members, a psychologist, and a social historian. These witnesses could have testified about incidents of parental drug use, family instability, parental rejection and neglect, exposure to domestic violence, learning disabilities in elementary school, and appellant's history of poverty, head injuries, and substance abuse. This mitigation evidence would have helped jurors understand appellant as an individual and thus would have helped the jurors reach a reliable penalty decision. (12RT 2819-2820). Counsel also planned to play the tape-recording of the hostage negotiations conducted during the Santa Monica Pier incident because the recording revealed a softer and friendlier side of appellant as he dealt with the hostages. Again, such evidence would have assisted the jury in reaching a verdict that reflected a true weighing of the relevant aggravating and mitigating circumstances.

The United States Supreme Court has frequently stated that the Eighth Amendment and evolving standards of societal decency impose a high requirement of reliability on the determination that death is the appropriate penalty in a particular case (see, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Mills v. Maryland* (1988) 486 U.S. 367, 377).

This Court observed in *Lang*: "'This deficiency of the record implicates another paramount concern of the state: "in capital cases . . . the state has a strong interest in reducing the risk of mistaken judgments." . . . Since 1976 the United States Supreme Court has repeatedly recognized that the qualitative difference between death and all other penalties demands a correspondingly higher degree of reliability in the determination that death is the appropriate punishment.' (*Woodson v. North Carolina* (1976) 428

U.S. 280, 305 (plur. opn.).) And since 1978 the high court has insisted that the sentencer must be permitted to consider any aspect of the defendant's character and record as an independently mitigating factor. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604-605 (plur. opn. of Burger, C. J.).)" (*People v. Lang*, *supra*, 49 Cal. 3d at pp. 1060-1061.)

For the foregoing reasons, appellant respectfully asserts that the failure to present a penalty phase defense, appellant's express requests and the trial court's consent notwithstanding, violated appellant's right to, and the state's interest in, a reliable determination of the judgment of death. It also violated appellant's right to effective assistance of counsel.

IX.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT DEATH IS A GREATER PUNISHMENT THAN LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE AND IN SO DOING VIOLATED THE EIGHTH AMENDMENT'S GUARANTEE OF A CAPITAL JURY SUITABLY INSTRUCTED TO AVOID AN ARBITRARY AND CAPRICIOUS DEATH VERDICT

A. Background

The trial court instructed the prospective jurors that death was a more severe punishment than life without the possibility of parole.

> [¶] The law says life without parole is a lesser sentence. It's less serious than death. Many of you said [in questionnaire responses], My God, I'd rather be dead than spend my life in prison. I'm telling you, the law that you have sworn to follow says, No, you cannot consider that. That may be your personal feeling. But you must agree to follow the law and the law says life without parole is a lesser punishment to death.[66] (5RT 1305:26-1306:5.)

Counsel for Flores, joined by counsel for Amezcua, objected to the court's instruction, noting that even if the jury were to find the aggravating factors substantially outweighed the mitigating factors, the law still allowed the jury to find that death was not the appropriate penalty, which, in counsel's view, suggested that the law did not consider death to be the worse penalty. (5RT 1311:15-18, 1312.)

> [¶] Suppose if the reason they don't think it [the death penalty] is appropriate is that in this case they would think that the defendants would actually suffer more by getting L-WOP, doesn't that conflict with the proposition that the law presumes that death is more serious?

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[66] Quotation is as punctuated in the Reporter's Transcript.

> To me, saying that the law presumes death is more serious takes away their discretion to decide what's appropriate in this case. (5RT 1311:27-1312:1.)

The defense further explained that the instruction incorrectly limited the jury's decision-making. "It tends to make [the jury] think they can't come back with that decision [life without parole] because that is not the worst verdict, which it might be." (5RT 1312:8-10.)

The court founded the question "interesting," and said it would look into the issue. (5RT 1312:4-6, 11-14.)

Later, after a prospective juror stated that she believed the death penalty to be "the easy way out," the court responded, "You understand that the law says that's not the easy way out. That life without parole is a lesser sentence; do you understand that?" (5RT 1442:3-5.)

The defense again objected to the instruction that the death penalty was a more severe penalty than life without parole. (5RT 1444:4-5.)

The court replied that it could not find case authority stating that death is the more severe penalty, but that the jury instructions state that the only time the jury "can vote for death is if they find the evidence in aggravation substantially outweighs the mitigation." (5RT 1444:18-20.) The court added: "That pretty well says what the law feels about life versus death." (5RT 1444:20-21.)

B. The Notion That a Competent Mind May Rationally Conclude That Death Is the Less Severe Option Is Grounded in Concepts of Human Dignity, Which the United States Supreme Court Has Declared to Be the Core Concept underlying the Eighth Amendment

Although California law appears to recognize that death is a greater punishment than life imprisonment without the possibility of parole, a review of the authorities (see discussion below) suggests that the law on this point is not as explicit as has been believed.

