SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	) Case No. S161781
	)
v.	)
	) Superior Court No.
JUSTIN HEATH THOMAS,	) RIF086792
	)
Defendant and Appellant.	)
	)
	)

Appeal from the Superior Court of the State of California

In and For the County of Riverside

Honorable Terrance R. Boren, Judge

SUPREME COURT
FILED

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Deputy

APPELLANT'S OPENING BRIEF
(Appeal from a Judgment of Death)
(Volume I: Pages 1-193)

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	) Case No. S161781
	)
v.	)
	) Superior Court No.
JUSTIN HEATH THOMAS,	) RIF086792
	)
Defendant and Appellant.	)
	)
	)

Appeal from the Superior Court of the State of California

In and For the County of Riverside

Honorable Terrance R. Boren, Judge

APPELLANT'S OPENING BRIEF

INTRODUCTION

Despite remarkably weak evidence, appellant Justin Thomas was convicted of the murder and robbery of Rafael Noriega. Noriega was killed during September 1992. His body was found in a rural area of Moreno Valley. (6RT 1910, 1829-1831, 1939-1940.) There was no physical evidence connecting Justin to Noriega's death. Because of the lack of evidence,

Justin was not arrested for Noriega's murder for years after his death. Only Dorothy Brown, who died three years before Justin's trial, connected Justin to Noreiga's death. (6RT 1939-1940.) Brown's testimony from a prior judicial proceeding was read to Justin's jury. (6RT 1905.) Brown testified that she was arrested in 1994 for selling methamphetamine. Brown was questioned and told the police that Justin had killed Noriega. (6RT 1918-1919, 1922-1923.) During her sworn trial testimony, Brown admitted that she lied when she made her statement in 1994 and had done so in hope for leniency. (6RT 1923, 1931, 1945.) During 2004, the police shot and killed Brown when she resisted arrest. (13RT 2865-2866.)

Brown had serious credibility problems. She was a career criminal, drug addict, and drug dealer. Brown had a motive to falsely accuse Justin to help her own criminal problems. Brown's account of Noriega's death was proved wrong by the forensic evidence. Brown was certain that Justin shot Noriega with a .9 millimeter Glock because she was with Justin when he purchased it. (6RT 1923, 1951; 13RT 2872-2873.) Ballistics evidence showed that a .9 millimeter Glock could not have been used to shoot Noriega. (12RT 2731.)

Sometime in 1994 or 1995, Justin was living in Austin Texas. He started dating Kim Reeder. (7RT 2068.) Reeder was involved in a lesbian relationship Regina Hartwell. The women were heavy drug users. Hartwell had money and funded Reeder's drug use, lavish lifestyle, and vacations. (7RT 2025-2028, 2038, 2072.) Justin met Hartwell through Reeder.

(7RT 2075-2076.) In 1996, Justin was convicted in Texas of Hartwell's murder. (6RT 1905.)

The deaths of Hartwell and Noriega were completely unrelated events separated by years, method, and geography. Despite the lack of any logical connection between the two incidents, the trial court admitted evidence of Hartwell's death, pursuant to Evidence Code section 1101, to prove Justin's intent when he allegedly shot Noriega. (2RT 1022-1023.) Justin's defense was identity. He denied killing Noriega. (13RT 2946-2953; 16CT 4197, 4203.) Evidence of Hartwell's murder was not admissible under section 1101 to prove intent because Justin's defense was identity. Intent was not in issue. The trial court erred by admitting the highly prejudicial evidence pertaining to Hartwell's death.

The admission of evidence that Justin had killed Hartwell turned the tide in his trial. There was meager evidence connecting Justin to Noriega's death. During the guilt phase, more evidence was presented pertaining to Hartwell's death than to Noriega's death. Reeder testified primarily about Hartwell's death. Her testimony comprised almost one-fourth of the prosecution evidence during the guilt phase. (7RT 2,015-2,040, 2,067-2,284; 8RT 2,162-2,284.) The guilt phase of the trial was littered with other errors which require reversal, including the erroneous admission of Brown's testimony from the Texas trial and a jury instruction for second degree murder which prevented the jury from determining whether Justin should have been found guilty of the lesser offense of second degree murder.

Even if this Court affirms the conviction for first degree and the special circumstance allegations, the judgment of death should be reversed. Justin was born in 1971. (16RT 3287.) His youth was punctuated by the absence of any meaningful parental guidance, early exposure to drug use by his father, and an unstable home life. Justin's mother was an unwilling and disinterested mother. She used alcohol, and most likely drugs, while pregnant. (17RT 3466-3467, 3469, 3471.) Justin's father beat his mother while she was pregnant. (17RT 3469.)

Justin's parents separated when he was about three years old. (16RT 3288.) He lived with his grandparents when he was four to five years old. (17RT 3464.) Justin was 10 years old or younger when he started using drugs. (16RT 3290-3293.) Justin's father taught him how to roll a joint, chop a line, snort drugs, and use a syringe to self-inject drugs. (16RT 3290-3291, 3293.) Because Justin was scared of needles, his father helped him inject himself. (16RT 3302.) Justin was 10 or 11 years old when his mother made her first of four suicide attempts. (17RT 3474.) Appellant became a drug addict sometime between the ages of 13 and 16. (16RT 3327.) Justin's father committed suicide around 1994 or 1995. (7RT 2007.)

Dr. Alex Stalcup, a specialist in addiction medicine, explained that addiction was widespread in Justin's family. (17RT 3498.) Justin's life long drug addiction had impaired

his ability to make good choices. (17RT 3502-3503.) Justin was one of the worst cases of genetic addiction Stalcup had encountered. (17RT 3500.)

Justin's jury had difficulty deciding the sentence. The jury was deadlocked after three days of deliberations and the readbacks of testimony. The majority of jurors believed the deadlock could not be broken. (18RT 3709, 37143-3715; 17 CT 4463; 18 CT 4512-4514) The jury had taken three to four ballots. The split was initially six to four with two jurors undecided. (18RT 3713.) The trial court asked the jurors if additional deliberations would be helpful. (18RT 3714.) Eleven jurors thought additional deliberations would not help. One juror said additional deliberation may help. (18RT 3714-3716.)[1]

The defense counsel requested a mistrial because the jury was deadlocked. (18RT 3716.) The trial court denied the request. (18RT 3716-3718.) The jurors were sent home at 2:31 p.m. on December 21, 2007, and ordered to return on January 3, 2008, to resume deliberations. (18CT 4516.) The jury resumed deliberations on January 3, 2008, and reached a verdict after deliberating about an hour. (18CT 4517.)

Justin challenges the sentence because it was the result of coercion in violation of his statutory and constitutional rights. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 237-239 [108

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[1] Five jurors said further deliberations would not help. One juror said, "absolutely not." (18RT 3715.) Three jurors said, "probably not." One juror said maybe. Juror seven said additional deliberations would not help reach a verdict. (18RT 3716.)

S.Ct. 546, 98 L.Ed.2d 568]; Pen. Code, §1140.) The trial court erred by denying the defense motion for a mistrial. The judgment of death must be vacated.

STATEMENT OF APPEALIBILITY

This is an automatic appeal from a final judgment following a trial and a judgment of death which disposes of all the issues between the parties and is authorized under Penal Code[2]section 1239, subdivision (b), and the California Rules of Court, rule 8.600, subdivision (a).

STATEMENT OF THE CASE

A felony complaint filed on June 30, 1999, alleged in count one that Justin committed murder in violation of section 187. Count one further alleged appellant: (1) used a firearm during the commission of the offense within the meaning of section 12022.5, subdivision (a); (2) had been previously convicted of murder within the meaning of section 190.2, subdivision (a)(2); and (3) committed the murder while engaged in the commission of a robbery within the meaning of section 190.2, subdivision (a)(17)(i). The complaint also alleged appellant had been convicted of a serious felony within the meaning of section 667, subdivision (a). (1CTP 1.)[3] The preliminary hearing was held on July 6, 2001. (1CTP 28-70.)

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[2] All future statutory references are to the Penal Code unless otherwise stated.

[3] The clerk's transcript is cited according to the following format:

- The clerk's transcript originally filed with this Court commenced with volume

The trial court ordered appellant to be bound over to the Superior Court for trial on one count of murder and all the allegations. (1CTP 77-78.)

An information filed on July 19, 2001, contained the same allegations as the complaint. (1CTP 81-82.) On October 7, 2007, the serious felony enhancement was dismissed by the prosecution (CTP 82.)[4] On October 17, 2007, the trial court denied appellant's motion to exclude his statement from evidence based on lack of voluntariness, denial of his Sixth Amendment right to counsel, and violation of his Miranda rights. (3RT 1257-1258.)

Trial testimony commenced on October 29, 2007. (6RT 1750.) The jury found

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one and ended with volume 18. It was titled, "Clerk's Supplemental Transcript on Appeal." Volume one commenced with page one. The first document therein is a minute order dated October 3, 2007. These 18 volumes shall be cited as "**CT**."

• Following appellant's first motion to correct, augment, and supplement the record on appeal, three more volumes of clerk's transcript were made part of the record on appeal. These volumes are titled, "Clerk's Transcript of Preliminary Proceedings." The first volume is marked "Volume 1 of 3," and commences with a felony complaint filed on June 30, 1999. These volumes shall be cited as "**CTP**."

• Following the filing of appellant's supplemental motion to correct, augment, and supplement the record on appeal, two more volumes of clerk's transcript were made part of the record on appeal. These volumes are titled "Clerk's 2nd Supplemental Transcript on Appeal." It commences with page 130 and shall be cited as "**CST**."

• There are four volumes of confidential clerk's transcripts filed pursuant to section 987.9. Documents from the section 987.9 clerk's transcripts have been cited in this Opening Brief. Those volumes are cited titled **Conf. CST**.)

[4] The serious felony enhancement was lined out by hand in the information. (CTP 82.)

appellant guilty of count one. It found true the allegations that appellant used a firearm, and committed robbery, during the commission of the offense. (14RT 3022-3023.) On December 10, 2007, the trial court held the hearing on the prior murder allegation. (14RT 3031-3048, 3051-3064.) That same day, the jury found true the prior murder conviction allegation. (14RT 3087-3088.)

The penalty phase commenced on December 11, 2007. (15RT 3131-3138.) On December 21, 2007, the jury stated that it was deadlocked. (18RT 3709.) The jurors were polled and expressed the opinion that nothing could be done to break the deadlock. (18RT 3714-3715.) The trial court denied a defense motion for a mistrial. (18RT 3719.) On January 3, 2008, the jury returned a verdict of death. (18RT 3722.) The jurors were polled and affirmed the verdict. (18RT 3723.)

Appellant filed a motion for a new trial. (18CT 4540-4547.) The prosecution filed an opposition to the motion. (18CT 4557-4571.) Appellant also filed a motion to reduce the sentence to life in prison without the possibility of parole. (18CT 4552-4556.) The prosecution filed an opposition. (18CT 4548-4551.) On March 7, 2008, the trial court denied appellant's motion for a new trial. (19RT 3733-3737.) It also denied appellant's motion to reduce the sentence to life in prison without the possibility of parole. (19RT 3737-3739.) The sentencing hearing occurred the same day. (19RT 3751-3755.) The trial court imposed the

judgment of death for count one. (19RT 3752-3753.) On March 12, 2008, the trial court sentenced appellant to the mid-term of four years in state prison for the firearm enhancement. The trial court declined to impose a restitution fine because it found compelling and extraordinary reasons not do so. (19RT 3758-3759.)

STATEMENT OF FACTS–THE GUILT PHASE

A. THE PROSECUTION EVIDENCE

I. FACTS PERTAINING TO THE CHARGED CRIME: THE DEATH OF RAFAEL NORIEGA

1. Justin's Background

Curtis Barger and Justin attended Canyon Springs High School in Riverside County. They played on the football team and graduated from high school in 1990. (7RT 1966-1967, 1982.) After high school, Barger and Justin played semi-professional football. (7RT 1968, 1984.) They occasionally used methamphetamine together. (7RT 1968-1969.) During the Fall of 1991, Barger and Justin lived together in an apartment in Colton. (7RT 1983.) Justin left the Moreno Valley area during the football season in 1992. Barger did not know where he went. (7RT 1971-1973.) Barger did not see Justin again for one to two years. (7RT 1972-1973, 1996.)

Andy Anchondo was Justin's uncle. During the early 1990s, Anchondo managed the MacNally Chicken Ranch. He lived in a home at the ranch. (7RT 2000-2001.) Around the June 1992 time period, Justin lived with Anchondo. Sometime during 1992, Justin left Moreno Valley. Justin drove a light blue pickup truck. (7RT 1969, 2004.) Sometime after September 1994 or in 1995, Justin stayed for one or two months at the MacNally Chicken Ranch which was managed by his uncle. Justin then left for his father's residence in Texas.

(7RT 1972-1973, 1996.) When Barger saw Justin at the chicken ranch, Justin said he had been discharged from the Army. (7RT 1987.) Barger received several telephone calls from Justin when he was in Texas. Justin said he had resumed using methamphetamine and was using it with his father. (7RT 1976, 1989-1900.) Barger did not recall telling Detective Silva, during an interview in 1998, that Justin said he was dealing methamphetamine. (7RT 1977.)

2. Rafael Noriega's Life as a Drug Dealer

During September 1992, Rafael Noriega lived with Michelle Barajas and her three daughters at 25776 Margarita Street in Moreno Valley. The daughters were named Heather Barajas,[5] Jennifer Barajas, and Eva Barajas. (6RT 1865-1866, 1888; 7RT 2041-2042.) Robert Manzano also lived at the residence. He was the father of Heather's daughter. (6RT 1866-1867.) In 1992, Heather was 14 years old, Jennifer was 12 years old, and Eva was 11 years old. (6RT 1868, 1896; 7RT 2042.) Noriega owned a silver revolver with a pearl handle. (6RT 1869.) He worked as a dishwasher at a restaurant. (6RT 1868.)

Heather and Eva believed that Noriega sold drugs. (6RT 1868-1869, 1874; 7RT 2047.) Manzano and Noriega referred to drugs via a code. Heather on several occasions saw Noriega with large sums of cash. (6RT 1875.) Noriega owned two vehicles; a green Nissan and a gray Nissan. (6RT 1872.) Heather had once gone with Noriega to a chicken ranch.

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[5] Heather was married at the time of trial and testified under the name of Heather Kelley. (6RT 1865.)

Noriega met a tall, stocky male, but Heather did not know that person's ethnicity. (6RT 1873.) Heather could not identify appellant as the person who met Noriega at the chicken ranch. (6RT 1873-1874.) The last evening the Barajas sisters saw Noriega, he received a page on his personal pager. Manzano warned Noriega not to meet the person who had paged him, but he left the residence alone between 8:00 and 10:00 p.m. (6RT 1860-1867, 1890.)

3. Dorothy Brown—the Only Eyewitness Connecting Justin to Noriega's Death—and her Background as a Criminal and Drug User.

Dorothy Brown testified on August 22, 1996, during the penalty phase of Justin's trial in Travis County, Texas, for the alleged murder of Regina Hartwell. Brown's testimony from the Texas trial was read into the record. (6RT 1905.) During 1994, was arrested for selling methamphetamine. Brown was questioned and told law enforcement officers that Justin had killed Noriega. She hoped to obtain leniency by identifying Justin as the person who killed Noriega. (6RT 1918-1919, 1921, 1923, 1945.) When Brown testified before the Texas jury, she had been convicted of possession of methamphetamine for sale, possession of a loaded firearm, and grand theft automobile. (6RT 1933.) On March 26, 2004, the police shot and killed Brown when she was stopped by them following a vehicle pursuit and she reached for her waistband. (13RT 2865-2866.)

When Brown was interviewed by a detective following her arrest, she said Justin used a .9 millimeter Glock firearm to shoot Noriega. (13RT 2872.) The prosecution firearms

expert testified that a .9 millimeter Glock was not one of the firearms that could have been used to shoot Noriega based on the ballistics evidence. (12RT 2731.)

4. The Death of Noriega

Brown lived in Moreno Valley. During the Summer of 1992, Brown met Justin through a mutual friend. Brown was 29 years old in 1992. She made her living selling drugs. (6RT 1905-1906, 1932.) Brown regularly obtained methamphetamine from Justin. (6RT 1907.) She conducted narcotics transactions with appellant at a chicken ranch owned by his family. It was in an area known as The Hills. (6RT 1909.) Brown went to the chicken ranch two to three times a week to pick up drugs from appellant. (6RT 1934.)

During September 1992, Justin made a telephone call to arrange a meeting with a drug connection named Rafa. (6RT 1910.) The meeting was to occur at 3:00 a.m. (6RT 1935.) Justin asked Brown to follow him to the meeting in her own vehicle. She agreed. (6RT 1910, 1935-1936.) Brown drove a Toyota truck she had stolen the previous evening. (6RT 1936.) Justin said he did not want to get ambushed in the middle of nowhere. Justin wanted Brown to be a lookout. Justin drove his truck to the meeting. He had a friend who was 17 or 18 years old in the truck with him. (6RT 1910, 1937.)[6] Brown had never met Rafa. (6RT 1935.)

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[6] When Investigator Silva interviewed Justin on January 26, 2000, he asserted that the male with Justin was named Kelly Smith. (16CT 4156.) There was never any independent evidence presented of the identity of this male mentioned by Brown.

Brown parked on a trail near the chicken ranch. Justin drove around a bend and further into the foothills. Brown was high on drugs. (6RT 1911.) An older couple approached Brown and told her that she should not be out there because it was dangerous. She said her boyfriend had just gone to use the bathroom. (6RT 1911.)

When the couple left, Brown got out of her car and walked to Justin's location. The headlights of Justin's truck were lit. Justin got out of his truck and yelled something to a person that Brown believed was Rafa. Rafa was in a small, silver-blue Nissan vehicle. Exhibits 138 and 139 are photographs of Rafa's vehicle. (6RT 1912, 1942-1943.)[7] Rafa got out of his vehicle and opened its trunk. There was a green colored bag. Justin stood next to the door of his truck. Justin obtained a gun from the seat of his truck and rapidly fired at least three shots at Rafa. (6RT 1913, 1938.) Rafa fell to the ground. (6RT 1939-1940.)

Brown ran back to her vehicle, entered it, and turned on the radio. Justin approached Brown's vehicle and asked her if she had heard that. Brown said "what." Justin said gunshots. Brown said yes. Justin told Brown to come with him. Brown followed Justin on foot. It was a distance equal to one to two blocks. Brown saw the taillights of Rafa's vehicle as it drove away. Brown assumed Justin's friend was driving the vehicle. (6RT 1914-1915, 1939-1940.)

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[7] Brown referred to the person appellant met as Rafael and Rafa. (6RT 1910, 1912.)

A man was laying dead on the ground. Justin threw the body in the back of his truck. The green colored duffle bag was also in the back. Justin got in the back of the truck and told Brown to drive down the trail. They drove what seemed like a long way in a circle. (6RT 1916, 1940-1941.) Brown stopped near her vehicle. Brown ran back to her car and drove home. (6RT 1917, 1941.) About two hours later, Justin came to Brown's residence. He had taken a shower and was clean shaven. Justin tried to give Brown a broken shovel. She did not want it. Justin threw the shovel in the backyard. (6RT 1917, 1943.) Justin said that he had to leave town. He gave Brown a large quantity of methamphetamine. Brown did not see Justin thereafter. About one month later, Justin called Brown and asked her to send him marijuana. Brown sent the marijuana to a town in Texas named Gonzales. (6RT 1918, 1944.)