Moreover, an evolving body of material increasingly suggests that the view as to which of these two punishments is really the greater is a subjective rather than legal one, just as the decision as to whether the aggravating evidence is so substantial in comparison with the mitigating circumstances that death is warranted is a subjective rather than legal one in that individual jurors are free to assign whatever moral or sympathetic value each deems is appropriate to each factor.

The law, for example, has recognized that a competent defendant sentenced to death may knowingly and intelligently waive any federal constitutional right to appeal that sentence. (*Gilmore v. Utah* (1976) 429 U.S. 1012.) Gary Mark Gilmore was tried and sentenced to death by a Utah jury and neither sought nor obtained any appellate review of the death sentence imposed upon him by the trial court. Thereafter, his mother petitioned the United States Supreme Court for a stay of execution of the death sentence. The Court granted a temporary stay of execution in order to allow the State of Utah to respond, which it did. Gilmore, through counsel, also filed a response challenging his mother's standing to initiate proceedings in his behalf. (*Id.*, at pp. 1013-1014.) The Court determined

that Gilmore's appearance in the case through the filing of a response necessarily eliminated his mother's standing to seek relief in his behalf. The Court also reviewed the appellate record and found that Gilmore's mental capacity and emotional stability had been evaluated and assessed and that he was found competent to make the necessary decisions concerning his sentence. (*Id.*, at pp. 1016-1017.) The Court thereupon dismissed the stay of execution over the dissents of three justices whose shared concerns focused on possible Eighth Amendment violations ("the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment") and the constitutionality of Utah's death penalty statute. (*Id.*, at pp. 1018-1020.)

In *Evans v. Bennett* (1979) 440 U.S. 1301, the United States Supreme Court (Rehnquist, J., as Circuit Justice) granted a mother's application for a stay of her son's execution based on her son's alleged incompetency. John Louis Evans confessed to the crime at trial and asked the jury to find him guilty so that he could receive the death penalty pursuant to Alabama law. His conviction and sentence were appealed and affirmed by the Alabama courts and he unsuccessfully petitioned for a writ of certiorari in the United States Supreme Court. His mother then petitioned for the stay of execution. The application for stay indicated that Evans had refused to undertake any further appeals and had repeatedly expressed his desire to die. (*Id.*, at p. 1302.) In addition, Evans refused to be evaluated by a psychiatrist and expressed a preference for electrocution rather than serving the rest of his life in prison. (*Id.*, at p. 1305.) Justice

Rehnquist granted a temporary stay in order to allow the matter to be considered by the full court, but opined:

> [¶] The fact that Evans has elected not to pursue post-conviction remedies that would serve to forestall the impending execution is not controlling, since it may well be, as the media has advertised, that John Evans has confronted his option of life imprisonment or death by execution and has elected to place his debts on a new existence in some world beyond this. The Court finds no evidence of irrationality in this; indeed, in view of the allegations in the case of *Jacobs v. Locke*,[67] the death row conditions of confinement case presently pending in this Court, it may well be that John Evans has made the more rational choice." (*Id.*, at p. 1305.)

In *Lenhard v. Wolff* (1979) 443 U.S. 1306, Justice Rehnquist, once more sitting as circuit justice, again granted a stay of execution so the case might be considered by the full Court. This case involved an application brought by the attorneys for a defendant under sentence of death questioning his competency because he had disassociated himself from efforts to have his sentence reviewed. (*Id.*, at p. 1307.)

In granting the stay of execution, Justice Rehnquist observed that had he been ruling on the application for stay as a member of the full court, he would have voted to deny the stay, explaining:

> [] The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of its motive, suggests that the preservation of one's own life at whatever cost is the *summum bonum,* a proposition with respect to which the greatest philosophers and theologians have not agreed and

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[67] The opinion provides no further citation for *Jacobs v. Locke*.

> with respect to which the United States Constitution by its terms does not speak.

(*Id.*, at pp. 1312-1313.)

These cases reflect a clear recognition by the United States Supreme Court that a defendant's decision to allow the execution of his death sentence may be an inherently rational one and that there is validity to the view that death is not necessarily the greater or most severe punishment.

The idea that death may be the better alternative exists in other areas of our culture and our lives.[68] For example, on-going discussions centering on legal, religious, and moral conceptions of suicide and a personal right to death have brought about state laws allowing physician-assisted death in this country, some directly or indirectly supported by judicial decisions. Voters in the state of Oregon approved a ballot initiative that established the Oregon Death with Dignity Act in 1994 and reapproved it after the state legislature placed a repeal of it on the ballot in 1997. (Oregon Revised Statutes, section 127.800-995). The act legalizes physician-assisted dying. In *Gonzales v. Oregon* (2006) 546 U.S. 243, the United States Supreme Court ended a federal challenge to the law by holding that the United States Attorney General was not empowered to overrule state laws determining what constituted the appropriate use of medications during life-ending procedures.