Somebody turned Brown into law enforcement for selling methamphetamine. She was arrested on June 3, 1994, and served 20 months in custody. (6RT 1918-1919, 1921.) Brown's house was searched because she was selling drugs. (6RT 1944.) Brown was interviewed by Detective Wilson. She was asked if she knew anything about the killing of Noriega. Brown said she was high on drugs during the interview and cried throughout it. Brown could not recall much of the interview. (6RT 1926, 1928, 1948.) Brown lied to Detective Wilson because she feared Justin. (6RT 1918-1919, 1928, 1921.) Because Brown was high, she was willing to say anything to be able to leave. She told the police what she

thought they wanted to hear. Brown hoped for leniency. (6RT 1931.) She told the police that she was present when the shooting occurred. Brown "beefed up" the story so the police would go easy on her. She did not mention that she was driving a stolen vehicle. Brown did not want to get in further trouble. Brown lied and said that she was in the vehicle driven by Justin. (6RT 1923, 1945.) Brown was not sure whether she told Detective Wilson specific information about the gun Justin used to shoot Noriega. (6RT 1946.) Brown contradicted herself and testified that she told Detective Wilson that she knew for a fact that Justin shot the victim with a Glock .9 millimeter firearm. (6RT 1923.) Brown told Detective Wilson that $5,000 in cash and a large quantity of methamphetamine were taken from Noriega. Brown made up both facts. (6RT 1951-1952.)

5. The Discovery of Noriega's Body and Vehicle

On September 15, 1992, Ryan Goodwin and two friends were driving four-wheelers in the Reche Canyon area. Reche Canyon was in the Moreno Valley foothills near Moreno Beach Drive and Locust Drive. (6RT 1829-1831.) Locust Drive was a dirt road that led to Reche Canyon. (6RT 1832.) A chicken ranch was near Reche Canyon. (6RT 1833.)

Goodwin and his friends saw a vehicle with two doors open. There was no one around the vehicle. (6RT 1829-1831.) Goodwin noticed a pile of burned debris and ashes on the front driver's side floorboard. It was six to eight inches in diameter and three inches high.

(6RT 1935-1836.) Goodwin saw a firearm under the driver's seat. It was black with a bluish color. The firearm was .22 caliber semi-automatic and had a full magazine. One bullet was in the chamber. (6RT 1836-1837.) Goodwin and his friend turned the firearm over to Deputy Michael Lopez at Valley View High School. (6RT 1838, 1848.)

Deputy Dean Baer of the Riverside County Sheriff's Department was dispatched to Valley View High School. Deputy Lopez gave him the Jennings .22 caliber semi-automatic firearm which the three students had brought to the school. (6RT 1847-1848.)The serial number was 382886. The model was J-22. (6RT 1849.)

Deputy Baer went to the Nissan Sentra where the students found the firearm. Rafael Noriega was the registered owner. Department of Motor Vehicle records listed 25776 Margarita Street in Moreno Valley as Noriega's address. The license plate was 2CIN757. The vehicle appeared normal. (6RT 1852-1853.) The next day, Deputy Baer spoke with someone at Noriega's listed address. Deputy Baer returned to the Nissan Sentra. The driver's side window was shattered and the car battery was missing. (6RT 1853-1854.) Deputy Baer had learned that Noriega was reported missing. He had a helicopter fly over the area, but it did not find anything. Deputy Baer also had Explorer Scouts search the area, but they did not find anything. Noriega's vehicle was towed and stored. (6RT 1856.) Deputy Baer inspected Noriega's room. There was clothing, a television, and a stereo. (6RT 1858.) The firearm was destroyed during August 1996. (6RT 1858.)

On October 17, 1992, Ronald Roy Jones, a correctional officer with the California Department of Corrections, was horseback riding with Carol Gates and two other friends in the Moreno Valley foothill area off of Moreno Beach Drive and Locust Drive. (6RT 1775-1778, 1781-1782.) A black line in the middle of Exhibit 145 was marked "Locust." Moreno Beach Drive intersected Locust Drive at the black line. The Reche Canyon area was to the left of Locust Drive and past Moreno Beach Drive. Jones and his friends were riding down the foothills towards the bottom of the canyon. (6RT 1777.) Jones saw boots protruding from under a wood palette. Jones commented to his friend Dave[8] that it was a sick Halloween prank. (6RT 1777-1778.) Jones smelled rotting flesh. Dave approached the boots. Jones stayed about five feet away from the palette. He saw a head. (6RT 1779-1780.) Jones went to a house and called the police. He directed a police officer to the location of the body. (6RT 1780.)

A few weeks before the trial, Gates took Investigator Nic Labella to caves which were located about a mile from the location where Noriega's body was discovered. (6RT 1783.) Kimberley Reeder, Justin's former girlfriend and a major prosecution witness, testified that Justin told her he had shot someone named Rafa and hid the body in a cave. (7RT 2022; 8RT 2254.) Noriega's body was not found in a cave. (6RT 1777-1780.)

6. The Investigation of the Crime Scene

Gary Thompson was a retired deputy sheriff from Riverside County. In 2000, he

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[8] Dave's last name was not identified in the record.

started working for the District Attorney's Office as an investigator. (6RT 1794-1795.) On October 17, 1992, Thompson went to the location in Reche Canyon where Noriega's body had been found. (6RT 1796.) The green circle on Exhibit Four showed that area. Chicken coops which belonged to the MacNally Chicken Ranch appeared in the lower left hand corner of Exhibit Four. (6RT 1800-1801.)

Thompson arrived at the crime scene around 2:00 p.m. (6RT 1799.) Forensic technicians were collecting evidence and taking photographs. (6RT 1796.) The body was under a wood pallette. It appeared the pallette had been lying in a pile of dirt near another pallette. The body appeared to have been moved to the location where it was found. Thompson reached that conclusion because the dirt had the impression of a palette. (6RT 1804.) The body was decomposed. Thompson believed the body had been there a month, but that was only an estimate. (6RT 1805.) The area immediately to the right of the dirty bag in Exhibit 14 was the location of the body before it was moved. (6RT 1805-1806.) Four bags of methamphetamine were found in Noriega's jacket. Jewelry and a watch were also recovered from the crime scene. (6RT 1806, 1817.) A .45 caliber casing was recovered. It was marked Exhibit 126. (6RT 1808.) Thompson did not have any suspects. The criminal investigation was suspended. (6RT 1818.)

7. The Autopsy of Noriega's Body

On October 22, 1992, Robert Ditraglia, a forensic pathologist, performed the autopsy on Noriega's body. (8RT 2291-2293, 2295.) The body was severely decomposed. The tissue

was broken down and the body was partially skeleton. Portions of the soft tissue were missing, including the soft tissue of the head. (8RT 2296.) The decomposition made it difficult to determine the time of death. (8RT 2297-2298.) Ditraglia determined that the body was Caucasian. He classified Hispanics as Caucasian. (8RT 2298-2299.) The skull was disarticulated, which meant that it had come apart due to decomposition. The skull and bones were arranged in their proper location. The body measured 60 inches. (8RT 2299.)

Ditraglia found on the body low tie shoes, long pants without a belt, multi-colored boxer shorts, a striped T-shirt, and a leather jacket that was possibly brown suede. The leather jacket appeared to have been burned on the outside and the backside. (7RT 2300.) The T-shirt had two holes. One hole was on the front side of the right shoulder and the other hole was approximately in the center of the chest. (8RT 2301.) A Citizen's black band watch, a yellow metal chain with a crucifix, a yellow metal bracelet, and a ring, were recovered from the body. (8RT 2315.)

The decomposed state of the body precluded finding entrance and exit wounds. Ditraglia could not find bleeding along a particular path from the bullets or holes in organs. (8RT 2301.) The body had a hole in the sternum. Ditraglia could not absolutely conclude the hole was caused by a bullet, but that was the logical explanation. (8RT 2302.) Exhibit 23 showed the hole in the chest. (8RT 2302.) Rib numbers four and five on the back side of the right chest were fractured. The fractures were right under the armpit. Those fractures could have been caused by a bullet hitting the ribs or blunt force trauma. (8RT 2303-2304.) The sacrum and coccyx also were fractured. This fracture could have been caused by a bullet

striking or other trauma. The fracture could have occurred after death. (8RT 2304.)

If the hole in the sternum was from a bullet, that injury was fatal. The heart would have been damaged and severe and rapid bleeding would have occurred. (8RT 2306.) Ditraglia recovered several metal projectiles which were marked exhibits 24 through 30. The first bullet was recovered from the left sleeve of the jacket. The second bullet was recovered from the right plural cavity. It was the area inside the chest where the lung was located. The bullet was deformed, which was common with bullets that enter bodies. (8RT 2307.) The third bullet was recovered from the left thorax, which was the left side of the chest where the left lung was located. The fourth projectile was recovered from the pelvis area between the hips. (8RT 2308-2309.) It was two fragments and he could not determine how many bullets composed those fragments. The fifth projectile was found in the left thorax. A couple of fragments were found in the right midline chest. The seventh projectile was found in the left buttock. In summary, there were two fragments in the pelvis, one in the buttocks, four in the chest, and one in the sleeve. The bullet may not have entered the body in the location where Ditraglia found the fragments. Ditraglia could not conclude that Noriega was shot seven times. He could not determine the direction of travel of the bullets or the position of the bullets when Noriega was shot. (8RT 2311.)

When the bullet entered the chest, the likely mechanism of death was the bullet punching a hole, or tearing tissue, in the internal organs such as the heart, aorta, pulmonary artery, lungs, or the spine. Death would be caused by bleeding. The victim would have rapidly bled into his body and the blood pressure would drop. The rate at which the victim

lost consciousness depended on which organs were perforated. Ditraglia did not have that information. (8RT 2313.)

Ditraglia could not determine whether the victim was shot from the front or back. He was more likely shot from the front because the front of the T-shirt had holes, but that was not conclusive evidence. The bullet could have entered the back of the victim, traveled between the ribs, and exited the front of the body. (8RT 2314.)

8. Justin's Alleged Plan to Murder Michael Aguon and Christine.[9]

Maximillian Garcia knew Justin from high school. They used methamphetamine together. (9RT 2325-2327.) Garcia and Justin knew friends named Michael Aguon and Christine.[10] (9RT 2327.)

On October 25, 2006, Michael McDonagh, an investigator for the Riverside County District Attorney's Office, interviewed Garcia in Avenal State Prison. (9RT 2331-2332.) Garcia said he had used methamphetamine with Justin about three times a week. Garcia said that drug use made Justin paranoid. Justin's paranoia increased with his increased drug use. Garcia, Aguon, Christine, and Justin stayed together in a residence in Norco. Garcia said Justin feared that Aguon and Christine were going to turn him into the police. He put a shotgun behind the front door of the residence and waited for Aguon and Christine to come home. Justin intended to shoot them. Garcia warned Aguon and Christine to stay away until

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[9] This evidence was offered pursuant to Evidence Code section 1101, subdivision (b), to show evidence of Justin's intent, premeditation and deliberation, motive, common plan or scheme, and lack of self-defense. (1CTP 271-286.) .

[10] There was no testimony about Christine's last name.

the situation calmed. They did so, and Justin never followed through with the plan. (9RT 2334.)

Garcia testified at trial. He could not recall the event described above in which Justin allegedly planned to kill Aguon and Christine. (9RT 2328.)

9. The Investigation

During the late 1990s, Martin Silva, an investigator for the District Attorney's Office, investigated Noriega's death. (9RT 2341-2342.) On October 26, 1998, Silva interviewed Andy Anchondo. Anchondo said someone named Dorothy visited appellant at the egg ranch. (9RT 2348.)[11] During April 1999, Silva also interviewed the Barajas sisters. (9RT 2349.) Heather Kelly told Silva that she had once gone to the chicken ranch with Noriega. Kelly knew that Noriega was dealing drugs. He dealt with a big, husky white male he met at the chicken ranch. Eva Barajas also described going to the chicken ranch once or twice with Noriega. (9RT 2350.) Eva also said that she knew Noriega was dealing drugs. (9RT 2351.)

Silva also interviewed Barger. Barger said that Justin called him from Texas.(9RT 2354.) Justin moved to Texas sometime during 1994 or 1995. (7RT 2068.) During the first telephone call, Justin told Barger that he was having a good time. Justin said that he had a girlfriend, but his girlfriend had a girlfriend. Barger said Justin called him again two to three weeks later. Justin said he had gone to a bad place, was dealing drugs with his father, and was not doing very well. (9RT 2354.)

On January 26, 2000, Silva interviewed Justin in Texas. Exhibit 149 was a recording

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[11] The terms chicken ranch and egg ranch were used interchangeably during the trial.

of the interview. (9RT 2356-2358; 16CT 4154-4220.) It was played for the jury. (9RT 2358-2360.)[12] Justin said the following during the interview: (1) Dorothy was the only person he took out to the chicken ranch (16CT 4156); (2) he had seen Rafa around Moreno Valley and did drug deals with him (16CT 4157); (3) he did not recognize a photograph of Monzano and did not know him (16CT 4157); (4) Brown was trying to "put all this on me," because she was back in prison (16CT 4159); (5) he had known Rafa about one year (16CT 4160); (6) Justin was badly hooked on methamphetamine during September 1992 (16CT 4161-4162); (7) around September 1992, Justin was gone for four to five months when he was with his father and then he joined the military later that year (16CT 4161, 4163-4164); (8) he thought he had met Rafa through someone named Max (16CT 4170, 4173); (9) he never met Rafa at night and they always met in public places (16CT 4178, 4181, 4189); (10) he obtained many guns from Dorothy (16CT 4179); (11) he denied meeting Rafa at the chicken ranch (16CT 4182); (12) Justin probably last met Rafa in Grand Terrace and paid him between $400 and $800 which Justin owed him (16CT 4190); (13) Justin shortly thereafter left for Texas (16CT 4190); (14) he met Rafa more than 10 times total, but not more than 25 times (16CT 4191); (15) he asked if there was evidence of a gun being shot (16CT 4211); (16) he suggested that Noriega could have been shot somewhere else and somebody put the body near Justin's uncle's ranch (16CT 4212); and (17) Dorothy and Kelly were lying if they said they were with Justin at the ranch. (16CT 4218-4219). When Silva directly accused Justin

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[12] The corresponding transcript was marked Exhibit 149B. (9RT 2356.) It appears at volume 16 of the Clerk's Supplemental Transcript on Appeal, pages 4154 through 4220.

of killing Noriega, Justin did not admit being involved in his death. (16CT 4197, 4203.)

Paul Sham, a criminalist with the Department of Justice, worked in the Riverside Laboratory. He was qualified as an expert witness in firearms identification and bullet comparison. (12RT 2714-2717.) Seven bullet fragments were submitted to him for analysis. (12RT 2719.) Sham believed the fragments were from at least five bullets, but they could have come from more bullets. The bullets were nominal .38 caliber. That means the bullets could have been .38 special, .357 Magnum, or .9 millimeter. He could not determine the exact caliber of the bullets because the diameters of those calibers were close to each other. (12RT 2724.) Exhibit 156 was a two page document listing the firearms that could have fired the bullets. (12RT 2730.) It listed 18 firearms, and the list was not exhaustive. (12RT 2739.) An Intratec model TEC-9 could have fired the bullets. (12RT 2730.)

In 1997, Sham was asked to determine whether the bullets could have been fired from separate firearms. (12RT 2732.) He could not make that determination. The bullets could have been fired from the same firearm or separate firearms. (12RT 2734-2735.)

During 1995, John Sams lived in Austin, Texas. (9RT 2363-2365.)[13] Sams knew Kimberly Reeder and Regina Hartwell. Sams met Justin through Hartwell. (9RT 2364-2365.) Sams saw Justin at parties, but spent only a few minutes with him. (9RT 2365-2366.) Sams used alcohol and drugs with Hartwell, and sold cocaine to her. (9RT 2367, 2375.) Justin made statements such as, he was from California, and he killed people. Justin talked about

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[13] Appellant moved to Texas after Noriega's death. Appellant met Kimberly Reeder and Regina Hartwell in Texas. That relationship is described below.

killing people who got out of line. He never specifically said he killed someone in California. Justin said he shot someone for drugs. (9RT 2368-2369.) Sams believed Justin was bragging, trying to impress people, and was not being truthful. (9RT 2370-2371.) Sams believed Justin was "full of bullshit." (9RT 2384.)

II. THE DEATH OF REGINA HARTWELL[14]

1. The Relationship Between Kimberly Reeder, Regina Hartwell, and Appellant

During the fall of 1994, 18 year old Kimberly Reeder was a freshman at the University of Texas in Austin. At the time, Reeder's last name was LeBlanc. Reeder was from the Austin area. (7RT 2015-2017, 2023.) Sometime around July 1994, Reeder met Regina Hartwell at a gay nightclub. (7RT 2018, 2023, 2027.) Hartwell was a lesbian and about 28 years old. (7RT 2023.) Reeder was living with her parents when she met Hartwell. (7RT 2025.)

Reeder and Hartwell started dating. Hartwell had a great deal of money because her mother had received money from a lawsuit. Hartwell was not employed. Hartwell was able to buy many things for Reeder, including trips, dinner and jewelry. They took trips to the Bahamas, New York and Cancun. Hartwell gave Reeder access to her bank account by giving her an ATM card with the PIN number. Reeder, with Hartwell's permission, used the ATM card to make daily withdrawals from Hartwell's account. (7RT 2025, 2072.)

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[14] Justin was convicted in Texas of Hartwell's murder. For the California prosecution, the prosecutor offered evidence that Justin had killed Hartwell pursuant to Evidence Code section 1108 to show Justin's intent, premeditation and deliberation, motive, common plan or scheme, and lack of self-defense. (1CTP 271-286.) .

Drug use quickly became a part of the relationship between Hartwell and Reeder. (7RT 2026.) Reeder had used drugs since she was 16 years old, but she started using more serious drugs after she became involved with Hartwell. (7RT 2085.) Hartwell and Reeder used Ecstasy, LSD, and mushrooms. (7RT 2026.) They started using cocaine and crystal methamphetamine. Hartwell provided the drugs. Around December 1994, or January 1995, Reeder told Hartwell that she was not a lesbian, and asked if they could just be friends. Hartwell was not happy and was not willing to accept that Reeder was not gay. (7RT 2027-2028, 2037.) Hartwell continued to provide drugs to Reeder. They continued socializing by going to clubs, dinners, and on vacations. (7RT 2028.) They used drugs together four to five times a week. (7RT 2038.) Hartwell continued to buy things for Reeder. Reeder continued using Hartwell's ATM card to withdraw money from Hartwell's account. (7RT 2028.)

During January 1995, Reeder moved into an apartment located in South Austin near Highway 290. Hartwell paid Reeder's rent. Hartwell lived in a one bedroom apartment in the Chateau Apartments located at 900 South Lamar Street in Austin. (7RT 2029-2030, 2038; 11RT 2589-2592.) The apartments of Reeder and Hartwell were about a 20 minute drive from each other. (7RT 2038.)

Reeder worked as a receptionist at the World Gym. Sometime between January and June 1995, Reeder met appellant at the gym. He worked there as a trainer. Reeder pursued Justin. Justin lived in an apartment in South Austin with his father, an aunt, and a cousin. It was about 15 minutes from Reeder's apartment. (7RT 2068.) Reeder drove Justin around to various locations. He did not have a vehicle. Justin went inside residences, and then returned.

Justin admitted to Reeder that he was distributing drugs. (7RT 2069-2070, 2074.) Justin said that he had crystal methamphetamine mailed to him from California. Reeder started using methamphetamine. She had not previously used methamphetamine. Reeder continued to see Hartwell while she dated Justin. Hartwell insisted that Reeder see her just about every day. Hartwell continued to give Reeder money even though she was dating Justin. (7RT 2071.) About two weeks after Reeder and Justin started dating, Justin's family moved to a house in Del Valley. (7RT 2072-2073.) Justin told Reeder that he had killed someone in California named Rafa because he was a narc. (7RT 2022.)

Hartwell was initially unhappy that Reeder was dating Justin. However, she was interested in selling drugs with Justin. Hartwell knew people in the gay community, and believed she could help Justin sell narcotics in gay clubs. Justin was not initially thrilled about distributing in clubs, but became more enthusiastic when he realized the potential to make money. (7RT 2075-2076.) Reeder believed that Justin sold drugs in a gay nightclub just once or twice. He did not blend in well. (7RT 2081.)

Reeder believed that Hartwell was jealous of her relationship with Justin. Reeder did not want Hartwell to be alone with Justin. Hartwell and Justin appeared to get along, but they competed with each other. (7RT 2076.) On one occasion, Justin arranged for a shipment of drugs to be delivered to Hartwell's apartment. Hartwell was upset, but she had told him that he could have drugs shipped to her apartment. Reeder did not understand why Hartwell got upset. (7RT 2080-2081.) Hartwell also told Justin he could bring his weapons to her apartment so that they could talk about them. Justin owned a Tech-9 and another small, silver

firearm. (7RT 2084-2085.)

2. The Death of Regina Hartwell.

Hartwell's neighbor was William Jeremy Barnes. They were close friends. (10RT 2463-2465.) Barnes knew about Hartwell's relationship with Reeder and their drug use. (10RT 2467-2471.) Barnes became aware of Justin about a month before June 28, 1995. Hartwell was not happy about simply being friends with Reeder or Justin's presence. (10RT 2470.) Sometime after Barnes became aware of Justin, Hartwell showed Barnes an Uzi machine gun and another small handgun she possessed. Barnes had never previously seen Hartwell with firearms. (10RT 2470-2471.)

A few days before June 28, 1995, Reeder and Hartwell had an argument in Hartwell's apartment. Reeder believed the argument was probably about Hartwell not wanting Reeder to sell drugs with Justin or be involved with him. Hartwell believed Justin was dangerous. Reeder also had previously told Hartwell that she intended to move home with her parents. (7RT 2088-2089.) Reeder left and went to her apartment. (7RT 2088-2089.)

On June 28, 1995, Barnes spoke with Hartwell in her apartment. She was very upset. Hartwell said that she had a huge fight with Reeder. Hartwell was very jealous that Reeder and Justin were together. Hartwell was emotionally confused because Reeder would have sex with her and say she loved her to get money. (10RT 2476.) Hartwell said that she wanted to get away from drugs and all the bad things she was doing. Hartwell thought she could get Justin out of her life by reporting his drug activities to the police. Hartwell asked Barnes the name of someone to report Justin's drug dealing. (10RT 2476-2477.) Later the next morning,

Hartwell left a voice message on Barnes' message machine. She sounded calmer than the previous night. Hartwell asked Barnes if he could clean her apartment because she intended to have a party that weekend. (10RT 2478.)

Sylvia Marie Leal was also Hartwell's friend. She knew about Hartwell's drug use and the relationship between Reeder and Hartwell. (10RT 2402-2411.) During the summer of 1995, Leal worked as an intern for the Austin Police Department. (10RT 2402-2403.) Leal spoke with Hartwell on June 28, 1995, at approximately 8:00 p.m. Hartwell sounded stressed and excited. Hartwell wanted Leal to contact a narcotics investigator with the Austin Police Department so Justin would get arrested. (10RT 2415-2416.)

After Reeder left Hartwell's apartment on June 28, Hartwell called Reeder's apartment. Justin was present. Hartwell wanted to speak with Justin. Reeder gave Justin the telephone. He spoke with Hartwell for just a few minutes. Reeder could tell that Hartwell was upset. The conversation ended by Justin hanging up the telephone. (7RT 2091.) Justin said Hartwell was going to turn him in. He said he was not going to let any person send him to prison. Justin appeared upset and serious. (7RT 2092-2093.) Reeder and Justin had been using methamphetamine throughout the day. Reeder was high. (7RT 2092.)

Reeder and Justin quickly left for Justin's residence in Del Valley. (7RT 2093-2094.) Justin said he was not going to let Hartwell send him to prison. Reeder's impression was that Justin was going to kill Hartwell. Justin asked Reeder if she could handle it, but she could not recall when Justin made that comment. (7RT 2093.) Justin said he needed to get some things. Justin put on a trench coat and had a small bag with objects. Reeder could not

remember what was inside the bag. (7RT 2094.)

Reeder drove Justin to a restaurant in the Oak Hills area of Austin and dropped him off there. (7RT 2098.) Reeder may also have been using cocaine and methamphetamine. Reeder was very nervous from her drug use. The drugs caused her to be awake for days. Reeder's drug use substantially altered her judgment. (7RT 2096, 2098.)

Michael Mihills knew Justin from the World Gym. (12RT 2742-2743.) Mihills and other friends often went to Jim's restaurant after working out. (12RT 2744.) Mihills received a telephone call from Justin to meet at Jim's. Brian Frnka and Ryan Collity were present at the restaurant with Mihills and Justin. The dinner lasted about 30 minutes. (12RT 2745.) Justin said he was concerned Hartwell was going to turn him in for dealing drugs. (12RT 2745, 2748-2749.) Justin also said something about being kicked out of a residence. (12RT 2752.) Mihills learned that Justin was arrested on July 5, 1995. Mihills believed the dinner occurred about two weeks prior to Justin's arrest. (12RT 2745-2747.)

Reeder picked Justin up from Jim's about an hour after she dropped him off there. (7RT 2099.) Reeder and Justin went back to Reeder's apartment in Austin. (7RT 2099-2100.) Reeder told Justin they needed to take Valium and go to bed because the day had gotten out of hand. (7RT 2100-2101.) Justin asked Reeder if she could handle him killing Hartwell. She said yes. Reeder did not want Justin to kill Hartwell. She just wanted more drugs. Reeder did not call the police because she wanted to get high despite knowing that Hartwell could lose her life. (7RT 2100.) Reeder took several Valiums and went to bed. (7RT 2102.)

Reeder's next memory was someone knocking on the door the next day, June 29,

1995. Reeder opened the door. Justin was there. He was upset and anxious. Justin's hand was bleeding. Reeder could not remember which hand. There was a lot of blood. (7RT 2103, 2112.) Justin took off his clothes, put them in a bag, and took a shower. (7RT 2104.) Reeder saw Hartwell's wallet, but could not recall whether it was in a bag or on the ground. Justin said: (1) Hartwell had fought back really hard and was stronger than he thought; (2) Hartwell cut him during the struggle (7RT 2105); (3) he had stabbed Hartwell on the couch and dragged the body to the bathtub; and (4) he wrapped the body in a comforter and put it in the back of Hartwell's jeep. (7RT 2106-2107.)

Reeder and Justin drove to Del Valley after Justin showered and changed clothing. Reeder drove her own vehicle. Justin drove Hartwell's vehicle. (7RT 2108-2109.) Justin mentioned something about buying cement, chains, and a garbage can, and sinking Hartwell's body in a river. He also talked about cutting the body into pieces. (7RT 2109.)

Reeder and Justin went to a store that may have been a Walmart, but Reeder was not sure. They then went to Builder's Square and purchased a chain, padlock, cement, and trash can. (7RT 2111-2112.) Reeder and Justin returned to Justin's house at Del Valley. Reeder went into the house and used drugs while Justin stayed outside. (7RT 2112-2113.) When Justin entered the house, Reeder and Justin discussed what to do with Hartwell's body. He said he could not follow through with his plan to cut up the body because there were people in the woods who would see what he was doing. (7RT 2113.)

Justin decided not to sink Hartwell's body in the river. (7RT 2114.) Reeder and Justin drove down a country road. Reeder drove her own vehicle. Justin drove Hartwell's vehicle.

Justin left Hartwell's vehicle in weeds in a rural area near a ditch surrounded by trees. (7RT 2115-2116.) Reeder and Justin drove to a gas station. Justin put gas in Reeder's vehicle and in a can. They drove back to Hartwell's vehicle. Justin put the gasoline on Hartwell's vehicle, and lit it on fire. Hartwell's jeep went up in flames. (7RT 2116-2117.) Reeder and Justin then checked into a hotel. (7RT 2118-2119, 2120-2121.)

3. The Investigation.

Terry Duval worked for the Bastrop County Fire Department. He was trained in arson investigations. (10RT 2527-2529.) On June 29, 1995, at 9:39 p.m., the Fire Department received a call about a burning vehicle. The Fire Department responded to the call. They went to County Road 248. It was a gravel road. County Road 248 intersected Highway 1209. (10RT 2532.) When Duval arrived, he saw a large thermal column, and an orange glow, behind trees that were off the road. (10RT 2531.) Duval estimated that the jeep was about 170 feet off Highway 1209. It had been driven behind the brush. (10 RT 2533-2534.) The fire was very hot and intense. The smell of gasoline was overwhelming. Duval saw a burn trail from poured gasoline. (10RT 2536-2537.) It was commonly used to start a vehicle on fire. (10RT 2537.) Duval surveyed the Jeep and saw what appeared to be bones, a skull, and a torso. A perimeter was set up and the Sheriff's Department was called. (10RT 2540.)

Deputy John Barton of the Austin Sheriff's Department went to the location where Hartwell's Jeep had been found. (10RT 2546-2548.) The Jeep was completely burned out. A body was in the fetal position in the back seat. The head pointed towards the left side of the vehicle. The body was burned beyond recognition. Deputy Barton could not tell if it was

a male or female. (10RT 2549.) Deputy Barton called the Bastrop County Sheriff's Department and asked for a homicide investigator to respond to the scene. (10RT 2550.)

Detective Don Nelson of the Bastrop County Sheriff's Department arrived at the scene. (11RT 2581-2583.) He found a folding lock blade knife in a blue cloth near the body in the back seat. It was taken into evidence. (11RT 2583.) Detective Nelson returned to the crime scene on June 30. He found a license plate on the ground. It had license number RHV33H. The vehicle was registered to Regina Hartwell. (11RT 2586.)

Reeder continued to withdraw money from Hartwell's account on a daily basis with the ATM card. She gave much of the money to Justin. (7RT 2123-2125.) Reeder continued purchasing and using drugs. (7RT 2126.)

On July 1, 1995, Barnes went to Hartwell's apartment to clean it. He had a key. (1RT 2480, 2491.) The apartment was dirty and smelled of cigarettes. Some of the furniture had been moved. There was trash and toilet paper all over the apartment. Barnes went to the bathroom and noticed Hartwell's makeup was not on the counter. She usually kept her makeup on the bathroom counter. Barnes noticed blood splatters in the bathroom. (10RT 2480.) The toilet paper had blood on it. There were bits of blood on the bathroom wall. (10RT 2481.) Barnes also observed a small amount of blood against the wall in the kitchen and blood splatter in the living room. (10RT 2484-2485.) There was a large stain on the carpet to the right of the apartment as Barnes entered through the front door. The stain covered half of the reclining chair. Barnes had not previously seen that stain. There was also a small amount of blood on the back wall where a sofa had been located. Barnes was not

concerned about the blood because Hartwell was having her period and also had nosebleeds when she used cocaine. (10RT 2481, 2487.) Barnes then cleaned Hartwell's apartment. (10RT 2486.)

A day or so later, Barnes went back to Hartwell's apartment. Barnes was concerned because Hartwell would not have simply left without arranging for him to take care of her pets. (10RT 2495-2496.) Barnes found Reeder in the bathroom. Reeder was scrubbing a stain on the countertop of the bathroom. Barnes asked Reeder what she was doing. Reeder said that she was trying to get the blood off. Reeder fell into a fetal position and screamed. Barnes picked her up and told her everything was going to be okay. Reeder was hysterical. She said that she should have called her and taken care of her, and that she had loved her. (10RT 2498.) Sylvia Leal arrived. Barnes and Leal decided to call the police. They cleaned up the drug paraphernalia in Hartwell's apartment so she would not get in trouble. (10RT 2499.) Officers from the Austin Police Department arrived at Hartwell's apartment and took a missing person report. (10RT 2501; 11RT 2592.)

On July 5, 1995, Sergeant R. L. Wardlow of the Texas Department of Public Safety, and other officers, searched Hartwell's apartment. (11RT 2591-2592.) Wardlow obtained Reeder's pager number and called it. He inserted Hartwell's home telephone number into the pager and cross referenced an address for Justin of 2809 Whirla Way in Del Valle. Wardlow requested Detective John Junt and Deputy Don Nelson to go to that address. (11RT 2594.) Detective Nelson drove to Justin's residence in Del Valle. Reeder and Justin were taken away in police vehicles. (11RT 2589.)

The evening of July 5, 1995, Sergeant Wardlow met Reeder at the Austin Police Department headquarters. (11RT 2594-2595.) He obtained Reeder's consent to search her residence and vehicle. Reeder's Jeep was at Justin's residence in Del Valle. (11RT 2596.) Wardlow saw Justin that evening. Justin had a cut in the web of his right hand between the thumb and forefinger. The cut was beginning to heal, but it was still red, and pus was present. (11RT 2569-2570, 2572-2573, 2597.) Appellant was arrested for murder. (11RT 2598.)

A search warrant was obtained for Justin's residence in Del Valle. Wardlow, and other deputies, went to Justin's residence to search it. Bonnie Thomas arrived in a pickup truck. A chain was recovered from the back of the pickup truck. A trash can was located on the lower level of the house near a staircase. (11RT 2600.) The receipt for the hotel where Reeder and Justin stayed was located. (11RT 2602-2603.)

4. The Autopsy of Hartwell's Body.

Roberto J. Bayardo was a retired medical examiner and a forensic pathologist. He had been employed by Travis County in Texas. (11RT 2618-2620.) On June 30, 1995, Bayardo performed the autopsy on Hartwell's body. She was a white female. The body was severely burned. He estimated her height at 60 inches. The remains weighed 70 pounds. A large portion of the body had been burned to ash. (11RT 2521-2622.) The face was completely burned. The flesh was missing from the face. The eyes were shrunken and at the bottom of the sockets. The teeth were still present. The left side of the trunk was burned. Most of the ribs on the left side, and the right side of the abdomen, were missing. (11RT 2623-2624.)

Bayardo could not determine if there were injuries to the arms and legs of the body

because the flesh was missing. X-rays were taken. There was no evidence of bullets or broken pieces of knives. After Bayardo performed the internal examination, he found a stab wound to the upper portion of the right chest. The wound was located just above the internal portion of the right clavicle. The entry point was near the center of the neck just below the right clavicle. The wound measured one inch in length. (11RT 2625.)

Bayardo opened the chest cavity and found the right side filled with blood. A stab wound went through the upper portion of the right lung. The stabbing instrument entered just above the collarbone and went into and out the right lung. It went to the back of the chest. Two large blood vessels between the lung and the entrance wound were cut. There were three pints of blood in the right chest cavity. That amount of blood in the chest cavity was not common. It indicated that veins and arteries had been perforated. The stabbing instrument went from head to toe and towards the back at a 30 degree angle. (11RT 2626.) Bayardo estimated the depth of penetration of the stab wound at five to six inches. He estimated the width of the stabbing instrument to be three quarters of an inch. It was definitely a fatal injury. Hartwell was dead before her body was burned. (11RT 2627-2628.) A kitchen knife could have been the instrument of death. (11RT 2639.)

Bayardo did not find any other injuries, but he could not rule out other injuries because of the burned condition of the body. (11RT 2628.) The toxicology reports showed the presence in Hartwell's body of alcohol and the breakdown product of cocaine. She had probably used cocaine more than six hours before she died. (11RT 2630, 2638-2639.) Hartwell had also used Valium within several hours of her death. (11RT 2631, 2637.) The

blood alcohol level in the bile was .14 percent. Hartwell had stopped drinking for two to three hours before she died. She was not legally under the influence of alcohol at the time that she died, but she had been earlier. (11RT 2637.)

There was no way to determine Hartwell's position when she was stabbed based on the autopsy, but there was about an 80 percent chance she was sitting up. (11RT 2634, 2640-2641.) Bayardo could not determine whether the stabber used the left or right hand. (11RT 2635.) Hartwell bled to death as a result of a stab wound to the chest. She was conscious for two to three minutes after she was stabbed. (11RT 2635.)

5. The Forensic Evidence Pertaining to Hartwell's Death.

Jill Hill and Gary Molina worked for the crime laboratory at the Texas Department of Public Safety. They performed DNA analysis and crime scene investigation. (11RT 2646-2647, 2652-2656.) Molina and Hill collected blood evidence from Hartwell's apartment and Hill performed DNA analysis on it. (11RT 2652-2653, 2655, 2664.) Molina reviewed the results of the DNA testing. (11RT 2657.) The DNA of blood collected from the chair of Hartwell's apartment was consistent with Justin's DNA. (11RT 2669.) The DNA of blood found on a black cube table in Hartwell's apartment matched Hartwell's blood. (11RT 2672-2673.) The DNA of blood collected from a marble statute in Hartwell's apartment was consistent with Justin's DNA (11RT 2675.) The DNA of blood found on the wall near the bathroom was consistent with Hartwell's DNA. (11RT 2675-2676.) The DNA of blood found near the closet door was consistent with Justin's DNA. (11RT 2676-2678.) The DNA of blood from the carpet between the sofa and the black cube table was consistent with

Hartwell's DNA. (11RT 2676-2678.) The DNA of blood found on the shower curtain rod was consistent with Justin's DNA. (11RT 2680.) Tissue paper with blood on it was collected from the trash can. The DNA of that blood was consistent with Justin's DNA. (11RT 2683-2684.) The DNA of a blood stain located near the handle of the passenger door of Hartwell's jeep was consistent with Justin's DNA. (11RT2686.) Hill attempted to perform DNA analysis on a knife, but could not obtain any results. (11RT 2687-2688.)

B. THE DEFENSE EVIDENCE

Detective Silva testified. (13RT 2876-2868.) Silva's interview with Reeder was recorded and a transcript was prepared. Silva reviewed that transcript prior to being called as a defense witness. (13RT 2868.) Reeder told Silva that Justin said he had hid Rafa in caves near a valley. (13RT 2870.)

During September 1998, Silva interviewed Brown. She was in state prison in California. (13RT 2870.) Brown said the following: (1) when Noriega was shot, she was heavily intoxicated because of the use of methamphetamine and she had not slept for days; (2) she and Justin had used methamphetamine together prior to the shooting; (3) she had gotten out of the car and started walking, but could not remember when she first heard the sound of gunshots; (4) Justin used a .9 millimeter Glock firearm to shoot Noriega and she was present when appellant purchased that firearm; and (5) Justin and Noriega were in a heated argument in Spanish before the shooting and there was a duffel bag which contained a lot of stuff. (13RT 2871-2873.) Brown corrected herself during the interview about when she first heard the gunshots. She said she walked up, looked over rocks and trees, saw

headlights pointed at each other, and then saw the shooting. (13RT 2875-2876.)

STATEMENT OF FACTS–THE PENALTY PHASE

A. THE PROSECUTION EVIDENCE

The prosecution presented as aggravation witnesses: (1) the testimony of Deputies Webb and Montez that Justin possessed a shank while incarcerated in the Riverside County Jail (15RT 3226-328, 3151, 3156-3157); (2) Noriega's sister who testified about the impact on his family of his death (15RT 317); and (3) Justin's former spouse who testified about the volatile relationship between them. (15RT 3174.)

Dirk Webb, a deputy sheriff for Riverside County, worked in the jail as a guard. On September 20, 2005, Webb searched Justin's cell in the Robert Presley Detention Center. Justin shared the cell with an inmate with the last name of Zaiza. (15RT 3224-3225.) The cell was located in the administrative segregation unit. (15RT 3226.) Webb found a four inch shank in a legal size accordion folder. The folder was in the shelving area. (15RT 3228.) Legal material which contained the names of Justin, Dorothy Brown, and Rafael Noriega, were in the accordion folder. (15RT 3230.) Webb was unaware of Justin stabbing anyone, and he never heard from others that Justin had done so. (15RT 3232.)

A second incident occurred in which Justin possessed a shank. He took the unusual step of warning the deputy about the shank so he would not get injured. (15RT 3161.) Thomas Richard Montez , a deputy sheriff for Riverside County, worked in the jail as a guard. (15RT 3151-3152.) On December 12, 2006, Montez worked the graveyard shift. At approximately 1:15 a.m., Montez and other deputies searched Justin's cell for contraband.