In 1999, Texas passed the Advanced Directives Act (Texas Health & Safety Code chapter 166). Section 166.046, subsection (e) of that

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[68] "Death is easier than a wretched life; and better never to have born than to live and fare badly." – Aeschylus

act allows a health care facility to discontinue life-sustaining treatment ten days after giving written notice if the continuation of life-sustaining treatment is considered futile by the treating medical team.

In 2008, Washington voters passed Washington's Death with Dignity Act (Revised Code of Washington, chapter 70.245.) This act legalized physician-assisted dying with certain restrictions by allowing some terminally ill patients to determine the time of their own death.

In 2009, the Montana Supreme Court considered the question of whether a lower court had erred in its decision that competent, terminally ill patients have a constitutional right to die with dignity and that physicians who help them are protected from prosecution under the state's homicide statutes. (*Baxter v. Montana* (2009) 2009 MT 449, at ¶ 3.) The plaintiffs had alleged in part that mentally competent, terminally ill patients have a right to die with dignity under sections of the Montana Constitution that addressed individual dignity and privacy. The court chose to resolve the case at the state statutory rather than constitutional level. The court concluded that since suicide is not a crime under Montana law, the state's consent statute would shield doctors from homicide liability if they provided aid in dying to terminally ill, mentally competent adult patients who consented. (*Id.*, at ¶¶ 11, 12.) The court further concluded there was nothing in Montana Supreme Court precedent or Montana statutes to indicate that physician aid in dying was against public policy, and therefore the immunity provided by the consent statutes was applicable. (*Id.*, at ¶¶ 13, 25, 49.)

Thus, these illustrations taken from United States Supreme Court cases and state court decisions and statutes support the view that

competent adults can and do rationally conclude that death is sometimes the less severe option.

Moreover, there has been judicial recognition of egregious conditions within California's prison system that supports the view that competent minds may rationally view life without possibility of parole as a greater penalty than death.

For example, in 2011, the United States Supreme Court held that a court-mandated population limit was necessary to remedy the violation of prisoners' rights under the Eighth Amendment. *Brown v. Plata* (2011) 536 U.S. ___, 131 S.Ct. 1910; 179 L.Ed.2d 969, affirmed a decision by a three-judge panel of the United States District Court for the Eastern and Northern Districts of California, which had ordered California to reduce its prison population to 137.5 percent of design capacity within two years. (*Id.*, 131 S. Ct. at p. 1923.) *Plata* found that severe overcrowding in California prisons prevented the State from providing prisoners with basic sustenance, including adequate medical care, and found these conditions to be incompatible with the concept of human dignity. (*Id.*, at p. 1928.) In reaching its decision, the Court discussed a prisoner's rights under the Eighth Amendment on a philosophic as well as pragmatic level. "As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. '"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."' (*Atkins v. Virginia* (2002) 536 U.S. 304, 311, 122 S. Ct. 2242,

153 L. Ed. 2d 335 (quoting *Trop v. Dulles* (1958) 356 U.S. 86, 100, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion)).)" (*Plata, supra*, 131 S. Ct. at p. 1928.)

It is worth noting that the notion of human dignity that has been held to be the core concept underlying the Eighth Amendment is echoed by the Death with Dignity titles of the physician-assisted suicide acts of Oregon and Washington and is implicit in the holdings that a competent mind may rationally choose death as the better option of *Gilmore*, *Evans*, and *Lenhard v. Wolff, supra.*

Plata also took note of actual consequences of overcrowding to prisoners. The Court observed that California's prisons had operated at approximately 200 percent of design capacity for at least 11 years, resulting in prisoners being "crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers. [Citation.] As many as 54 prisoners may share a single toilet. [Citation.]" (*Plata, supra*, 131 S. Ct. at p. 1923.) The Court further noted that "[p]risoners suffering from physical illness also receive severely deficient care. California's prisons were designed to meet the medical needs of a population at 100% of design capacity and so have only half the clinical space needed to treat the current population. [Citation.] A correctional officer testified that, in one prison, up to 50 sick inmates may be held together in a 12- by 20-foot cage for up to five hours awaiting treatment. [Citation.] The number of staff is inadequate, and prisoners face significant delays in access to care. A prisoner with severe abdominal pain died after a 5-week delay in referral to a specialist; a prisoner with 'constant and extreme' chest pain died after

an 8-hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a 'failure of MDs to work up for cancer in a young man with 17 months of testicular pain.'" (*Plata, supra*, at p. 1925.)

In *Madrid v. Gomez* (N.D. Cal. 1995) 889 F. Supp 1146, the United States District Court for the Northern District of California concluded that prison officials at California's Pelican Bay State Prison had repeatedly violated the Eighth Amendment by engaging in a conspicuous pattern of excessive force and that the delivery of both physical and mental health care at the prison was constitutionally inadequate.

The court's factual findings regarding excessive force were based on: (1) the use of gas and taser guns during cell extractions, physical beatings resulting in broken bones and the intentional infliction of pain, the immersion of a mentally ill inmate in scalding water producing second and third-degree burns over one-third of the inmate's body (889 F. Supp., at pp. 1161-1168); (2) the use of fetal restraints in response to the kicking of cell doors (*id.*, at pp. 1168-1171); (3) the practice of confining naked or partially dressed and sometimes physically injured inmates in outdoor holding cages the size of telephone booths constructed of weave mesh metal and exposed to public view during inclement weather (*id.*, at pp. 1171-1172); (4) the use of cell extractions determined to be unnecessary and involving a strikingly high degree of force (*id.*, at pp. 1172-1178); and (5) unnecessary and reckless use of firearms (*id.*, at pp. 1178-1191).

The court's determination that physical and mental health care were inadequate was based on: (1) the need for mental health services at Pelican Bay (*id.*, at pp. 1214-1216); and (2) systemic deficiencies in the delivery of mental health care regarding staffing levels, screening and

referrals, the state of psychiatric records, delays in transfers for inpatient and outpatient care, and illustrative examples of inadequate care (*id.*, at pp. 1217-1226). The court made similar findings regarding the inadequate provision of physical health care. (*Id.*, at pp. 1257-1260.)

The court found that prison officials took no action to seriously address the issue in continued disregard for the substantial risk of harm to inmates. (*Id.*, at pp. 1191-1198, 1226-1227.) The court further found that the omissions by the officials were of such a degree that they constituted deliberate indifference. (*Id.*, at pp. 1246-1255.)

The relevance of the findings regarding the conditions within California's prison system made in *Plata* and *Madrid* to the present discussion regarding the trial court's instruction that death is the most severe penalty is multifold. *Madrid* was decided in 1995 and chronicles prison conditions within Pelican Bay, which was opened in 1989. (*Id.*, at p. 1155.) *Plata* was decided in 2011 and addressed constitutional violations in California's entire prison system that "have persisted for years." (*Brown v. Plata*, *supra*, 131 S.Ct. at p. 1922.) Thus, the conditions within California's prison system are pervasive and long-standing. They were also litigated and determined to violate the Eighth Amendment's cruel and unusual punishments clause, a guarantee binding on the States by the Due Process Clause of the Fourteenth Amendment. (*Ibid.*) Because California's unconstitutional prison conditions existed for a long time, because they were the subject of litigation, and because they were egregious in nature, it may reasonably be assumed they have been within the public awareness and thus provide adequate support for the view that

life in prison with impossibility of parole is a punishment greater than death.

Finally, there is empirical evidence that, presented with the opportunity to consider the issue, many in our society disagree which is the greater penalty. The trial court here observed that many prospective jurors in this case had questioned whether death was in fact the greater penalty. Case law on this subject, which appellant discusses in the following section, chronicles instances in which jurors in other cases have asked this question. (See, e.g., *People v. Harris* (2005) 37 Cal.4th 310, 361; *People v. Tate* (2010) 49 Cal.4th 635, 706-707.)

Appellants in this case expressed a preference for a death sentence in their jailhouse discussions with the prosecutor. Appellants, for example, explained in the context of their negotiations for a reduced restitution fine that if they were to get the death sentence they would be allowed to have televisions, radios, and compact discs during the time they were housed on death row. (DPSuppIII SuppCT 61:18-24.)

Flores contrasted that with his personal experience of serving a non-death sentence.

> I just – I just came out of high desert 180.[69] . . . [¶] So, 180. No program. You don't go to the yard or anything. The yard opens, the door opens, you try to kill your neighbor, unless he's not with us, you know. . . . [¶] So, now I'm going to death row, something different, something new, right? And I don't wanna have a lot of restitution because when I

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[69] An apparent reference to High Desert State Prison in Susanville, California, which, the California Department of Corrections website states, include two yards with 180 design facilities. (http://www.cdcr.ca.gov.)

> buy a TV, they're gonna make me pay to the victims. . . . (DPSuppIII SuppCT 62:2-5, 9-11.)