Justin still shared the cell with inmate Zaiza. Zaiza and Justin were awake (15RT 3153-3154.) They were handcuffed, removed from the cells, and taken to the day room. Justin wore only his boxer shorts. Deputy Montez felt a hard object in front of the fly area of Justin's boxers. Montez asked Justin what it was. Justin said, "Be careful guys. It will cut you." Montez told Justin to remove the object and he did so. It was a broken toothbrush with two razor blades attached to the tip. (15RT 3156-3157.) The common term for such a device was a shank. (15RT 3158.) It was uncommon for a prisoner to warn a guard about the presence of a shank. (15RT 3161.) Inmates were issued razors in order to shave. In Montez's opinion, the razors were configured on the toothbrush in order to cut or injure people. Montez had seen people sustain serious injuries from such devices. (15RT 3157-3158.) The device could have been used for self-defense. (15RT 3162.)

Dawn Bothof met Justin around 1988. Dawn got pregnant. They married on July 1, 1990. Dawn took Justin's last name. (15RT 3174-3175, 3179-3180.) Dawn and Justin got divorced in 1998. (15RT 3180.) The marriage was volatile and occasionally violent. They separated and reconciled on several occasions. (15RT 3175-3176.) Dawn and Justin's son, Preston, was born November 7, 1990. (15RT 3179.)

Justin went to Canyon Springs High School. He was the captain of the football team. Dawn did not see Justin use cocaine or talk about it between the time they met and got married. (15RT 3179-3180.) Dawn and Justin initially had a good relationship. However, Justin's violent behavior increased as he used drugs and alcohol. His personality changed. Dawn occasionally reported the violence to the police, but usually she did not. (15RT 3182.)

During the 1991/1992 time period, Dawn and Justin were living at her parents' residence in Norco. On March 22, 1992, Justin came home with his cousin Brian Anchondo. (15RT 3182, 3184.) Justin was under the influence of drugs and alcohol, or both substances. Dawn and Justin argued because he had been out the entire evening. Justin pushed and slapped Dawn. (15RT 3182-3183, 3185.) At some point during the altercation, Dawn tried to call 911, but Justin yanked the cord out of the telephone and threatened her if she called the police. (15RT 3186.) Justin pulled out a rifle. Brian yelled, "don't do it," when Justin was about to fire the gun. Brian and Justin fought for the gun. The gun discharged. The bullet went by Preston and through a wall. (15RT 3183.)

Another incident occurred several months later, but before Justin joined the Army. Dawn was living with her sister in an apartment in Grand Terrace. (15RT 3188, 3190.) Dawn and Justin were not living together, but they were trying to work out their problems. They went to a bar. Justin got into a confrontation with the bouncer and was removed from the bar. Dawn and Justin returned to her apartment. Justin had a rifle. (15RT 3188.) He said that he was going to kill the bouncer. (15RT 3189.) Justin was very intoxicated. Dawn told Justin not to go. They argued. Justin choked Dawn when she was laying down on her bed. She started to become unconscious. Dawn's sister yelled, "what are you doing?" Justin stopped. (15RT 3190-3192.) Dawn and her sister ran out the door of the apartment. They went to a friend's residence and then returned to the apartment. (15RT 3190, 3193-3194.)

Dawn and her sister got the gun away from Justin. Dawn put the gun in the back of the truck. Dawn and her sister got Justin in the truck and drove through Reche Canyon

towards the chicken ranch. Justin pounded on the window and stated that people were after him. He jumped out of the truck. Dawn did not know where Justin went. Dawn and her sister went to Andy Anchondo's residence and stayed there because they were fearful. (15RT 3194-3195.) Justin was paranoid. Dawn had never previously seen Justin behave that paranoid. (15RT 3195.)

Justin left the area for about two weeks to a month. He went to Texas. (15RT 3196.) Justin threatened to kill Bothof when he returned. He said, "I've done it before. I can do it to you." Justin made statements to the effect that he knew how to kill people and where to dump the bodies. Justin showed Bothof an area off of Moreno Beach Drive where he said he would dump a body. Justin then said he was just trying to scare Dawn and denied dumping a body. (15RT 3197-3198.) Dawn was interviewed by Investigator Silva during June 1998. During that interview, Dawn did not say anything about Justin making comments about dumping bodies. (15RT 3198.)

Justin used and distributed drugs from the time he married Dawn until the end of 1992. He joined the military during either 1992 or 1993. Dawn argued with Justin about his drug use. She did not learn that he sold drugs until after they separated. (15RT 3199-3201.) Justin said that he had to clean himself up. Dawn told Justin she would not stay with him the way he was. Justin joined the Army. Dawn did not live with Justin when he started military service. After basic training, Dawn and Justin moved to Oahu during June 1993. (15RT 3201-3202.)

It appeared to Bothof that Justin did not use drugs for a period of time. Justin,

however, resumed using drugs. His personality turned violent. Dawn did not see Justin use drugs, but was told by friends that he was doing so. Justin had problems at work. Dawn once caught Justin consuming a large quantity of water in order to clean drugs out of his system. Justin later had a positive drug test. (15RT 3203.)

Several incidents of domestic violence occurred in Hawaii. (15RT 3205, 3209.) Sometime between June and Christmas in 1993, Dawn was home with friends. Justin took the car keys and drove away. Justin was either intoxicated or on drugs. He acted crazy. Justin was not in a condition to drive. Dawn and her friend followed Justin in her friend's vehicle. Justin stopped and left the car keys in the vehicle. Dawn asked Justin if she could have her car and let Justin's friend drive Justin. Justin entered Dawn's vehicle, twisted her down, and took the keys out of her hand. Dawn sustained minor whiplash injuries, which hurt for two or three days. (15RT 3208-3209.) Justin drove away in Dawn's vehicle. (15RT 3208.) Dawn reported the incident to the civilian police. They asked her what she did to provoke the incident. She said nothing. Dawn left frustrated. (15RT 3208.)

During the summer of 1994, Dawn and Justin lived in a condominium in Hawaii. They argued. Justin's drug problem continued. Dawn told Justin she was going to leave. Justin said that he would not let her take his son. He became hysterical. Dawn locked Preston and herself in the bathroom. Justin stabbed the bathroom door with a knife. (15RT 3209-3210.) Justin was not working his normal hours because he had injured his leg and was wearing a cast. Justin forced Dawn at knifepoint to stay on the couch for three days. Dawn slept during the three days. Justin used methamphetamine and did not sleep much. Dawn tried to get up.

Justin pushed her down and told her not to move. He said he was going to kill her. Justin told Dawn that he was not going to let her leave and take Preston. (15RT 3212.) Justin never threatened to injure Preston. (15RT 3212.) Justin's father called the condominium. Justin told him what was transpiring. Justin let Dawn speak with his father. Justin's father told Dawn to pretend that she was speaking with him, but to call 911. Dawn did so and the police came to the condominium. (15RT 3212-3213.)

Dawn became pregnant with her daughter. She did not know if it was Justin's child. (15RT 3215, 3217.) Justin kicked Dawn in the stomach while she was pregnant and threw her to the ground. (15RT 3215.) Justin flew back to California. (15RT 3214.) Dawn's daughter was born during October 1994. Justin last saw his children around November 1994. (15RT 3218-3219.)

Armada Ramirez was Noriega's sister. Noriega was the eighth child in the family. (15RT 3170.) Armada was 13 or 14 years old when Noriega disappeared. Noriega had lived with his family in Sinola State in Mexico. Noriega had been gone from the family home three to four years before he died. Armada had a good relationship with her brother. He spoiled her and bought her things. Noriega was very affectionate. (15RT 3171-3172.) Noriega's parents suffered greatly when they learned that he had been killed. (15RT 3172.)

B. THE DEFENSE EVIDENCE

Justin testified. He denied killing Noriega or Hartwell. (16RT 3286.) Justin was not present when Noriega was killed. (16RT 3435.) Justin helped dispose of Hartwell's body, but he did not know who killed her. (16RT 3353-3354.)

Justin was born in Redlands in 1971. He was 36 years old at the time of trial. Justin was 20 years old when Noriega died. He was 23 years old when Hartwell died. (16RT 3288.) Justin's parents separated when he was about three years old. Justin occasionally lived at the chicken ranch. Justin's grandparents, uncle, aunt, mother, and cousins lived at the ranch. (16RT 3288.)

Justin's father showed him how to use drugs. Justin was not sure of his age when the drug abuse commenced. Justin was as young as three, six, or seven years old, or nine or 10 years old when he started using drugs. (16RT 3290-3292.) On several occasions, Justin found his father's drug stash and asked him what it was. Justin's father showed him how to roll a joint, chop a line, snort drugs, and use a syringe to self-inject. Justin's earliest memory of using drugs with a needle was around the age of 13 or 14. (16RT 3290-3291, 3293, 3300.) Justin was scared to shoot up because of the needle, but his father assisted him. (16RT 3302.) Justin had used cocaine by the age of 10. (16RT 3298.) Most of his drug use with his father occurred during the summer when Justin visited him. During the school year, Justin lived with his grandparents or his mother. Justin did not use drugs when he lived with them. (16RT 3291.) Justin's father reasoned that if Justin was going to use drugs, he wanted Justin using around him in the event anything bad happened. Justin used LSD when he was 13 or 14 years old. (16RT 3293-3294.)

Justin was exposed to alcohol at an early age. Almost all of Justin's family gave him alcohol when he was a young boy. It was accepted behavior. Justin went on fishing trips with his father. His father provided him alcohol during the trip. Justin did not remember

feeling the effect of the alcohol until he was around 10 to 12 years of age. (16RT 3312-3313.) Justin estimated that he had used alcohol about 10 times between the ages of six and eight. (16RT 3314.)

Justin did not want the jury to know about his drug abuse as a youth because he was concerned they would give him life in prison with parole. Justin wanted to receive the death penalty, but he did not want to die. Justin believed his appeal would receive more attention, and resources, if he received the death penalty. (16RT 3297, 3321, 3325.) Justin's attorneys were arguing for a life sentence, and presenting mitigation witnesses, against his wish. (16RT 3297, 3316-3317.) Justin did not want his attorneys to present any good character evidence. (16RT 3316-3317.) Justin's trial attorneys explained to him that the strategy was to get him life in prison without parole. This was contrary to Justin's wishes. (16RT 3225.)

Justin was a good student in school when he applied himself. He did not, however, always apply himself. (16RT 3505.) Justin engaged in typical recess activities when he was in elementary school. He also played neighborhood sports with friends. Justin played football in high school. He was 6'3" tall and weighed 215 pounds. (16RT 3307-3308.) Justin continued to use drugs through seventh and eighth grade. The use varied from once a week to once a month depending on the availability of the drugs. By seventh grade, Justin's drug use had grown more sophisticated. He used drugs with girls. (16RT 3309-3310.) Justin became addicted to drugs between the ages of 13 and 16. (16RT 3327.)

High school football was the best thing that ever happened to Justin. He used his athletic ability and competed. His drug use decreased. Justin received awards for playing

football. (16RT 3328-3329.) Between 1985 and 1987, Justin lived with his father in Madres, Oregon. He played football and used drugs. (16RT 3330-3331.) Justin then played football for Canyon Spring High School in Moreno Valley. His team won the CIF football championship. (16RT 3331-3332.) Justin's coaches and teammates considered him a good player. (16RT 3332.) Justin received letters from 13 Division I colleges about playing football. He was good enough to play college football and had the grades to do so. However, Justin's girlfriend became pregnant. Justin's grandparents were from the "old school," and believed Justin had to accept the consequences of his conduct. Justin dropped out of high school, got married, went to night school, and obtained a job. He worked mostly warehouse and construction jobs to support his family. Justin also sold drugs. (16RT 3335.)

Justin's marriage was difficult. He often argued with his wife and he was physical. Many of the arguments were about infidelity. They were both unfaithful. Justin became physical when he was trying to get Bothof off of him. He tried to walk away when they argued. Bothof nagged Justin and threw objects and hit him. (16RT 3419-3420.) Justin never struck Bothof with his fist. (16RT 3421.)

Justin's football coaches did not want him to give up on football. They directed him to a semi-professional football team. Justin made the team and won awards, including rookie of the year and defensive player of the year. (16RT 3336.) Justin was invited to try out by some professional AFC teams after his second year of semi-professional football. Justin was slightly underweight. (16RT 3337-3338.) Justin gave up football around the age of 20 because of methamphetamine use. He became a drug addict again. Justin used drugs on a

recreational basis when he got married. (16RT 3341-3343.) Bothof told Justin she would take him back only if he straightened up his life and stopped using drugs. Justin joined the Army. Justin was discharged from the Army for failure to rehabilitate from drug use. (16RT 3343.) Justin met Noriega. Brown's testimony about Justin's involvement with Noriega's death was not true. (16RT 3344-3345.)

Justin was discharged from the Army during the October/November 1994 time period. He moved to Texas because he planned to live with his father and play football at the University of Texas. Justin and his father lived in an apartment in Austin. Justin was employed as a trainer at the World Gym. (16RT 3349-3350.) He resumed selling drugs. Justin needed money to support his wife and children. Justin initially did not use drugs, but eventually resumed his habit. (15RT 3351-3352.)

Justin started dating Reeder. She told Justin she wanted to introduce him to Hartwell. Reeder told appellant that Hartwell was her girlfriend and benefactor. Justin and Hartwell became friends. (16RT 3353.) Justin believed Hartwell was killed because of drugs and money, but he did not know who caused her death. (16RT 3354.) Justin probably testified during the Texas trial that Hartwell had threatened to turn him in for dealing drugs. He was not concerned because he had not sold drugs with Hartwell. (16RT 3391-3392.) The evening before Hartwell's death, Reeder called Justin from Hartwell's apartment. Reeder had been fighting with Hartwell and asked Justin to give her a ride. Reeder did not want Hartwell around anymore. Hartwell and Reeder were both kicking and screaming. Justin had to drag Reeder away. A three way telephone conversation occurred. Hartwell threatened to turn

Justin in for dealing drugs. (16RT 3400.) After Hartwell had been killed and her body moved to the location where it was found, Justin poured gasoline on Hartwell's body and the vehicle and started the fire. Justin believed he was acting out of love for Reeder. (16RT 3426.) While Justin lived in Texas, he never said anything to anyone about killing someone in California. (16RT 3417.)

Justin's attorneys tried to arrange for magnetic resonance imaging, but he refused.(16RT 3356.) Justin also refused evaluation by a mental health specialist. (16RT 3557.) He believed that he was not brain damaged or predisposed to the use of drugs. One defense specialist had already stated that Justin was fine. A different specialist said Justin had an addictive personality. Justin agreed with the specialist who concluded he was fine, and disagreed with the specialist who concluded that he had an addictive personality. Justin chose his path. (16RT 3357-3359.) He did not believe that early exposure to alcohol played any role in his decisions. (16RT 3336.) Justin refused to speak with the mental health professionals retained by his attorneys because he believed a sentence of life in prison without the possibility of parole was not in his best interest. (16RT 3359.)

Justin had been in custody almost 13 years. He had been stabbed or lacerated many times while in custody. Justin had seen the deputies who testified about his possession of the shanks many times. Justin had never stabbed anybody and he had never been charged with such an offense. Justin warned the deputy about the shank. He admitted to possessing it. Justin did not look for people to stab. (16RT 3360-3361.) He had the shanks for protection. It was dangerous every time Justin left his cell and went onto the floor. (16RT 3363.) Justin

had obtained tattoos in prison in violation of the prison rules. (16RT 3376.) His tattoos were ethnically or culturally based. (16RT 3377.) Justin did not belong to any of the culturally based gangs in the Riverside jail, but he was friends with some of their members. Justin did not belong to any organizations while incarcerated in Texas. (16RT 3377.) When Justin was in custody in Texas, weaker inmates paid him for protection. Justin never started a fight while in custody, but probably egged on a fight. (16RT 3380.) Justin had been in about three fights in the Riverside County jail. He did not start any of the altercations. (16RT 3382.) Justin denied telling Deputy Galindo that he ran the jail. (16RT 3386, 3388.) He also denied dealing drugs with Hartwell in clubs. (16RT 3391.)

Andy Anchondo testified. He was Justin's uncle. Justin's mother, Judy, was Anchondo's sister. Anchondo lived at 27401 Locust Ranch, Moreno Valley. Justin occasionally lived at that address through the years. He was passed around among different families. (17RT 3462-3463, 3475.) Anchondo was 13 or 14 years old when Justin started living with his family. Justin was around four to five years old. (17RT 3464.) Justin's father was named Jim. (17RT 3465.) Justin's parents did not stay together very long and Justin had a difficult and unstable life because of his parents' drug use and suicide attempts. (17RT 3475.)

Judy became pregnant with Justin after she married Jim. Anchondo only saw Judy about once a month while she was pregnant. Judy drank alcohol to the point of becoming happy when she was pregnant. Her speech slurred. (17RT 3466-3467.) Anchondo saw bruises on Judy when she was pregnant. He assumed the bruises were from fighting with Jim.

Anchondo could not recall whether Judy used drugs, or smoked, when pregnant with Justin. (17RT 3469.) Anchondo may have told a paralegal that Judy used drugs while pregnant. He could not recall. (17RT 3471.) He also thought Judy told him that she used drugs, but he could not recall with certainty because of the passage of time. (17RT 3471.) Anchondo saw Jim give Justin a few sips of his beer when appellant was around nine years old. Anchondo does not have any other memories of Justin drinking prior to the age of 18. Anchondo was suspicious that Justin used drugs, but had never seen him do so. (17RT 3468.) Judy tried to commit suicide four times. Justin was 10 or 11 years old when Judy made her first suicide attempt. Anchondo believed that Justin was not aware of the suicide attempt. (17RT 3474.)

Cynthia Anchondo testified. She was Andy Anchondo's wife. (17RT 3477.) Cynthia had never seen Justin use drugs. She was aware of the charges against Justin and the fact that he had been convicted. Cynthia had never seen Justin be violent. He was a polite and happy person. (17RT 3477-3478.) Cynthia had seen Justin many times over the years. He had a very close relationship with his grandparents. (17RT 3479.) Justin's grandmother was more like his mother. (17RT 3480.) She tried to teach him right from wrong and instill good values in him. (18RT 3483.) Justin's mother, Judy, was emotionally unstable. She had a lot of problems. Judy blamed Justin for her problems. (17RT 3480.) Cynthia met Judy, but she never met Justin's father. Judy was married four times. He fourth husband was name Tom. Cynthia believed Justin had a good relationship with Tom. (17RT 3481.)

Alex Stalcup was a physician. He was certified in addiction medicine. It was a new speciality. Stalcup operated a clinic for people with drug and alcohol addiction. His effort

focused on using medications to affect brain function, stopping drug addictions, and teaching people not to relapse. (17RT 3487.) Stalcup became board certified in addiction medicine in 1994. (17RT 3534.)

Addiction was a disease of the pleasure producing part of the brain. (17RT 3487-3488.) Several drug chemicals, mostly from plants, activate the pleasure chemistry of the brain. Excessive use of drugs damages the pleasure chemistry of the brain. Injury to the pleasure system of the brain is the first step towards addiction. Excessive use of drugs causes the pleasure system to go deaf. The abuser requires more of the drug to experience the same feeling of pleasure. This was the first sign of addiction. (17RT 3488.) The abuser feels negative when sober. He develops the need to be high and not sober. Cravings develop. (17RT 3489.)

Drug abuse damages the prefrontal cortex of the brain. This was the portion of the brain that makes decisions and inhibits impulse. It weighs the risk and consequences of behavior and assesses right from wrong. Once the prefrontal cortex was damaged, the addict cannot see the consequences of behavior and makes poor choices. The addict's sense of right and wrong fails. (17RT 3489-3490, 3538.) An outsider may believe that an addict is making a choice. The addict, however, has lost control to the drug. They are not making choices based on reason and logic. (17RT 3537.) Hypofrontality is the medical term referring to damage to the decision making process. It is a general term suggesting that the decision making process was abnormal or diseased. (17RT 3513.) Addicts make decisions in ways that are different from non-addicts. (17RT 3490.) Most methamphetamine addicts stop

without treatment. Late stage methamphetamine addicts almost always need treatment to stop using. (17RT 3536.)