Later, when the prosecutor asked why appellants were giving him information that could be used against them in this case, Flores replied:

> We don't care. The whole thing is, we want death, right? The whole thing, we want death before, uhm – when you're incarcerated, we do a lot of weird things. More than likely we're going to get hepatitis. . . . [¶] We're gonna die is [sic] what, 20 years? We ain't gonna even make it to that chair, or that, uh bed. (DPSuppIII SuppCT 76:12-17.)

Later, Flores spoke again of appellants' feelings about the death penalty:

> [¶] But the death penalty isn't really fearful of it, right. . . . So we embrace it, you know? It's just another new place, like being in prison, you know. You know, I've been (*unintelligible*) the shoe [sic]. I've been in Level 3's. I've been in 270's, 180's. Bam, I've never been on death row. I heard it's pretty nice up there, isn't it? (DPSuppIII SuppCT 162:3-8.)

For the reasons set forth here, appellant respectfully submits that the notion that a competent mind may rationally conclude that death is the less severe option is grounded in concepts of human dignity, which the United States Supreme Court has declared to be the core concept underlying the Eighth Amendment, and is supported by documented findings and by empirical evidence. Moreover, this notion is one that occurs with some frequency throughout various elements of our greater

society and to that extent it does establish a general acceptance of the view that death is not always the most severe penalty.

C. The Law in California and the Uncertainties Attending It

In *People v. Thomas* (2011) 52 Cal.4th 336, this Court rejected the claim that the trial court erred in instructing that, "[f]or all purposes, you must consider and accept that death is a greater penalty than life imprisonment without possibility of parole." *Thomas* stated: "Under California law, death is a greater punishment than life imprisonment without possibility of parole. The instruction was proper." (*Id.*, at p. 361.) In so stating, this Court relied upon its decisions in *People v. Tate* (2010) 49 Cal.4th 635 and *People v. Harris* (2005) 37 Cal.4th 310. (*People v. Thomas*, *supra*, 52 Cal.4th at p. 361.)

In *Tate*, the trial court responded to the jury's question asking which punishment was the more severe – life without parole or death – by rereading CALJIC No. 8.88, which explains "each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (*People v. Tate*, *supra*, 49 Cal.4th at p. 706.) *Tate* relied, as did *Thomas*, on this Court's decision in *People v. Harris* in finding the trial court had adequately conveyed the principle that death is the more severe penalty. (*Id.*, at p. 707.)

In *Harris*, this Court held that the trial court properly responded to a jury request as to which was the more severe penalty by instructing that "under the law the death penalty is the more severe penalty.

Life in prison is not as severe as the death penalty." (*People v. Harris*, *supra*, 37 Cal.4th at p. 361.) *Harris* held: "That death is considered to be a more severe punishment than life is explicit in California law: CALJIC No. 8.88, approved in *People v. Duncan* (1991) 53 Cal.3d 955, 977-979, states in pertinent part, 'To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.'" (*People v. Harris*, *supra*, 37 Cal. 4th at p. 361.)

Thus, it appears that though *Harris* characterized the instruction that death is a more severe punishment than life without parole as "explicit" in California law, the authority upon which *Harris* relied is the language of the jury instruction CALJIC No. 8.88.

A jury instruction, however, is not the law. Rule 2.1050, subsection (b), of the California Rules of Court, states: "The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law. The articulation and interpretation of California law, however, remains within the purview of the Legislature and the courts of review."

In *Tate*, this Court explained *Harris*' characterization of the principle that death is the more severe punishment as being "explicit" in California law followed by a reference to the language of CALJIC No. 8.88 in this way. "Implicit in this analysis is the assumption that CALJIC No. 8.88 itself, by stressing that death is warranted only where aggravation 'so substantial[ly]' outweighs mitigation as to call for that penalty, makes the greater severity of the death penalty 'explicit.'" (*People v. Tate*, *supra*, 49 Cal. 4th at p. 707.)

Thus, in *Thomas*, this Court expressly stated that under California law death is a more severe penalty than life without parole in reliance upon *Tate*. *Tate*, in turn, relies upon *Harris*, which relied upon CALJIC No. 8.88, which, according to *Tate*, was properly relied upon by *Harris* because the language of CALJIC No. 8.88 makes the greater severity of the death penalty "explicit."

The problem with this line of reasoning, however, is that it does not conform to the strictures set forth in Rule 2.1050 of the California Rules of Court. The instructions themselves are intended to be accurate statements of the law, but they are not themselves the law. Subsection (b) reserves the "articulation and interpretation of California law" to the Legislature and the courts of review.

Here, when the *Thomas-Tate-Harris* analysis is followed back to its origin – the language of CALJIC No. 8.88 – it appears that the jury instruction gave rise to the articulation of the now "explicit" law that death is the greater punishment. The analysis turns the principle embodied within Rule 2.1050 on its head.