Powerful drugs damage the brain more than weak drugs. Drugs that get into the body via injection, or smoking, are very damaging and wipe out the rational decision making process. (17RT 3490-3491.) Methamphetamine is the best example of how drugs impair the decision making process. It is one of the strongest drugs known. It is very dangerous if smoked or injected. Users experience a massive surge of euphoria from its use. It hits the brain like an explosion and erodes the pleasure system from early use. If a person uses methamphetamine before the age of 18, there was a good chance the brain would never normally develop and the user will have chronic persistent injury. Any person watching such an individual would observe abnormal behavior. If a methamphetamine user can get away from the drugs for as much as seven years, the brain can heal and be restored to normal functioning. The user would be able to see their prior illogical thinking and poor decision making. Drug use can permanently damage the developing brain. (17RT 3492.)

The developing fetal brain is very sensitive to the effect of alcohol and marijuana. A developing fetal brain exposed to alcohol may never be normal. It was believed for many years that marijuana use by the mother was harmless to the fetus. It is now known through more sophisticated techniques that alcohol, and cannabis, target the prefrontal cortex and damage the brain's pleasure system. (17RT 3492-3493.) Children exposed to alcohol and cannabis in the womb are born impulsive and with poor decision making ability. They are very active and easily bored. The symptoms of an alcohol damaged child are chronic

bordeom, inability to enjoy, and damage to the pleasure system concurrent with impaired decision making ability. (17RT 3493.)

The decision making portion of the brain is not fully developed until the age of 22. (17RT 3493.) Individuals exposed to alcohol before the age of 18 are twice as likely to become addicted to alcohol and have an impaired decision making process. (17RT 3493-3494.) Early use of drugs or alcohol is a disaster. An individual becoming intoxicated before the age of three is a horrible injury to the brain. Use of cocaine or methamphetamine before the age of 14 is associated almost 100 percent of the time with severe damage to the decision making part of the brain. A child's exposure to cocaine or methamphetamine on a monthly or bi-monthly basis would have a very severe effect on the brain. (17RT 3494.) A parent providing the drug to a young child sends an especially harmful message and is extremely likely to lead to addiction. (17RT 3494.)

Most addicts in the early stage of addiction are not aware they are addicted. The addict believes he or she can stop using the drug and is in charge. The addict cannot understand that he or she is making dumb decisions and terrible mistakes. (17RT 3495.) The children Stalcup saw in his practice did not appreciate how harmful drugs were. The children were told drugs were bad, but it felt good when they used drugs. A child exposed to drugs by a trusted father no longer believes by the age of 14 that drugs are harmful. (17RT 3496.)

Stalcup interviewed Justin during August 2004 in the Presley Detention Center. (17RT 3496.) Justin was cooperative. He did not want to receive the death penalty. (17RT 3553.) The interview lasted between 90 minutes and two hours. (17RT 3538.) Justin displayed the

symptoms of fetal alcohol syndrome during the interview. He made funny faces and stared into space. Justin's behavior was bizarre and inappropriate. He thought he was cool. Justin did not see that his behavior was inappropriate. (17RT 3518.)

Justin provided information about his family background. By the age of 14, Justin was feeling negative and sluggish when he was sober. (17RT 3496-3497.) He had trouble sitting still in school and concentrating. Justin had a temper and felt hopeless when he tried to plan his future. (1RT 3560.) Stalcup diagnosed Justin with the disease of addiction. (17RT 3521.) Justin said there was widespread addiction in the family of his parents. The disease was inherited. Justin said his mother consumed alcohol, and smoked marijuana daily, when she was pregnant with him. Justin displayed all the symptoms of a child born with the gene for addiction. Seventy-percent of addicts inherit the disease of addiction. (17RT 3498.) Justin was one of the worst cases of genetic inheritance of addiction that Stalcup has encountered. (17RT 3500, 3517.) Justin's father, and many members of his family on both sides of his parents, were drug addicts. (*Ibid.*)

Justin said he was three years old when his father gave him enough alcohol to get him intoxicated. Justin was given alcohol as a sedative to keep him quiet. Justin said he was five years old when his father taught him how to snort and use cocaine. Justin said using cocaine was the most amazing experience he ever had from the first time he tried it. The first step towards addiction was a positive experience. The positive experience is called reinforcement and makes the person want to use drugs again. The pleasure a five year old experienced from using cocaine was far above any natural pleasure he or she could experience and would be very damaging. (17RT 3499.)

Justin had the brain of an 80 year old person by the time he was 10 years old. Justin lacked the ability to stop using drugs by the age of 16 or 17. He was addicted to drugs before he knew what they were. (17RT 3502-3503.) Justin's exposure to alcohol as a fetus aggravated his addiction. (17RT 3503.) He was a late stage drug addict by the age of 14. He was different from other children because he could not understand that he was making dumb decisions. (17RT 3504.) Not all children at risk of becoming addicted to drugs become addicts. Children who become involved in sports and music sometimes do not become addicts. The activity acts as a protective factor because it activates the pleasure center. Stalcup had observed sports act as a protective factor even for children at very high risk of addiction. Sports came first for Justin as long as he was playing and drugs were second. Justin became bored, and his drug use exploded, when he did not play sports. Stalcup had observed this phenomena in other individuals. (17RT 3506-3507.)

Drug addicts support their habit by selling drugs, theft, or prostitution. Justin supported his habit by selling drugs. (17RT 3508.) Justin became paranoid. He believed he was being told things by the television. Justin became suspicious of friends and believed that rocks and bushes moved. (17RT 3508.) Heavy methamphetamine users developed toxic psychosis. The user will behave similar to a severely affected paranoid schizophrenic. The user sees and hears things that are not there. They believe things that are not true and believe they are being followed. (17RT 3509.) Sleep deprivation occurs which further impairs judgment. (17RT 3514.) Toxic psychosis is an insane state of mind. (17RT 3552.) Toxic psychosis can take three to six months to dissipate after the methamphetamine use stops. Justin told Stalcup that he was using seven to 14 grams of methamphetamine per day. (17RT

3510.) Justin had toxic psychosis. (17RT 3512.) Users on a methamphetamine binge who are completely out of control typically use between one to three grams of methamphetamine per day. A person using more than three grams of methamphetamine per day has a dealer habit. Only a dealer can afford to use that much methamphetamine. The dealer eventually starts consuming his own product and owes money to people, but cannot stop using because of the addiction. (17RT 3510.)

Smart drug dealers do not use their own product. Justin described Noriega as a high end, heavy weight drug dealer with access to methamphetamine through Mexican crime families. Justin enabled Noriega to distribute his product. Justin told Stalcup he fell behind with Noriega because he used what he was supposed to be selling. Justin told Stalcup that he did not kill Noriega. (17RT 3511.) Hypofrontality can be observed on magnetic resonance imaging. Justin refused to be imagedt. (17RT 3518, 3553.) This was an example of Justin's impaired decision making ability. (17RT 3518.)

C. THE PROSECUTION REBUTTAL EVIDENCE.

Jesse Galindo, a deputy sheriff for Riverside County, worked in the Robert Presley Detention Center. (17RT 3587.) On March 9, 2004, he was delivering mail. Galindo passed a magazine to appellant. Justin asked about other magazines. Galindo told Justin the mail room scans the magazines and withholds negative or obscene material. Justin said, "Don't you know who I am? I'm Russo. I'm running things here and that's no secret." Galindo entered that exchange into Justin's classification notesr. (17RT 3588-3589.) Galindo did not know if the statement was true. (17RT 3593.) Galindo was aware that Justin had been stabbed. Justin was in lock down in his cell. (17RT 3591-3592.)

I

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE OF HARTWELL'S MURDER, AND JUSTIN'S ALLEGED PLAN TO MURDER THE MICHAEL AGUON AND HIS GIRLFRIEND, IN VIOLATION OF JUSTIN'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 15, OF THE CALIFORNIA CONSTITUTION, RIGHT TO A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 16, OF THE CALIFORNIA CONSTITUTION, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION, AND (D) EVIDENCE CODE SECTIONS 350, 352, AND 1101.

A. SUMMARY OF ARGUMENT

Justin's trial should have been about the death of Rafael Noriega. It was not. Instead, the trial was primarily about the death of Regina Hartwell. The death of Noriega was a sideshow to the far more inflammatory facts surrounding Hartwell's death. Noriega was killed during September 1992. (6RT 1910, 1938-1939.) Hartwell was killed during June 1995. (7RT 2104-2105.) Noriega's death did not have any logical connection to Hartwell's death. Justin objected to the admission of evidence pertaining to Hartwell's death. (2RT 1005, 1022.) The trial court overruled the objection and erroneously admitted evidence pertaining to Hartwell's death to show Justin's state of mind and intent. (2RT 1022-1023.) The trial court also erroneously admitted evidence that Justin planned to kill Michael Aguon

and his girlfriend Christine.[15]

The trial court committed three independent errors: (1) it admitted evidence of Hartwell's death pursuant to Evidence Code section 1101, subdivision (b)[16]; (2) it admitted numerous extraneous and prejudicial facts concerning Hartwell's death; and (2) it admitted evidence Justin planned to kill Aguon and Christine.. The credible evidence connecting Justin to Noreiga's death was minimal. There was no forensic evidence connecting Justin to the crime. There were no witnesses directly connecting Justin to Noriega's death who were not criminals and drug users. Justin was interrogated by a police detective and denied killing Noriega. In short, the prosecution evidence that Justin killed Noriega was remarkably weak. It rested almost entirely on the testimony of Dorothy Brown given during Justin's trial in Texas for Hartwell's death. That testimony was read into evidence during Justin's trial, (6RT 1094), because Brown had been shot to death by the police when she resisted arrest. (13RT 2866.) Brown was an accomplice, and a drug user, with a motive to falsely accuse appellant for her own benefit. It was highly unlikely the jury viewed her testimony as reliable.

The prejudicial impact of the jury hearing the details of Hartwell's death was substantial. It was unlikely the jury would have convicted Justin of Noriega's murder if it had not heard the lengthy testimony about Hartwell's death. The admission of evidence pertaining to Hartwell's death denied Justin a fair trial and was prejudicial under any standard of review for prejudice. Similarly, the evidence Justin planned to kill Aguon and Christine was

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[15] Christine's last name was never stated on the record.

[16] Once an Evidence Code section has been cited, further citations may omit any reference to the Evidence Code unless the context requires otherwise.

inflammatory and irrelevant. The judgment of guilt must be reversed.

B. STANDARD OF REVIEW

The trial court's rulings on the admission and exclusion of evidence are reviewed for an abuse of discretion. (*People v. Thomson* (2010) 49 Cal.4th 79, 128.) As explained below, the trial court's admission of evidence pertaining to Hartwell's death violated appellant's right to federal and state due process of law, his right to an accurate jury determination of the facts under the Sixth and Fourteenth Amendment, and Article I, section 16, of the California Constitution, and the prohibition against the imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments and Article I, section 17, of the California Constitution. Furthermore, this Court can review the prosecutor's offer of proof regarding Hartwell's death, and assess its relevance as well as the trial court. Hence, the de novo standard of review should apply in determining if the trial court erred by admitting evidence of Hartwell's death. (*In re Jenkins* (2010) 50 Cal.4th 1167, 1180.)

C. THE LACK OF SOLID, RELIABLE, AND CREDIBLE EVIDENCE CONNECTING JUSTIN TO NORIEGA'S DEATH.

The prosecution presented three categories of evidence to connect Justin to Noriega's death: (1) the testimony of the Barajas sisters; (2) Brown's testimony from the Texas trial; and (3) Justin's statements to third parties. The testimony of the Barajas sisters failed to connect appellant to Noriega's shooting. Brown's testimony was unreliable because she was a felon and an accomplice. The witnesses who testified about Justin's statements were also unreliable and testified to vague and contradictory statements by Justin which lacked credibility.

1. The Testimony of the Barajas Sisters Failed to Establish that Justin was with Noriega the Evening he was Shot.

During 1992, Noriega lived with the Barajas family. The three daughters in the family were named Heather, Jennifer, and Eva. The girls were ages 14, 12, and 11, respectively, during 1992. (6RT 1865-1866, 1868, 1888; 7RT 2041-2042.) Robert Manzano lived with the Barajas family. (6RT 1867.)

Heather testified that Noriega received a page on his pager the evening he disappeared. (6RT 1870-1871.) Manzano warned Noriega to not deal with the person he was going to meet and not to go. (6RT 1870-1871.) Sometime between a week to a month before Noriega disappeared, Heather went to a chicken ranch in Morena Valley with Manzano. Heather testified that she never went to the chicken ranch with Noreiga. (6RT 1872-1873.) Heather had told Detective Silva when she was interviewed in April 1999 that she had been to the chicken ranch with Noriega and he had met a husky white male there. Heather also believed that Noriega was selling drugs. (9RT 2349-2351.) The person Heather saw at the chicken ranch was tall and stocky. (6RT 1973.)

Jennifer testified that she went to the chicken ranch with Noriega on one or two occasions. She did not know why she went there and could not recall seeing Noriega interact with anyone. (6RT 1890-1891, 1896.) Eva testified that Noriega received a telephone call the night he disappeared. (7RT 2042.) She could not recall going to the chicken ranch with Noriega. (7RT 2044.) Eva told Detective Silva that she had gone with Noriega to the chicken ranch once or twice. She always stayed in the vehicle and believed Noriega was selling drugs. (9RT 2350-2351.)

In summary, there was no evidence or testimony from the Barajas sisters which placed

Justin with Noriega the night he disappeared.

2. Dorothy Brown's Testimony was Inconsistent, Unreliable, and the Product of Her Motivation to Escape Punishment.

Brown was the only eyewitness linking Justin to Noriega's death. Brown was the exact type of witness distrusted by the law; a drug abuser with a motive to falsely accuse someone else of criminal activity in order to minimize her own criminal liability. Indeed, Brown was shot by the police during a traffic stop when she failed to cooperate. (13RT 2865-2866.) Brown testified during Justin's trial in Texas and her testimony was read into the record during this case. (6RT 1905.)

Brown met Justin during the Summer of 1992. Brown was 29 years old. She sold drugs to support herself. (6RT 1905-1906, 1932.) Brown testified that Justin asked her to go to a meeting he had arranged with a drug connection. (6RT 1910, 1935-1936.) Brown drove a stolen vehicle to the meeting place. (6RT 1936.) Justin had a male friend with him. (6RT 1910, 1937.) Brown testified that Justin shot Noriega. (6RT 1913, 1938-1940.)

During June 1994, Brown was arrested for her narcotics activity. Somebody had identified Brown to law enforcement. (6RT 1918-1919, 1921.) Brown had three open criminal cases. (6RT 1921.) Brown was interviewed by Detective Wilson after her arrest. She was asked if she knew anything about Noriega's death. (6RT 1926, 1928, 1948.) In typical fashion for a drug abuser seeking to curry favor with law enforcement, Brown identified Justin as the person who killed Noriega. (6RT 1921-1923.) Brown was under the influence of a drug when she was interviewed by Detective Wilson. Brown told Wilson what he wanted

to hear. She was hoping for leniency. (6RT 1926, 1931.) Brown "beefed up" the story of what happened so the police would go easy on her. (6RT 1945.) Brown did not tell the police that she had driven a stolen vehicle. She said that she rode with Justin. (6RT 1923, 1945.)

The parties stipulated to Brown's criminal record. She had the following convictions: (1) a 1993 conviction for possession of methamphetamine for purpose of sale, possession of methamphetamine, and auto theft; (2) a 1994 conviction for auto theft; (3) a 1997 conviction for felony possession of methamphetamine for sale; (4) a 1997 conviction for making unlawful threats, making annoying or harassing telephone calls, and attempting to dissuade a witness; (5) a 2001 conviction for felony possession of methamphetamine; and (6) a 2003 conviction for possession of methamphetamine. (13RT 2866.) The following stipulation regarding Brown's death was read to the jury:

> On March 26th, 2004 Dorothy Lee Brown was involved in a vehicle pursuit with the Fountain Valley Police Department. Ms. Brown was driving a 1973 Volkswagen Beetle and attempted to evade officers during a traffic stop. The pursuit ended when Ms. Brown crashed into another car.
>
> When Dorothy Brown got out of her car several Fountain Valley police officers approached her with their guns drawn. Ms. Brown reached toward her waistband and one of the officers later told investigators he heard her say, quote, `I have a gun,' unquote. The officers who heard that statement —the officer who heard that statement fired his weapon three times striking her with all three rounds which killed her. No weapon was found in Dorothy Brown's possession.

(13RT 2865-2866.)

3. Justin's Statements to Third Parties.

During 1995, John Sams lived in Austin, Texas. He met Justin through Hartwell. (9RT 2364-2365.) Sams used alcohol and drugs with Hartwell, and sold cocaine to her. (9RT 2365-2366.) Justin made statements which Sams did not take seriously and believed was Justin trying to impress people with "bullshit." (9RT 2370-2371, 2384.) Justin said he was from California and killed people. Justin never specifically said that he killed someone in California, but he said he shot someone for drugs. (9RT 2368-2369.)

Kimberley Reeder testified to the following statements Justin allegedly made to her sometime during May or June 1995: (1) he had killed someone named Rafa, but Reeder could not recall how Justin said he killed him; (2) he put the body in the back of a truck and drove it to the caves where he hid it; (3) Justin's construction co-workers asked him about the blood in the back of the truck and he said it was from deer hunting; (4) he had previously met Rafa at the caves to conduct narcotics transaction and Justin killed him because he was a "narc." (7RT 2143-2144, 2253-2254.) Reeder had no doubt that Justin said he had hid the body in caves. (8RT 2254.) As explained in more detail below, Reeder was not a credible witness because of her motive to inculpate Justin in connection with Hartwell's death. Reeder was irrevocably committed to assisting the prosecution in any prosecution of Justin once she testified for the prosecution during Texas trial that Justin killed Hartwell,

D. JUSTIN'S OBJECTION TO THE ADMISSION OF EVIDENCE OF HARTWELL'S DEATH, EVIDENCE JUSTIN PLANNED TO KILL AGUON AND

CHRISTINE, AND THE TRIAL COURT'S RULING.

The prosecution filed a pretrial motion seeking the admission of evidence pursuant to Evidence Code section 1101, subdivision (b), to show Justin's intent, premeditation and deliberation, motive, common plan or scheme, and lack of self-defense. (1CTP 271-286.)[17] The evidence the prosecution wanted to admit was evidence of Hartwell's death from 1995 and Justin's alleged plan to kill Michael Aguone and his girlfriend, Christine. (1CTP 275, 277.) Justin filed a written motion to exclude evidence of uncharged crimes allegedly committed by him. (16CT 4107-4108.) The defense counsel objected to the admission of evidence pertaining to Hartwell's murder. (2RT 1005.) He argued the incident was not admissible under Evidence Code section 1101, subdivision (b). (2RT 1005.) The defense counsel argued the admission of Hartwell's murder would violate Justin's right to a fair trial under the Sixth Amendment right, the due process clause, and the prohibition against cruel and unusual punishment in the Eighth Amendment, and Justin's corresponding rights under the California Constitution. (2RT 1005.) The trial court concluded, "It seems to me that there is a sufficient basis under 1101 (b) for that to come in. It goes — it seems to me it has relevance to, and is probative on, the issue of the defendant's state of mind, his intent, and

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[17] On August 20, 2007, the trial court first litigated the admissibility of evidence pertaining to Hartwell's murder when Justin was in pro-per. Justin did not object to the admission of the evidence. (2Aug. RT 253-254, 259.) Justin was reappointed counsel. (2Aug. RT 358.) On October 10, 2008, the trial court litigated the issue a second time. (2RT 1005-1007.)

that the —under 352 the negative factors simply do not outweigh that probative value. So I would allow the 1101 (b) evidence in." (2RT 1022-1023.)