Moreover, the law, as articulated by the Legislature in Penal Code section 190.3 does not contain the instruction's language relied upon by *Tate* and *Thomas* in finding the law to be "explicit." In speaking of *Harris*' analysis, *Tate* said: "Implicit in this analysis is the assumption that CALJIC No. 8.88 itself, by stressing that death is warranted only where aggravation 'so substantial[ly]' outweighs mitigation as to call for that penalty, makes the greater severity of the death penalty 'explicit.'" (*People v. Tate*, *supra*, 49 Cal. 4th at p. 707.)

In contrast, after listing the factors to be considered in determining the appropriate penalty, Penal Code section 190.3 states in much more neutral tones: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in the state prison for a term of life without the possibility of parole."

Thus, the Legislature's articulation of the standard is devoid of the language in the instruction that "death is warranted only where aggravation 'so substantial[ly]'" outweighs mitigation, the very language that this Court found made "explicit" that death is the more severe penalty. In contrast, Penal Code section 190.3 states only that the trier of fact can impose death if the aggravating circumstances outweigh the mitigating circumstances.

Appellant respectfully submits that the problems in reasoning of the *Harris-Tate-Thomas* line of cases that have been described here and the authorities presented in the preceding section establishing that competent minds can rationally find that life without parole is a more severe penalty than death require reconsideration of the holdings that under California law death is the more severe penalty.

D. Appellant Was Prejudiced by the Instruction

Appellant was prejudiced by this instruction. Had the jury not been erroneously instructed that the death penalty was the greater punishment, some jurors may well have voted for life in prison without parole. Upon learning that the appellant preferred a death sentence, the jurors may have voted for life in prison in order to impose the sentence perceived to be more severe by appellant.

This Court has recognized that a jury that realizes that the defendant is seeking the death penalty may well return a sentence of life in prison in order to punish the defendant more severely than giving him the death penalty. In *People v. Bloom* (1989) 48 Cal.3d 1194, this Court held that granting a capital defendant's midtrial motion for self-representation did not contravene the policy against state-aided suicide. In so doing, this Court explained that a jury "[f]aced with a defendant arguing a preference for the death penalty after conviction of death-eligible offenses" might well conclude that death was "too good" for the defendant and that life imprisonment with no hope of parole would be the more severe and more appropriate punishment. (*Id.*, at p. 1223.) *Bloom* elaborated:

> While qualitatively different from the death penalty, the punishment of life imprisonment without hope of release has been regarded by many as equally severe: "When a person is doomed to spend his final years imprisoned, with no (or few) prospects of release, then in terms of his human dignity, his individuality, his freedom, and his autonomy, one could well argue that the oppressive confines of a prison constitute as great an infringement of his basic human rights as a death sentence." (Sheleff, Ultimate Penalties (1987) p. 56.) Life imprisonment without possibility of parole has been described as "'not so much a substitute for capital punishment, as a

> slower and more disadvantageous method of inflicting it.'" (*Id.*, at p. 62, quoting penologist William Tallack.) As the philosopher John Stuart Mill put it: "What comparison can there really be, in point of severity between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards – debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?'" (*Id.* at p. 60.) (*People v. Bloom*, *supra*, 48 Cal. 3d at p. 1223 fn.7.)

Under the circumstances present in this case, including the nature and number of the crimes for which the jury found appellant guilty, and appellant's expressly stated preference for a death sentence, it is indeed likely that jurors wanting to impose the greater punishment upon appellant would have chosen the penalty of life without possibility of parole, which Flores described in his jailhouse statement as a life of privation without television, radio, or compact discs.

X.

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

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the United States Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6.)[70] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an

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[70] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (548 U.S. at p. 178.)

essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. Appellant's Death Penalty Is Invalid because Penal Code Section 190.2 Is Impermissibly Broad

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. (Citations omitted.)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make *all* murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of

Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-two special circumstances[71] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

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[71] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law. (See Section E. of this Argument, *post*).

B. Appellant's Death Penalty Is Invalid because Penal Code Section 190.3, subd. (a), As Applied, Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U. S. Constitution

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. (*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88, par. 3.) The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime (*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, cert.

den., 494 U.S. 1038 (1990)), or having had a "hatred of religion" (*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, cert. den., 112 S. Ct. 3040 (1992)) or threatened witnesses after his arrest (*People v. Hardy* (1992) 2 Cal.4th 86, 204, cert. den., 113 S. Ct. 498), or disposed of the victim's body in a manner that precluded its recovery (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, cert. den. 496 U.S. 931 (1990)). It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.) Relevant "victims" include "the victim's friends, coworkers, and the community" (*People v. Ervine* (2009) 47 Cal.4th 745, 858), the harm they describe may properly "encompass[] the spectrum of human responses" (*ibid.*), and such evidence may dominate the penalty proceedings (*People v. Dykes* (2009) 46 Cal.4th 731, 782-783).

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa*, *supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case,

prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Determination of Each Factual Prerequisite to a Sentence of Death; It Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (Pen. Code, § 190.2) or in its sentencing guidelines (Pen. Code, § 190.3). Section 190.3, subdivision (a), allows prosecutors to argue that every feature of a crime that can be

articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. Appellant's Death Verdict Was Not Premised on Findings beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of

any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

At the start of the trial, the court also told all prospective jurors that if they reached the penalty phase there would be no requirement of proof beyond a reasonable doubt as to aggravating factors, nor was there a burden of proof on the State for the decision as to penalty. (5RT 1215-1216, 1239, 1241, 1265-1266, 1304-1306, 1331, 1418-1419, 1446.)

All of this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors. . . ." But, this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [*Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [*Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270 [*Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a

defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. *Any* factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.*, at p. 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose

after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.*, at p. 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker, supra,* 543 U.S. at p. 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California, supra*, 549 U.S. at p. 274.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (*Id.*, at p. 282.)

2. In the Wake of *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, Penal Code section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh(s) any and all mitigating factors.[72] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (14RT 3299), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious*

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[72] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most importantly – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88 [Spring 2010 Revision]; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[73] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[74]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias*

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[73] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances (fn. omitted),' we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, at p. 460)

[74] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown* (*Brown I*) (1985) 40 Cal.3d 512, 541.)

(2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (*People v. Black, supra*, 35 Cal.4th at p. 1254.)

The United States Supreme Court explicitly rejected this reasoning in *Cunningham.*[75] In *Cunningham*, the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law (DSL). The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were after a review of the relevant rules of court. (*Cunningham, supra*, 549 U.S. at pp. 276-279.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a

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[75] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*People v. Black, supra*, 35 Cal.4th at p. 1253; *Cunningham, supra,* 549 U.S. at p. 289.)

prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra,* 549 U.S. at pp. 290-291.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, at p. 293.)

The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. *Cunningham* observed that its "decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi*'s 'bright-line rule' was designed to exclude. See *Blakely, supra,* 542 U.S., at pp. 307-308, 124 S.Ct. 2531. But see *Black,* 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that '[t]he high court precedents do not draw a bright line')." (*Cunningham, supra,* 549 U.S. at pp. 291.)

In the wake of *Cunningham,* it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As Penal Code section 190, subdivision (a)[76] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, 549 U.S. at p. 279.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding

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[76] Penal Code section 190, subdivision (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

of one or more special circumstances in California, leads to only two sentencing options – death or life imprisonment – and *Ring* was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

"This argument overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' (*Apprendi, supra*, at p. 494.) In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151." (*Ring*, 536 U.S. at p. 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 536 U.S. at p. 604.) Section 190, subdivision (a), provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Pen. Code, § 190.3; CALJIC 8.88.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring, supra*, 536

U.S. at p. 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely*, *supra*, 542 U.S. at p. 328; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

3. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved beyond a Reasonable Doubt

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Az. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253;

Woldt v. People (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[77])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[78] As the high court stated in *Ring*, *supra*, 536 U.S. at p. 609: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death."

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one.

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[77] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[78] In *Monge*, the United States Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added), quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 and *Addington v. Texas*(1979) 441 U.S. 418, 423-424.)

This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

4. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty

(a) Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358,

364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

(b) Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship, supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship, supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." (*Id.* at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The

only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the United States Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added), quoting *Bullington v. Missouri*, 451 U.S. 430, 441 (1981), and *Addington v. Texas*, 441 U.S. 418, 423-424 (1979).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

(c) California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976)

428 U.S. 153, 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefore." (*Id.*, at p. 267.)[79] The same analysis applies to the far graver decision to put someone to death.

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[79] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Pen. Code, § 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury.

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons

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decision. (See Title 15, California Code of Regulations, section 2280 *et seq.*)

for imposing death. (See *Kansas v. Marsh, supra*, 548 U.S. at pp. 177-178 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

(d) California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on*

arbitrariness that it would not pass constitutional muster without comparative proportionality review." (Emphasis added.)

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at p. 52 fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that cann*ot be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia* (1972) 408 U.S. 238. The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing. Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*, 548 U.S. at pp. 177-178), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-

case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

(e) The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True beyond a Reasonable Doubt by a Unanimous Jury

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding four incidents of unadjudicated criminal activity allegedly committed by appellant and devoted a considerable portion of its closing argument to arguing these alleged offenses.