E. THE TRIAL COURT VIOLATED EVIDENCE CODE SECTIONS 350, 352 AND 1101, SUBDIVISION (B), BY ADMITTING EVIDENCE PERTAINING TO HARTWELL'S DEATH.

Evidence Code section 350 provides that, "No evidence is relevant except relevant evidence." Evidence Code section 352 grants the trial court the discretion to exclude evidence when its prejudicial effect outweighs it probative value. As explained more fully below, the trial court violated sections 350 and 352 by admitting evidence of Hartwell's death because it had no logical connection to Justin's alleged killing of Noriega. Hartwell's death occurred three years after Noriega's death and in completely different circumstances. Hartwell's death had "no tendency in reason" (Evid. Code, §210) to prove any fact in dispute pertaining to Noriega's death.

Evidence Code section 1101, subdivision (a), excludes specific instances of a person's character to prove his or her conduct on a specific occasion. Section 1101, subdivision (b), creates a narrow and limited exception to this rule. It provides in part as follows:

> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

People v. Ewoldt (1994) 7 Cal.4th 380, guides the admissibility of evidence under section 1101, subdivision (b). The trial court admitted evidence pertaining to Hartwell's death to prove Justin's intent regarding Noriega's death. *People v. Ewoldt*, supra,7 Cal.4th at p. 394, fn. 2, noted, "Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it." Uncharged acts may be relevant to prove intent because the frequency of such incidents negates an innocent state of mind:

> The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. (See *People v. Robbins, supra*, 45 Cal.3d 867, 880.) "[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . ." (2 *Wigmore, supra*, (Chadbourn rev. ed. 1979) § 302, p. 241.) In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant probably harbor[ed] the same intent in each instance. (*People v. Robbins, supra*, 45 Cal.3d 867, 879.)

(*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.)

Evidence of uncharged offenses is so prejudicial that its admission requires extremely careful analysis. (*Id.*, at p. 404.) Because substantial prejudicial effect is inherent in the admission of uncharged offenses, they are admissible only if they have substantial probative

value. (*Ibid.*) Furthermore, the admissibility of evidence under section 1101, subdivision (b), is subject to section 352. (*Ibid.*) The trial court erred by admitting evidence pertaining to Hartwell's death to prove Justin's intent to kill Noriega because: (1) the intent of the shooter was never in issue; and (2) Hartwell's death was a single, dissimilar event which failed to provide evidence of Justin's intent when he allegedly shot Noriega.

1. The Intent of the Shooter was Never in Issue.

The trial court erred by admitting evidence of Hartwell's death to prove the intent of the person who shot Noriega because the intent of the shooter was never at issue. The issue was whether Justin was the person who shot Noriega.[18]

A defendant's plea of not guilty puts all the elements of an offense in issue. (*People v. Scott* (2011) 52 Cal.4th 452, 471; *People v. Steele* (2002) 27 Cal.4th 1230, 1243.) Even when the defendant concedes the issue of intent, the prosecution is still entitled to present its case to prove a fact central to the issue of guilt. (*People v. Steele, supra*, 27 Cal.4th at p. 1243.) "[A] fact—like defendant's intent—generally becomes 'disputed' when it is raised by a plea of not guilty or a denial of an allegation." (*People v. Scott, supra*, 52 Cal.4th at p. 471.) However, the above rule is simply a general rule regarding the impact of a not guilty plea.

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[18] The trial court would also have committed error if it had admitted evidence of Hartwell's death to prove identity because of the clear lack of similarities between her death and Noriega's death. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403.) "[T]o prove identity through other uncharged acts, the similarities between the charged and uncharged offenses must be so unusual and distinctive as to be akin to a signature." (*People v. Lucas* (2014) 60 Cal.4th 153, 215.)

It is not a basis to admit evidence under section 1101, subdivision (b).

Evidence Code section 1101, subdivision (a), excludes specific instances of a person's character to prove his or her conduct on a specific occasion subject to certain exceptions not applicable to Justin's case. Hence, Justin's killing of Hartwell was a specific instance of conduct not admissible under section 1101, subdivision (a), unless subdivision (b) applied. Admitting uncharged acts or crimes solely because the defendant pled not guilty would have the practical effect of repealing section 1101, subdivisions (a) and (b). Hence, even when a defendant pleads not guilty, the trial court must find that an uncharged act or crime, offered to prove the defendant's intent, actually does so in light of the evidence pursuant to section 1101, subdivision (b). Furthermore, even when a specific instance of conduct is offered to prove intent, it is still inadmissible under section 1101, subdivision (b), unless it has sufficient similarity to the charged crime to prove the defendant's intent

Justin's defense was that he was not present when Noriega was shot and had nothing to with his death. (13RT 2946-2953 [defense counsel's closing argument].) Despite Justin's not guilty plea, intent was not in issue in light of the evidence and Justin's defense. Brown's testimony was the only evidence regarding the events which resulted in Noriega's death. According to her testimony, the shooter fired multiple shots at Noriega from close range. (6RT 1913, 1938.) Whoever shot Noriega obviously intended to kill him. The trial court did not give the jury self-defense instructions or voluntary manslaughter instructions. (13RT

2879-2904.)[19] There was simply no need to admit evidence pertaining to Hartwell's death to prove the shooter's state of mind because the intent of the shooter was clear. When an uncharged act or crime is offered to prove intent, "the act is conceded or assumed; what is sought is the state of mind that accompanied it." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn 2.) In the instant case, Justin did not concede that he shot Noriega.

Several lower appellate court cases demonstrate why evidence of Hartwell's murder was not admissible to prove Justin's intent. In *People v. Lopez* (2011) 198 Cal.App.4th 698, the defendant was convicted of first degree burglary. Someone entered the victim's house around 4:40 a.m. and stole two purses from the kitchen. A prior incident was admitted in which the defendant allegedly took the victim's purse from her boyfriend's vehicle. The defendant's defense was that he was not the person who entered the victim's residence during the morning and took the purses. The defendant argued on appeal that the prior theft of the purse from the vehicle was inadmissible because his intent regarding the taking of the victim's purses from her residence was a foregone conclusion if he was the person who

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[19] The trial court's rulings were contradictory. Justin argues below that the trial court erred by failing to give his requested instructions for self-defense, voluntary manslaughter based on sudden quarrel or heat of passion, and voluntary manslaughter based on imperfect self-defense. If the trial court properly refused to give these defense requested instructions, then its admission of Hartwell's death to prove Justin's intent necessarily was error. The trial court's refusal to give the defense requested instructions suggests that it concluded the intent of the shooter was not in issue because the shooter's only intent could have been to commit a killing that was not justified by self-defense or mitigated to voluntary manslaughter. If the shooter's intent was not in issue, there was no basis for the admission of evidence of Hartwell's death pursuant to section 1101, subdivision (b).

committed the crime. The Court noted that "the act in which appellant was alleged to have engaged–burglarizing Mendicino's house — was not conceded or assumed; the identity of the perpetrator in this crime was a highly contested issue." (*People v. Lopez, supra*, 198 Cal.App.4th at p. 714.) The Court concluded that the prior act was erroneously admitted into evidence:

> We find this to be a case with regard to the first degree burglary count where the evidence of uncharged offenses did not have substantial probative value that outweighed its inherent prejudice. Evidence regarding the Mendicino burglary showed that someone entered the kitchen of the Mendicino residence and took two purses. Assuming appellant committed the alleged conduct, his intent in so doing could not reasonably be disputed— there could be no innocent explanation for that act. Thus, the prejudicial effect of admitting evidence of a prior car burglary and prior car theft outweighed the probative value of the evidence to prove intent as to the Mendicino burglary charge.
>
> Simply put, evidence of uncharged acts cannot be used to prove something that other evidence showed was beyond dispute.

(*People v. Lopez, supra*, 198 Cal.App.4th at p. 715.)

In *Bowen v. Ryan* (2008) 163 Cal.App.4th 916, an eight year old child sued his dentist alleging that the dentist choked him during a dental procedure. The defendant denied choking the plaintiff. The trial court admitted nine other incidents in which the defendant allegedly used excessive force against child patients. The Court of Appeal noted that, "[h]ad defendant conceded doing these acts but sought to defend them as occurring by accident or otherwise,

evidence of uncharged acts may have been admissible to establish intent." *(Bowen v. Ryan, supra*, 163 Cal.App.4th at p. 926.) The prior acts were not admissible because "defendant denied choking or shoving plaintiff. Because the act was not conceded or assumed, defendant's intent was not in issue. Evidence of uncharged acts could not be admitted to prove an irrelevant matter." (*Ibid; see also People v. King* (2010) 184 Cal.App.4th 1281, 1303 [finding inadmissible a police officer's prior act of sexual molestation].)

Similar reasoning applies to the instant case. Brown's description of how Noriega was shot left no doubt regarding the intent of the shooter. Evidence of Hartwell's death was offered to prove an irrelevant matter.

2. Hartwell's Death was a Single, Dissimilar Event Unrelated to Noriega's Death.

Putting aside the fact that the intent of the person who shot Noriega was never in issue, evidence pertaining to Hartwell's death was still inadmissible because it failed to prove Justin's intent to kill Noriega. It is the recurrence of similar events which creates an inference of intent. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.)

A single incident which occurred almost three years after Noriega's death was not a sufficient pattern of activity to infer that Justin must have intended to kill Noriega. Noriega was shot to death in Riverside County during September 1992. Hartwell was killed in Austin, Texas during June 1995. There was evidence Justin killed Hartwell because he believed she was going to report his narcotics trafficking to the police. (7RT 2092-2093.) The prosecutor argued Justin killed Noriega to prevent him from reporting Justin's illegal activities to the

police (13RT 2905), but there was no evidence Justin shot Noriega for that reason. The prosecution alleged, and the jury found true, that Justin robbed Noriega during the murder. There was no evidence Justin's motive for killing Hartwell was robbery. The manner of death was different. Noriega was shot. (6RT 1913, 1938.) Hartwell was stabbed. (11RT 2626.) Hartwell's death involved a love triangle with her, Reeder, and Justin. This factor was absent for Noriega's death.

Even if Justin killed Noriega to prevent him from reporting his conduct to the police, evidence of Hartwell's murder did not prove Justin's intent when he killed Noriega. Justin's killing of Hartwell could not have influenced his intent to kill Noriega because Noriega's death occurred before Hartwell's death. If the prosecution theory was that Justin killed Hartwell and Noriega to prevent them from reporting his illegal conduct to law enforcement, then the prosecution should have argued Hartwell's death was relevant to show a common design or plan. Conduct occurring after a charged crime may be admissible when offered to prove a common design or plan. (*People v. Balcolm* (1994) 7 Cal.4th 414, 425.) However, evidence of Hartwell's murder was not admitted to prove a common design or plan, but was offered to prove intent. (2RT 1022-1023.) The incidents occurred almost three years apart. Hartwell's death was not part of a pattern of repeated conduct which established that Justin was in the habit and custom of killing anyone whom he thought may report him to the police. More incidents were required to make this inference. Hence, the trial court erred by admitting evidence of Hartwell's death.

3. The Lengthy and Prejudicial Nature of the Evidence Regarding Hartwell's Death Required its Exclusion from Evidence.

Even if evidence of Hartwell's death was marginally relevant to prove the shooter's intent, the evidence should have been excluded because it required lengthy and prejudicial testimony. Alternatively, the trial court erred by admitting excessive and marginally relevant evidence concerning her death. The guilt phase of the trial was more about Hartwell's death than Noriega's death.

The following prosecution witnesses gave testimony relevant to Noriega's death: Jones, (6RT 1775), Gates, (6RT 1781), Thompson, (6RT 1794), Goodwin, (6RT 1829), Baer, (6RT 1846), Kelley, (6RT 1865), Eva and Jennifer Barajas, (6RT 1883, 1888), Brown, (6RT 1905), Anchondo, (7RT 2000), Ditraglia, (8RT 2291), Garcia, (9RT 2325), Silva, (9RT 2341), and Sham. (12RT 2714.) The following prosecution witnesses gave testimony relevant to Hartwell's death: Reeder, (7RT 2067), Sams, (9RT 2363), Leal, (10RT 2402), Barnes, (10RT 2463, Duval, (10RT 2527), Barton, (10RT 2546), Gilchrest, (11RT 2569), Nelson, (11RT 2581), Wardlow, (11RT 2589), Bayardo, (11RT 3618), Molino, (11RT 2646), and Mihills. (12RT 2742.) Fourteen witnesses, excluding Reeder,[20] testified about Noriega's death. Twelve witnesses testified about Hartwell's death.

Reeder's testimony about Hartwell's death was especially lengthy and inflammatory. Reeder's testimony was a total of 242 pages. (7RT 2,015-2,040, 2,067-2,284; 8RT 2,162-2,284.) The guilt phase testimony of the prosecution witnesses was a total of 996 pages. (6RT 1,760- 12RT 2,756.) Reeder's testimony about Hartwell's death was almost 25 percent of the

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[20] Reeder briefly testified about appellant's admissions to killing someone in California which were relevant to Noriega's death.(7RT 2022.) However, the vast majority of Reeder's testimony was about Hartwell's death.

trial testimony offered by the prosecution during the guilt phase. Evidence Code section 352 is designed precisely to exclude such lengthy and prejudicial evidence about a marginally relevant, but tragic, issue.

The inflammatory facts concerning Hartwell's death required exclusion of evidence regarding her death or at least exclusion of the inflammatory evidence. The jury learned that Hartwell was killed with a knife. (11RT 2626.) That was obviously a brutal way to be killed. Several photographs were admitted into evidence regarding Hartwell's death which were inflammatory and should have been excluded. (See Issue XII [raising the issue of the admission of prejudicial photographs].) Exhibit 43, a photograph of Hartwell's charred skeleton, was especially gruesome. Exhibit 32 was a photograph of Hartwell while she was alive. The emotional impact on the jury of the contrast between the skeleton shown in Exhibit 43, and the smiling person shown in Exhibit 32, was substantial. The jury heard testimony from the coroner who performed the autopsy on Hartwell's body. (11RT 2618-2645.) He testified about the flesh missing from Hartwell's face, the shrunken eyes, and the left side of her trunk being completely burned. (11RT 2623-2624.) The jury also viewed several inflammatory photographs of Hartwell's interior body and organs. (Exhibits 44, 45, 46, 47, and 48.)

As explained above, Hartwell's death had little, if any, relevance to prove that Justin was the person who shot Noriega. The prosecution improperly bolstered a weak case with an inflammatory and irrelevant murder. The trial court erred by admitting evidence of Hartwell's death. Alternatively, it erred by admitting the gruesome details concerning

Hartwell's death.

F. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF JUSTIN'S ALLEGED PLAN TO KILL MICHAEL AGUON AND CHRISTINE

The trial court also erred by admitting the testimony of Maximillian Garcia that Justin intended to kill Michael Aguon and Christine.[21] The evidence was not admissible for the same reason that evidence Justin killed Hartwell was not admissible. The intent of the shooter was not in dispute. Because the intent of the shooter was not in dispute, evidence that Justin allegedly planned to kill Michael Aguon and Christine was not relevant. It should have been excluded under Evidence Code sections 350 and 1101, subdivision (b). The evidence should also have been excluded under section 352. The evidence simply portrayed Justin as an evil and out of control person. There was no relationship between the incidents. There was no testimony about when the incident occurred. Garcia's testimony simply invited speculation by the jury that Justin must have killed Noriega because he at one time planned to kill someone else. Garcia's testimony should have been excluded.

G. THE ADMISSION OF EVIDENCE PERTAINING TO HARTWELL'S DEATH, AND JUSTIN'S ALLEGED PLAN TO KILL MICHAEL AGUON AND CHRISTINE, VIOLATED JUSTIN'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS.

The admission of evidence offends due process when it renders the defendant's trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 481, 116 L.Ed.2d 385].) A defendant also has the right to due process of law under Article I, section 15 of the California Constitution. "Only if there are no permissible inferences the jury may

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[21] Maximillian Garcia knew Justin from high school. Garcia was allegedly present when Justin developed his plan to kill Aguon and Christine. (9RT 2325-2327.)

draw from the evidence can its admission violate due process. Even then, the evidence must be of such quality as necessarily prevents a fair trial. Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose." (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918 920.) "The dispositive issue is ... whether the trial court committed an error which rendered the trial so arbitrary and fundamentally unfair that it violated federal due process." *(Reiger v. Christensen* (9th Cir. 1986) 789 F.2d 1425, 1430.)

The admission of evidence pertaining to Hartwell's death, and Justin's alleged plan to kill Michael Aguon and Christine, denied Justin a fundamentally fair trial. There was no permissible inference to be made from the admission of the evidence because the evidence was offered to prove intent and the intent of the shooter was not in dispute. The trial was more about whether Justin killed Hartwell rather than whether he killed Noriega. The evidence of how Hartwell was killed was far more inflammatory than the evidence about how Noriega was killed.

Strong prosecution evidence pertaining to one count can bolster weak prosecution evidence for another count. This is one of the factors supporting severance of counts. (*People v. Arias* (1996) 13 Cal.4th 92, 127.) The issue raised herein addresses the exclusion of evidence and not severance. Nevertheless, the same principle applies. The prosecution unfairly used a strong case for which the evidence was inflammatory to bolster a weak case. The prosecution then added to the prejudice from the admission of evidence pertaining to Hartwell's death by admitting evidence of Justin's alleged plan to kill Michael Aguon and

Christine.

The admission of evidence of Hartwell's death, and Justin's alleged plan to kill Michael Aguon and Christine, also violated Justin's right to an accurate jury determination of the facts under the Sixth and Fourteenth Amendments and Article I, section 16, of the California Constitution. (*Ring v. Arizona* (2002) 536 U.S. 584, 536 [122 S.Ct. 2428, 153 L.Ed.2d 556] [the Sixth Amendment required the jury to find the aggravating facts necessary to impose the death penalty]; *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444] [the right to have a jury requires the trier of fact to determine the truth of every accusation].) It also violated the prohibition against the imposition of cruel and unusual punishment in the Eight and Fourteenth Amendments, and Article I, section 17, of the California Constitution. Those provisions require heightened reliability during the fact finding process of a capital trial. (*Beck v. Alabama* (1980) 447 U.S. 625, 632 [100 S.Ct. 2382, 65 L.Ed.2d 392]; *People v. Ayala* (2000) 23 Cal.4th 225, 262-263.) The jury could not have accurately determined whether Justin shot Noriega when its assessment of the evidence was skewed by the irrelevant and inflammatory evidence concerning Hartwell's death and the speculative inference that Justin must have killed Noriega because he planned to kill Michael Aguon and Christine.

H. PREJUDICE

Because the admission of evidence pertaining to Hartwell's death violated Justin's federal constitutional rights, the judgment of guilt must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17

L.Ed.2d 705, 87 S.Ct. 824].) The judgment of guilt must also be reversed under the standard for state law error. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.) This standard requires appellant to show "merely a reasonable chance, more than an abstract possibility," (*People v. Wilkins* (2013) 56 Cal.4th 333, 351), that the admission of evidence of Hartwell's death was prejudicial.

a. Brown was not a Credible Witness.

Brown was the only eyewitness who testified that Justin shot Noriega. Absent Brown's testimony, the prosecution evidence was insufficient as a matter of law to connect Justin to Noriega's death. Brown was precisely the type of witness to be distrusted for the following reasons:

i. Brown was a Convicted Felon who had a Motive to Falsely Accuse Justin and was Willing to Make Any Accusation That was Convenient for Her.

The parties stipulated that during 2004, Brown had been shot to death by a police officer when she was involved in a high speed pursuit which ended in a crash. She reached for her waistband and was shot three times. (13RT 2865.) She had the following convictions: (1) a 1993 conviction for possession of methamphetamine for sale; (2) a 1994 conviction for vehicle theft; (3) a 1997 conviction for possession of methamphetamine for sale; (4) a 1997 conviction for making harassing telephone calls and dissuading a witness; (5) a 2001 conviction for possession of methamphetamine; and (6) a 2003 conviction for possession of methamphetamine. (13RT 2866.) Brown had three criminal prosecutions pending, and was high on drugs, when she was arrested on June 4, 1994, and made a statement to Detective Wilson accusing Justin of killing Noriega. (6RT 1906, 1918-1919, 1921, 1926, 1928.)

In *People v. Louis* (1986) 42 Cal.3d 969, this Court found prejudice from the admission of testimony given by a witness at the defendant's first trial. The name of the witness was Tolbert. Tolbert, like Brown, was a critical witness because he was the only witness who connected the defendant to the crime. The Court noted his lengthy criminal history and hope for reward in exchange for testifying. Hence, the Court observed, "Tolbert, in short, was precisely the type of witness that a jury needs to scrutinize in person in order to intelligently evaluate his credibility and the truth or falsity of his testimony." (*People v. Louis, supra*, 42 Cal.3d at p. 989.) This Court's observation about the obvious lack of credibility of witnesses like Tolbert applies with equal force to Brown. The jury could not have viewed Brown as a credible witness. Brown's lack of credibility, and the fact that she was the only eyewitness connecting Justin to Noriega's death, should be given significant weight by this Court in assessing prejudice from the admission of evidence of Hartwell's death. The strength of the prosecution case was inextricably linked to Brown's credibility. She had none. It was only the prejudice from the admission of evidence that Justin killed Hartwell that convinced the jury he also killed Noriega.

Brown admitted during her testimony that she lied about details to Detective Wilson when she was arrested and accused Justin. (6RT 1919, 1928-1929.) Brown testified that when she was interviewed, and accused Justin, she would have said anything to get released. She told the police what she thought they wanted to hear. (6RT 1931.) Brown testified, "I lied to Detective Wilson to beef up the story enough for me to get out of jail. Okay. In reality the story that I gave you yesterday is the honest truth of it all. So you pick which one you

want to hear and which one you want to believe." (RT 1929.) When Brown accused Justin of killing Noriega, she was hoping the authorities would be lenient with her if she told them what she thought they wanted to hear. (6RT 1931.) Brown's cavalier attitude about telling the truth could not be more evident.

ii. Brown was Wrong About a Major Detail Regarding the Crime.

Brown was certain that Justin shot Noriega with a Glock firearm. (6RT 1923, 1951.) Brown told Detective Silva that she was present when Justin purchased the firearm. (13RT 2873.) Paul Sham, the prosecution ballistics expert, testified that it was not possible that the bullets found in Noriega's body were fired from a Glock .9 millimeter firearm. (12RT 2731.)

b. The Remaining Evidence Connecting Justin to Noriega's Death was not Strong

The prosecution evidence was notoriously weak. Brown was not a credible witness for the reasons above. There was no physical evidence connecting Justin to Noriega's death—a strong indicator of a weak prosecution case. (*In re Jones* (1996) 13 Cal.4th 552, 585 [a case must be considered close when there are no eyewitnesses or physical evidence connecting the defendant to the crime].) Reeder testified Justin said he had killed someone in California named Rafa and hid the body in a cave. (7RT 2022; 8RT 2254.) Noriega's body was not found in a cave. (6RT 1777-1780; Exhibit 10.)

Reeder had other credibility problems. She was arrested for Hartwell's murder and was at least an accessory after the fact to murder based on her own trial testimony. When Reeder was arrested, she had a strong motive to implicate Justin in as much criminal conduct as possible to enhance her own position with the authorities.

John Sams testified that Justin said he killed someone in California. (9RT 2368-2369.) Sams believed Justin was trying to impress people and bragging. Sams did not believe Justin and thought he was "full of bullshit." (9RT 2384.) Reeder likely heard the same "bullshit" that Sams heard from Justin and communicated it as fact to the police after she was implicated in Hartwell's murder.

Reeder was committed to perpetually falsely implicating appellant in Noriega's murder once she had first accused him. The easiest path for Reeder to avoid potential criminal problems such as a perjury prosecution, or being held in contempt if she refused to testify, was to continue to falsely implicate Justin in Noriega's death.

The admission of evidence of Hartwell's death was devastating. The prejudice from the jury learning that a defendant previously engaged in criminal conduct is substantial. "Even if evidence of other crimes is relevant under a theory of admissibility that does not rely on proving disposition, it can be highly prejudicial. Regardless of its probative value, evidence of other crimes always involves the risk of serious prejudice" (*People v. Thompson* (1980) 27 Cal.3d 303, 318.) Other crimes evidence has a "highly inflammatory and prejudicial effect" on the jury. (*In re Jones, supra*, 13 Cal.4th at p. 585.) The prejudice from the admission of prior criminal conduct increases exponentially when the prior crime was a murder committed by stabbing. The jury was besieged by witness after witness testifying about Hartwell's death, gruesome photographs of her corpse and the way she died, and the sordid details of the relationship between Reeder and Hartwell.

The admission of evidence of Hartwell's death was not harmless beyond a reasonable

doubt. The test under *Chapman* is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [111 S.Ct. 1884, 114 L.Ed.2d 432].) "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt, supra*, 500 U.S. at p. 403.) There is simply no way this Court can conclude that the admission of evidence of Hartwell's death did not contribute to the jury finding Justin guilty of killing Noriega. Reversal is also required under *People v. Watson*. There was clearly more than a chance, a reasonable probability, that the jury found Justin guilty because they were improperly influenced by the admission of evidence of Hartwell's death.

For the reasons above, the judgment of guilt must be reversed.

II

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED BROWN'S TESTIMONY FROM THE TEXAS TRIAL INTO EVIDENCE OVER DEFENSE OBJECTION IN VIOLATION OF THE FEDERAL AND STATE DUE PROCESS CLAUSES, EVIDENCE CODE SECTION 1291, AND THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION

A. SUMMARY OF ARGUMENT

Brown was deceased when Justin's trial occurred because she had been killed by a police officer when she resisted arrest. Brown testified during the penalty phase of the Texas trial.[22] Over defense objection, the trial court admitted Brown's testimony from the Texas trial into evidence because it concluded that Brown was unavailable and Justin had the same motive to cross-examine her during the Texas trial as he did during the current prosecution. (2RT 1032; 3RT 1258.) The trial court erred by admitting Brown's testimony over defense objection. The prosecution failed to carry its burden of proving that Justin had the same incentive to cross-examine Brown during the penalty phase of the Texas trial as he did during the guilt phase of the current prosecution. The admission of Brown's testimony was prejudicial because her testimony was the only direct evidence connecting Justin to Noriega's death. Hence, the judgment of guilt must be reversed.

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[22] Justin's Texas prosecution case was not a death penalty case. In Texas, the jury decides the penalty to be imposed within the prescribed statutory range.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

The trial court and the attorneys discussed the admissibility of Brown's testimony during pretrial proceedings. (2RT 1023.)[23] Defense counsel objected to the admission of the testimony under Evidence Code section 1291, due process, equal protection, and the prohibition against imposition of cruel and unusual punishment. (2RT 1025-1026.) The defense counsel argued that Justin's motive to cross-examine Brown during the penalty phase of the Texas trial was not the same as his motive to cross-examine her during the guilt phase of the instant case. He argued the motive was not the same because punishment was the only issue during the penalty phase of the Texas trial. (2RT 1025-1026.)

The prosecutor argued that Justin's motive to cross-examine Brown was the same because her trial testimony impacted the length of his sentence from the Texas court, which could have ranged from probation to life in prison. (2RT 1026-1027.)[24] The prosecutor argued Justin's motive when he cross-examined Brown during the Texas trial was to demonstrate that she was lying about whether Justin killed Noriega. (2RT 1027.) The

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[23] The trial court first addressed the admissibility of Brown's testimony from the Texas trial when Justin was in pro-per. (2 Aug. RT 249-253.) Once Justin was represented by counsel, the trial court readdressed the issue. (2RT 1023-1030.)

[24] The attorneys made conflicting statements about whether Justin was eligible for the death penalty during the Texas prosecution. The prosecutor stated that the sentence range was from probation to life in prison. (2RT 1026-1027.) The defense attorney made a comment suggesting death was a possible sentence during the Texas prosecution. (2RT 1025.) During the penalty phase of the Texas trial, the jury was instructed, "The punishment authorized for this offense is by confinement in the Institutional Division of the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than five years." (12CT 2957.) Hence, the death penalty was not an authorized punishment during Justin's Texas prosecution.

prosecutor also argued that Justin's motive to cross-examine Brown merely had to be similar in each case and not identical. (2RT 1027.) He asserted the Texas attorneys had questioned Brown extensively. (2RT 1028-1030.) The trial court stated that it would allow Brown's testimony from the Texas trial to be read to the jury subject to a prove-up hearing. (2RT 1032.)

The trial court later conducted an Evidence Code section 402 hearing to determine whether Brown's testimony from the Texas trial could be read to the jury. (3RT 1244-1245.) Exhibit 114 was a certified document from the California Department of Motor Vehicles for Dorothy Lee Lugo. She was the same person as Dorothy Brown. (3RT 1246-1247, 1253, 1256.) Exhibits 106-1 through 106-11 were certified copies of testimony from the Texas trial. (3RT 1256; 6CT 1582–12CT 2985.) Exhibit 117 was the death certificate for Brown. (3RT 1256.) Defense counsel renewed his objection under Evidence Code section 1291. (3RT 1257.) The trial court ruled that an adequate foundation had been established for the admission of Brown's testimony from the Texas trial. It overruled the defense objection. (3RT 1258.) The transcript of Brown's testimony was read to Justin's jury during the prosecution case-in-chief. It stated that Justin shot Noriega. (6RT 1913, 1938.) There was no other direct evidence connecting Justin to Noriega's death.

C. STANDARD OF REVIEW

The trial court's rulings regarding the admissibility of evidence is normally reviewed under the abuse of discretion standard. (*People v. Thomson* (2010) 49 Cal.4th 79, 128.) However, in the instant case, the issue is whether Justin's motive to cross-examine Brown

during the Texas trial was the same as his motive to cross-examine her during the guilt phase of the instant case. The Court is applying the law to undisputed facts.[25] The standard of review should be de novo. (*Martinez v. Brown Constr. Co.* (2013) 56 Cal.4th 1014, 1018 [the application of law to undisputed facts is a question of law which is reviewed de novo].)

D. THE TRIAL COURT ERRED BY ADMITTING BROWN'S TESTIMONY FROM THE TEXAS TRIAL INTO EVIDENCE.

Evidence Code section 1291 is an exception to the hearsay rule. It permits the introduction of certain former testimony when the witness is "unavailable." Section 1291 provides:

> (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:
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> ...
>
> (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

(Evid. Code § 1291, subd. (a)(2).) Section 240 defines unavailability and includes the situation where the declarant is "absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) The motive for the

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[25] As previously stated, the prosecutor and the defense attorney made conflicting statements about whether death was a possible penalty during the Texas prosecution. (2RT 1025-1027.) The Texas jury was instructed that life in prison was the maximum possible sentence. (12CT 2957.) Hence, it was undisputed that the maximum sentence for the Texas prosecution was life in prison and not the death penalty.

defendant to cross-examine the witness at each of the hearings does not need to be identical, but must be similar. (*People v. Samayoa* (1997) 15 Cal.4th 795, 850.) Factors to be considered are matters such as the similarity of the party's position in the two cases, the purpose sought to be accomplished in the cross-examination, and whether under the circumstances a thorough cross-examination of the declarant by the party would have been reasonably expected in the former proceeding. (*People v. Ogen* (1985) 168 Cal.App.3d 611, 617.) The proponent of the evidence has the burden of showing the opposing party's motive to cross-examine the witnesses at both hearings was similar. (*People v. Livaditis* (1992) 2 Cal.4th 759, 778-779 [the proponent of hearsay evidence has the burden of showing the exception applies and laying the foundation].)

The prosecution failed to carry its burden of showing that Justin's motive to cross-examine Brown during the penalty phase of the Texas trial was sufficiently similar to his motive to cross-examine her during the guilt phase of this case to warrant admission of her testimony under section 1291, subdivision (a)(2). The prosecutor represented that Brown's testimony impacted the sentence that would be imposed by the Texas court, but he failed to present any evidence to corroborate that claim.[26] The prosecutor did not request the trial court

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[26] When the prosecutor argued that he should be allowed to read to the jury the transcript of Brown's testimony, he failed to make any reference to the instruction given to the jury during the penalty phase of the Texas trial that the penalty range was from probation to life in prison. (2RT 1026-1030; 3RT 1244-1258.) Because there was no evidence suggesting the trial court was aware of this instruction to the Texas jury, the instruction could not have influenced the trial court's assessment under section 1291 whether Justin's motive to cross-examine Brown during the Texas trial was the same as his motive to cross-examine her during the California trial.

to take judicial notice of the Texas sentencing statutes.

Furthermore, when Brown testified during the Texas trial, Justin had already been found guilty of Hartwell's murder. Hartwell was stabbed. It was highly like Justin was going to receive a substantial sentence. Despite the fact that Brown testified about another murder, her impact on Justin's sentence from the Texas court was likely to be minimal. Conversely, during the instant case, Brown was the prosecution's star witness who tied Justin to Noriega's death.

Motive to cross-examine within the meaning of section subdivision (a)(2), has two aspects: (1) whether the defendant's motive to cross-examine the witness was similar as a matter of trial strategy; and (2) whether the defendant's actual motive to cross-examine the witness was similar. Justin's actual motivation to cross-examine Brown during the penalty phase of the Texas trial was not nearly as strong as his motive to cross-examine her during the guilt phase of this case.

Justin did not occupy similar positions during the penalty phase of the Texas trial and the guilt phase of the California trial. It was unlikely the Texas attorneys wanted to inflame the Texas jury any further by engaging in lengthy cross-examination of Brown when her testimony was being offered only as penalty evidence following a finding of guilt to murder. The cost benefit analysis for Justin during the Texas trial weighed heavily in favor of an abbreviated cross-examination of Brown to avoid inflaming the jury. The cost benefit analysis would have been significantly different if Brown's testimony from the Texas case could have resulted in a murder conviction.

The brevity of the cross-examination of Brown during the Texas trial demonstrates that Justin's motive to cross-examine her during that hearing was significantly different than the California prosecution. Brown first testified out of the presence of the jury in the Texas case. Her cross-examination went from page 1,927 to page 1,930, and from the past line on page 1,931 to page 1932 of the reporter's transcript.[27] When Brown testified before the Texas jury, the cross-examination commenced on page 1,947, and went to page 1,955. Re-cross-examination went from page 1,956 to page 1,959,following brief questioning by the prosecutor, and additional re-cross-examination occurred from page 1,959 to page 1,961. Justin's California jury thus heard a total of 18 pages of cross-examination of Brown. This may have been appropriate during the penalty phase of the Texas trial, but was a meager amount of cross-examination in a case in which the defendant's life was at stake. Reeder's cross-examination by Justin's attorneys during the guilt phase of this trial lasted 122 pages. (8RT 2,162-2,284.) It was clear that the Texas attorneys did not have the same motive to cross-examine Brown that they would have had if she had been giving testimony that could have resulted in a conviction.

This Court has upheld the admission of prior testimony under section 1291 in several cases. (*People v. Samayoa* (1997) 15 Cal.4th 795, 850 [upholding the admission, during the penalty phase of a capital trial, of the preliminary hearing testimony of a witness because the

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[27] The page citations are to the current record on appeal. The court reporter transcribed Brown's testimony as it was read into the record.

defendant's motive to cross-examine the witness during both hearings was to discredit the witness]; *People v. Zapien* (1993) 4 Cal.4th 929, 974-975 [upholding the admission of the testimony of a witness from the preliminary hearing when the defendant's motive was to discredit that witness's testimony at the preliminary hearing and the trial]; *People v. Wharton* 53 Cal.3d 522, 589 [upholding the admission of the preliminary hearing testimony of an alleged rape victim from an unrelated criminal case at the penalty phase of the trial because the defendant's motive to cross-examine the victim was to discredit her testimony].) All of the above cases upheld the admission of preliminary hearing testimony. The defendant obviously has a strong motive to cross-examine, and discredit, a prosecution witness at a preliminary hearing in order to not be bound over for trial in the Superior Court. Justin, conversely, did not have the same motive to cross-examine Brown. Brown's testimony at the Texas trial had no impact on any potential charges against Justin and likely had little practical impact on his sentence from the Texas court.

E. THE ADMISSION OF BROWN'S TESTIMONY DENIED JUSTIN'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND AN ACCURATE JURY DETERMINATION OF THE FACTS.

The admission of Brown's testimony deprived Justin of his right to due process under the Fourteenth Amendment, and Article I, section 15 of the California Constitution, because it made his trial fundamentally unfair. (*Estelle v. McGuire* , supra, 502 U.S. at p. 70.) The prosecution case was unfairly bolstered by reading Brown's penalty phase testimony from the Texas trial into evidence during the instant case instead of having her appear before the

jury. The jury heard about Brown's criminal history and drug abuse, but it was unlikely the jury truly understood Brown's lack of credibility without observing her. The prosecution in this case received the same windfall as the prosecution in *People v. Louis* from its star witness not appearing before the jury. Brown, "in short, was precisely the type of witness that a jury needs to scrutinize in person in order to intelligently evaluate . . . [her] credibility and the truth or falsity of . . . [her] testimony." (*People v. Louis, supra*, 42 Cal.3d at p. 989.)

The admission of Brown's testimony also violated: (1) Justin's right to an accurate jury determination of the facts under the Sixth and Fourteenth Amendments and Article I, section 16, of the California Constitution, (*United States v. Gaudin*, (1995) 515 U.S. at p. 510); and (2) the prohibition against the imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments, and Article I, section 17, of the California Constitution. (*Beck v. Alabama*, (1980) 447 U.S. at p. 632 [the Eighth and Fourteenth Amendments require heightened reliability during the fact finding process of a capital case]; *People v. Ayala, supra*, 23 Cal.4th at pp. 262-263.) The jury could not have accurately determined whether Justin killed Noriega when it was unable to scrutinize Brown's demeanor. This was especially unfair to Justin because she was the single most important prosecution witness.

For the reasons above, the admission of Brown's testimony violated Justin's federal and state constitutional rights.

F. THE ADMISSION OF BROWN'S TESTIMONY VIOLATED JUSTIN'S RIGHT OF CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

The admission of Brown's testimony from the Texas trial also violated Justin's right of confrontation under the Sixth and Fourteenth Amendments. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Amendment contemplates that a witness who makes testimonial statements admitted against a defendant will ordinarily be present at trial for cross-examination, and that if the witness is unavailable, his prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him. *(Crawford v. Washington* (2003) 541 U.S. 36, 68 [124 S. Ct. 1354, 158 L. Ed. 2d 177].) The confrontation clause envisions "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (*Ohio v. Roberts* (1980) 448 U.S. 56, 64 [100 S.Ct. 2531, 65 L.Ed.2d 597] overruled on the grounds in *Crawford v. Washington, supra*, 541 U.S. at pp. 60-65.)

Justin cross-examined Brown during the penalty phase of the Texas trial. Justin's right of confrontation was violated despite this opportunity for cross-examination. The United States Supreme Court, and this Court, have held that a defendant's right of confrontation was

not violated when the previous testimony of a witness was admitted into evidence as long as the defendant had the opportunity to cross-examine the witness at that hearing. *(California v. Green* (1970) 399 U.S. 149, 165-166 [90 S.Ct. 1930, 26 L.Ed.2d 248]; *Mattox v. United States* (1895) 156 U.S. 237, 243-244 [15 S.Ct. 337, 39 L.Ed. 409] [finding no confrontation clause violation when the witness testified at the defendant's first trial, died, and his testimony was read into the record during the second trial]; *People v. Samayoa, supra*, 15 Cal.4th at p. 850].) *Crawford v. Washington* continued to recognize this exception when it stated the, "Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford v. Washington, supra*, 541 U.S. at pp. 53-54.)