The U.S. Supreme Court's recent decisions in *U. S. v. Booker*, *supra*; *Blakely v. Washington*, *supra*; *Ring v. Arizona*, *supra*; and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth

Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

(f) The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

(g) The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury,

however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft* [(2000) 23 Cal.4th [978], 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*" (*People v. Arias* [(1996)] 13 Cal.4th [92], 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*People v. Morrison*, *supra*, 34 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[80]

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created

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[80] See also *People v. Cruz* (2008) 44 Cal.4th 636, 681-682 [noting appellant's claim that "a portion of one juror's notes, made part of the augmented clerk's transcript on appeal, reflects that the juror did 'aggravate [ ] his sentence upon the basis of what were, as a matter of state law, mitigating factors, and did so believing that the State – as represented by the trial court [through the giving of CALJIC No. 8.85] – had identified them as potentially aggravating factors supporting a sentence of death'"; no ruling on merits of claim because the notes "cannot serve to impeach the jury's verdict"].

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

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

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

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

D. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants That Are Afforded to Non-Capital Defendants

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged

classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *People v. Prieto* (2003) 30 Cal.4th 226,[81] as in *People v. Snow* (2003) 30 Cal.4th 43,[82] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also *People v. Demetrulias* (2006) 39 Cal.4th 1, 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., Penal Code sections 1158, 1158a.) When a California judge makes a sentencing choice in a non-capital case, the court's "reasons ... must be stated orally on the record." California Rules of Court, rule 4.42(e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate

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81 "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, *supra*, 30 Cal.4th at p. 275.)

82 "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3.)

facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, by contrast, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[83] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

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[83] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

E. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments to the U.S. Constitution

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.].) Indeed, as of January 1, 2010, the only countries in the world that have not abolished the death penalty in law or fact are in Asia and Africa – with the exception of the United States. (Amnesty International, "Death Sentences and Executions, 2009 – "Appendix I: Abolitionist and Retentionist Countries as of 31 December 2009" (publ. March 1, 2010) (found at www.amnesty.org).

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1

Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the United States Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other countries include the imposition of the death penalty for felony-murders or other non-intentional killings,

and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[84] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[84] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

Cumulative Error

XI.

THE NUMEROUS ERRORS THAT OCCURRED DURING THE GUILT AND PENALTY PHASES OF HIS TRIAL, WHEN CONSIDERED CUMULATIVELY, DEPRIVED APPELLANT OF A FAIR TRIAL

"Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 963; *People v. Hill* (1998) 17 Cal.4th 800, 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1074; *People v. Pitts* (1990) 223 Cal.App.3d 606, 815.)

In such cases, "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

Here, appellant has identified numerous errors that occurred during the guilt and penalty phases of his trial. Each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of the right to confront the evidence against him, of a fair and impartial jury, and of fair and reliable guilt and penalty determinations in violation of appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Further, each error, by itself, is sufficiently prejudicial to warrant reversal of appellant's conviction

and/or death sentence. Even if that were not the case, however, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

Joinder

XII.

APPELLANT JOINS IN ALL CONTENTIONS RAISED BY HIS COAPPELLANT THAT MAY ACCRUE TO HIS BENEFIT

Appellant Oswaldo Amezcua joins in all contentions raised by his coappellant that may accrue to his benefit. (Rule 8.200, subdivision (a)(5), California Rules of Court ["Instead of filing a brief, or as a part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal."]; *People v. Castillo* (1991) 233 Cal.App.3d 36, 51; *People v. Stone* (1981) 117 Cal.App.3d 15, 19 fn. 5; *People v. Smith* (1970) 4 Cal.App.3d 41, 44.)

CONCLUSION

For the reasons set forth herein, it is respectfully submitted on behalf of defendant and appellant OSWALDO AMEZCUA that the judgment of conviction and sentence of death must be reversed.

DATED: January 20, 2012

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(1), California Rules of Court, states that an appellant's opening brief in an appeal taken from a judgment of death produced on a computer must not exceed 102,000 words. The tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), are excluded from the word count limit.

Pursuant to Rule 8.630, subdivision (b), and in reliance upon Microsoft Office Word 2010 software which was used to prepare this document, I certify that the word count of this brief is 72,281 words.

DATED: January 20, 2012

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PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to the within entitled action. I am an employee of Bleckman & Blair, Attorneys at Law, and my business address is Suite 3 Ocean Plaza, 302 West Grand Avenue, El Segundo, California 90245.

On **January , 2012**, I served the **Appellant's Opening Brief on behalf of Oswaldo Amezcua in People v. Amezcua and Flores (CSC No. S133660; LASC No. KA050813)** on the interested parties in said action by placing true copies thereof, enclosed in sealed envelope(s) addressed as stated below, with postage/delivery fee fully prepaid at El Segundo, California, with the United States Postal Service or United Parcel Service.

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I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January , 2012, at El Segundo, California.

_____

JANYCE K. BLAIR