Cross-examination of Brown when she testified during the penalty phase of the Texas trial was not an adequate substitute for her live testimony during the instant case because: (1) Brown was the most important prosecution witness because her testimony was the only evidence directly connecting Justin to Noriega's death; (2) Brown's disreputable character, criminal record, drug addiction, and motive to falsely implicate Justin in order to obtain leniency for her own criminal prosecutions, made it especially important for the jury to be able to personally see and hear Brown's live testimony; and (3) Justin had significantly less motive to aggressively cross-examine Brown at the Texas trial than she did during the trial of the instant case.

In *Pointer v. Texas* (1965) 380 U.S. 400 [85 S.Ct. 1065, 13 L.Ed.2d 923], the

defendant was convicted of robbery. The defendant was not represented by counsel during the preliminary hearing. A witness testified at the preliminary hearing, but was not available to testify at the trial. The transcript of the witness' preliminary hearing testimony was admitted into evidence over the defendant's objection. The Court stated, "because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips, its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment." (*Pointer v. Texas, supra*, 380 U.S. at p. 407.) Justin's case is distinguishable because he was represented by counsel during the penalty phase of the Texas trial. However, because Justin had significantly less motive to cross-examine Brown at the Texas trial than he did during the trial of the instant case, Justin was denied his right of confrontation in a similar manner to not having counsel at all during the Texas trial. The prejudice to Justin from the jury not seeing and hearing Brown testify was significant. Her credibility was significantly enhanced by a dry reading of her testimony by an articulate witness rather than the criminal dope fiend Brown had become. "Cross examination and the opportunity to observed the demeanor of the witness—are not lightly to be disposed of in the criminal, fact-finding process." (*People v. Winson* (1981) 29 Cal.3d 711, 717.)

For the reasons above, the reading into the record of Brown's testimony from the penalty phase of the Texas trial violated Justin's right of confrontation.

G. PREJUDICE

Because the admission of Brown's testimony violated Justin's federal constitutional rights, the judgment of guilt must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The judgment must also be reversed under the state law standard for prejudice. (*People v. Watson, supra,* 46 Cal.2d at pp. 836-837.) For purpose of brevity, Justin incorporates the prejudice discussion from Argument I in this portion of the Brief. The admission of Brown's testimony was clearly prejudicial. Her testimony was the only evidence directly connecting Justin to Noriega's death. Without Brown's testimony, the prosecution evidence was insufficient to connect Justin to Noriega's death. There was no physical evidence connecting Justin to Noriega's death and none of the other witnesses were able to place appellant near the location of Noriega's death. The judgment of guilt must be reversed.

III

THE TRUE FINDING TO THE PRIOR MURDER SPECIAL CIRCUMSTANCE ALLEGATION SHOULD BE REVERSED BECAUSE THE TEXAS MURDER CONVICTION DID NOT MEET THE REQUIREMENT OF PENAL CODE SECTION 190.2, SUBDIVISION (A)(2), TO BE CONSIDERED A PRIOR MURDER CONVICTION, THE TRIAL COURT ERRONEOUSLY OVERRULED DEFENSE OBJECTIONS TO EXHIBITS, AND HENCE THE TRUE FINDING TO THAT ALLEGATION VIOLATED THE FEDERAL AND STATE DUE PROCESS CLAUSE, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION

A. SUMMARY OF ARGUMENT

The Texas murder conviction was alleged as a special circumstance to make Justin eligible for the death penalty. (1CTP 81-82.) The trial court held a hearing and concluded that the Texas conviction contained all the elements of murder as defined under California law. (12RT 2770.) A jury trial was then held for the allegation. The jury concluded that Justin was the individual who had been convicted of the crime. (14RT 3087.)

The trial court erred by: (1) admitting documents from the Texas case over defense objection; and (2) concluding that the Texas conviction contained all the elements of murder as defined under California law. Texas Penal Code section 19.02, subdivision (b)(2), provides that a person commits murder if he "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual . . .." Under California law, express malice requires "a deliberate intention unlawfully to take away

the life of a fellow creature." (Pen. Code, §188.) Implied malice requires the defendant to act with conscious disregard of the danger to human life. (*People v. Knoller* (2007) 41 Cal.4th 139, 156.) Section 19.02, subdivision (b)(2), falls short of establishing express or implied malice under California law. Hence, the true finding to the murder special circumstance allegation must be reversed. The reversal of the true finding to the Texas murder conviction requires reversal of the judgment of death.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

1. The Prosecution Pretrial Motion

The prosecution filed a pretrial motion asserting the Texas conviction contained all the elements of the crime of murder as defined under California law. (1CT 2-13.)[28] Several exhibits were attached to the motion. Exhibit one was the Texas appellate court opinion affirming the murder conviction. (1CT 15-18.) Exhibit two was the grand jury indictment. (1CT 20.) Exhibit three was the charge to the jury which defined the crime of murder. (1CT 22-29.) Exhibit four was the jury's guilty verdict. (1CT 31-32.) The appendix to the motion contained the Texas murder statute (1 CT 34), several Texas appellate court opinions discussing the crime of murder (1 CT 36-61, 72-126), and a copy of Texas Penal Code section 6.03, which defined different mental states associated with the commission of crimes (1CT 63), and Texas Penal Code section 1.07, which defined a number of terms. (1CT 65-70.)

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[28] Justin did not file points and authorities addressing whether the Texas murder conviction met the definition of murder under California law.

2. The Trial Court's Ruling Regarding the Texas Murder Special Circumstance Allegation.

The trial court held a hearing regarding the special circumstance allegation of a prior murder conviction. (12RT 2767-2770.)[29] The trial court had reviewed the prosecution motion. (12RT 2767.) The prosecutor asked the trial court to consider Exhibits 107 through 112 which had been previously admitted. It offered into evidence Exhibit 113, which was a certified copy of the judgment and prison records. (12RT 2767.) The prosecutor also offered Exhibits 106-1 through 106-11 into evidence. Those were the transcripts from the Texas trial. (12RT 2767-2768.) The prosecutor also asked the trial court to take judicial notice of the guilt phase testimony of Rocky Wardlow, for the purpose of establishing Justin's identity as the person who had been convicted of the offense and the Texas appellate court opinion. (12RT 2768.)

Defense counsel objected to the admission of the exhibits based on due process, the right of confrontation, and the prohibition against cruel and unusual punishment. (12RT 2768.) The prosecutor argued that the Texas conviction was the equivalent of a California murder conviction based on the least adjudicated elements test or the entire record of conviction test.[30] He asked the trial court to find, under both theories, that Justin's Texas

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[29] The trial court first conducted a hearing regarding the prior murder conviction allegation and then a jury trial. This bifurcated procedure was required *People v. Epps* (2001) 25 Cal.4th 19,24.

[30] Under the least adjudicated elements test, the trial court determines whether a foreign conviction contains all the elements of a California crime by examining the least adjudicated elements of the foreign crime. (*People v. Martinez* (2003) 31 Cal.4th 673, 683-684.) Under the entire record of conviction test, the trial court determines whether a

murder conviction contained all the elements of murder as defined under California law. (12RT 2768- 2769.) The trial court stated that it would take judicial notice of the requested documents. It concluded that the Texas conviction contained all the elements of a California murder conviction based on both the least adjudicated elements test and the entire record of conviction test. (12RT 2770.)

3. The Jury Trial on the Texas Murder Special Circumstance Allegation.

The trial court also held a jury trial regarding the Texas murder special circumstance allegation. (14RT 3031-3046, 3087-3088.) When the hearing commenced, the prosecutor asked the jury to consider the prior testimony of the witnesses concerning Hartwell's death for the purpose of establishing that Justin was the individual that killed her. The prosecutor specifically told the jury not to consider the testimony of those witnesses to determine any other fact concerning Hartwell's death. (14RT 3051.) The prosecutor then offered Exhibits 107, 108, 109, 112, and 113. (14RT 3051-3052.) Exhibit 107 was a certified copy of the Texas indictment. (14RT 3052.) Exhibit 108 was the Texas charge to the jury for the elements of murder. (14RT 3052-3053.) Exhibit 109 was the Texas guilty verdict. (14RT 3053.) The prosecutor urged the jury to infer Justin was the person described in those documents. (14RT 3052-3053.)

Justin did not present any evidence. (14RT 3053.) The trial court instructed the jury. (14RT 3053-3059.) The jury was instructed that it could not consider the testimony of

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foreign conviction contains all the elements of a California crime by examining the documents which were part of the foreign conviction. (*Ibid.*)

witnesses during the guilt phase of the trial to determine the facts and circumstances of Hartwell's death. (14RT 3059.) It was further instructed, "the question for you to decide is whether the defendant was convicted of murder in the first or second degree prior to this trial." (14RT 3059.) The defense counsel argued the evidence did not prove the prior conviction beyond a reasonable doubt. (14RT 3062.) The jury found the Texas prior murder conviction allegation to be true. (14RT 3087.)

C. THE TEXAS MURDER CONVICTION DID NOT QUALIFY AS A MURDER CONVICTION UNDER CALIFORNIA LAW.

1. Legal Standards Governing Prior Conviction Allegations.

Penal Code section 190.2 defines the special circumstances which make a defendant eligible for the death penalty. Subdivision (a)(2) of that statute defines as a special circumstance a previous conviction for murder from another jurisdiction which contains all the elements of murder as defined under California law. A foreign conviction can be found to meet the definition of murder under California law under the elements test or based on the record of the prior conviction. *(People v. Martinez* (2003) 31 Cal.4th 673, 683-686; *People v. Andrews* (1989) 49 Cal.3d 200, 222-223; *People v. Guerrero* (1988) 44 Cal.3d 343, 352.) "When the record does not disclose any of the facts of the offense actually committed, a presumption arises that the prior conviction was for the least offense punishable." (*People v. Guerrero, supra*, 44 Cal.3d at p. 352.)

The trial court judge has the task of determining whether the foreign conviction contains all the elements of a California offense. (*People v. McGee* (2006) 38 Cal.4th 682, 695, 708-709 [deciding as a matter of statutory and constitutional law that the trial court

judge determines whether the foreign conviction contains all the elements of a California crime].) The jury decides the authenticity, accuracy, or sufficiency of the prior conviction records. (*People v. McGee, supra*, 38 Cal.4th at p. 700; *People v. Epps* (2001) 25 Cal.4th 19, 27.)

The record of the prior conviction includes the appellate court opinion *(People v. Woodell* (1998) 17 Cal.4th 448, 451), transcripts from the preliminary hearing and trial (*People v. Reed* (1996) 13 Cal.4th 217, 223; *People v. Bartow* (1996) 46 Cal.App.4th 1573, 1580), and the charging document. (*People v. Martinez, supra*, 31 Cal.4th 673, 688.) Regardless of what document is presented to prove a conviction, "[t]he normal rules of hearsay generally apply to evidence admitted as part of the record of conviction to show the conduct underlying the conviction." (*People v. Woodell* (1998) 17 Cal.4th 448, 458.) Therefore, a statement in the record of conviction that is offered to prove the truth of the matter stated must fall within an exception to the hearsay rule. (*People v. Reed* (1996) 13 Cal.4th 217, 230–231.)

2. The True Finding to the Special Circumstance Allegation of Murder Cannot be Sustained Based on the Record of the Prior Conviction Test

The true finding to the murder special circumstance allegation cannot be sustained based on the record of the prior conviction test because the exhibits considered by the trial court failed to prove that the Texas conviction included all the elements of murder as defined under California law.

The appellate court opinion was attached to the prosecution motion. (1CT 15-18.) The defense counsel objected to the trial court considering that document based on hearsay, the

confrontation clause, due process, and the Eighth Amendment. (12RT 2768.) The taking of judicial notice of the appellate court opinion did not allow the trial court to consider the contents of the opinion for the truth of the matter asserted over a hearsay objection. *(People v. Woodell* (1998) 17 Cal.4th 448, 458-459; 2 *Jefferson's California Evidence Benchbook* (2d ed. 1982), §47.2, p. 1757 [a court may not take judicial notice of hearsay allegations as being true just because they appear in a court record or file].)

The opinion appears at page 15 through 18 of the first volume of the clerk's transcript. The opinion does not describe the basis of its factual conclusion that Justin killed Hartwell. It simply stated, "appellant stabbed Hartwell to death in her apartment. He wrapped Hartwell's body in a blanket and placed it in the back of her jeep, then drove the Jeep to LeBlanc's[31] apartment. LeBlanc agreed to help appellant dispose of Hartwell's body." (1CT 15.) The trial court was within its authority to take judicial notice of the opinion. However, the trial court should have sustained the defense objection and not considered the above quoted language that appellant stabbed Hartwell to death. The basis of that information was hearsay. The opinion fails to articulate the evidence establishing that Justin stabbed Hartwell or that the stabbing was done in a manner meeting the definition of murder as defined under California law. Had the defense hearsay objection been sustained, there were no other facts in the opinion establishing that Justin killed Hartwell in a manner that met the definition of murder under California law. Hence, the overruling of the defense hearsay objection was not harmless error under either harmless beyond a reasonable doubt standard in *Chapman v.*

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[31] LeBlanc was Kim Reeder.

California, supra, 386 U.S. at p. 24, or the more likely than not standard in *People v. Watson, supra,* 46 Cal.2d at pp. 836-837.

Even if the above quoted language was admissible, it did not contain sufficient details about Justin's stabbing of Hartwell to establish that it met the elements of murder as defined under California law. A stabbing which results in death does not necessarily occur with malice aforethought as defined under California law.

The prosecutor also offered Exhibits 107 through 112, and certified copies of the Texas trial transcript which were marked Exhibits 106-1 through 106-11, to prove the Texas conviction. (12RT 2767-2768.)[32] The trial court admitted these documents and granted the request for judicial notice. (12RT 2770.) The trial court concluded that the Texas conviction contained all the elements of murder as defined under California law. The true finding to the special circumstance allegation cannot be sustained based on the above documents. Exhibit 107 was the indictment. Because Justin did not plead guilty in the Texas case, the indictment was not evidence of what he actually did to commit murder under Texas law. Exhibit 108 was the Texas charge to the jury. It told the jury that murder included: (1) intentionally or knowingly causing the death of another individual; or (2) intending to cause serious bodily injury and committing an act clearly dangerous to human life that causes the death of another individual. (Exhibit 108.) The instruction was not evidence that Justin killed Hartwell in a manner that met the definition of murder under California law. Furthermore, as explained below, the definition of murder in the instruction did not meet the definition of murder under

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[32] The transcripts of the Texas trial, Exhibits 106-1 to 106-11, appear at volumes six (page 1582) to volume 12 (page 2985) of the clerk's transcript.

California law. Exhibit 109 was the verdict. Exhibits 110, 111, and 112 were the judgment. These exhibits did not describe the conduct associated with the crime.

The true finding to the murder special circumstance allegation cannot be affirmed based on the transcripts from the Texas trial. In order for the trial court to have found the special circumstance allegation true based on the record of prior conviction test, it had to make a finding of fact that the Texas conviction involved conduct that met the definition of murder under California law. The record fails to establish that the trial court read the transcripts from the Texas trial. (12RT 2767-2770.) The trial court could not have found that Justin killed Hartwell with malice aforethought, as defined under California law, based on trial testimony it had not read. This Court, furthermore, cannot sustain the true finding to the murder special circumstance allegation based on its own review of the trial testimony. Due process required the trial court judge to make the finding of fact that the Texas conviction contained all the elements of murder as defined under California law. (*Cf. United States v. Santiago* (2d Cir. 2001) 268 F.3d 151, 156 [we read *Apprendi* as leaving to the judge, consistent with due process, the task of finding not only the mere fact of previous convictions but other related issues as well]; *People v. McGee* (2006) 38 Cal.4th 682, 704-705.)

This Court has the authority to review for legal error, and sufficiency of the evidence, the trial court's finding of fact that a foreign conviction contained all the elements of a California crime. However, due process and Penal Code sections 1125 and 1158 commit that finding of fact to the trial court and not this Court.

The true finding to the murder special circumstance allegation cannot be sustained because: (1) the trial court erroneously overruled the defense objection to the Texas appellate

court opinion; (2) the remaining documents reviewed by the trial court failed to prove that Justin killed Hartwell with malice aforethought; and (3) the trial court failed to review the trial transcript from the Texas testimony and that evidence cannot therefore be a basis to uphold the true finding.

3. The Crime of Murder, as Defined under Texas Law, Does not Contain all the Elements of Murder as Defined Under California Law, Based on the Plain Wording of the Texas Murder Statute.

"When the record does not disclose any of the facts of the offense actually committed, a presumption arises that the prior conviction was for the least offense punishable." (*People v. Guerrero, supra*, 44 Cal.3d at p. 352.) Assuming the records admitted into evidence failed to establish that Justin's conviction from Texas contained all the elements of murder as defined under California law, the issue is whether the true finding to the murder conviction can be affirmed based on the mere fact of the Texas conviction. Texas Penal Code section 19.02[33] defines murder as follows:

> (b) A person commits an offense if he:
>
> (1) intentionally or knowingly causes the death of an individual;
>
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
>
> (3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act

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[33] The version of section 19.02 quoted above was the version of the Texas murder statute in effect at the time of Hartwell's death. (See History to Pen. Code, §19.02; Leg. Ch., 900, S.B. 1067), §1.01, effective September 1, 1994.)

> clearly dangerous to human life that causes the death of an individual.

California Penal Code section 187, subdivision (a), defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." Malice may be express or implied. (§188.) Malice is express "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) Malice is implied "when considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*Ibid.*) Intentionally or knowingly causing the death of another person, as set forth in Texas Penal Code statute 19.02, subdivision (b)(1), meets the definition of express malice in section 188. However, the court must look to the least adjudicated element of the prior conviction when applying the elements test. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 262.) The question is whether the standard in section 19.02, subdivision (b)(2), meets the definition of malice aforethought under California law. (*Ibid.*)

Justin will first examine the definition of implied malice under California law. That definition will then be compared to the elements of section 19.02, subdivision (b)(2). That comparison demonstrates that section 19.02, subdivision (b)(2), does not contain all the elements of implied malice.

People v. Phillips (1966) 64 Cal.2d 574, first defined implied malice. Malice was implied when the killing was caused by "an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another, and who acts with conscious disregard to life." (*People v. Phillips, supra*, 64 Cal.2d at p. 587.) This Court has adhered to this definition to the

present day. (*E.g. People v. Chun* (2009) 45 Cal.4th 1172, 1181-1182.) Implied malice includes "both a physical and a mental component. The physical component is satisfied by the performance of an act, the natural consequences of which are dangerous to human life. The mental component is the requirement that the defendant knows that his conduct endangers the life of another and ... acts with conscious disregard." (*People v. Chun, supra*, 45 Cal.4th at p. 1181.)

In *People v. Knoller* (2007) 41 Cal.4th 139, this Court further explained the concept of implied malice. The Court of Appeal in *People v. Knoller* concluded that implied malice was established by the defendant's awareness of the risk of causing serious bodily injury to another. *People v. Knoller* rejected this standard for implied malice. After reviewing a line of cases that supported the standard adopted by the Court of Appeal, this Court concluded that, "a conviction for second degree murder based in implied malice requires proof that a defendant acted with conscious disregard of the danger to human life." (*People v. Knoller, supra*, 41 Cal.4th at p. 156.)

A violation of section 19.02, subdivision (b) (2), requires the defendant to "intend[] to cause serious bodily injury . . . ." Intending to cause serious bodily injury is a mental state falling short of acting with "conscious disregard of the danger to human life." *(People v. Knoller, supra*, 41 Cal.4th at p. 156.) The second clause of section 19.02, subdivision (b)(2), requires the defendant to "commit an act clearly dangerous to human life . . .." This clause does not result in section 19.02 containing the elements of implied malice under California law because it focuses only on the nature of the defendant's conduct and not his mental state. The mental state for implied malice is acting with conscious disregard for human life. The

mental state for section 19.02, subdivision (b)(2), is intending to cause serious bodily injury. Intending to cause serious bodily injury clearly does not necessarily mean a person acted with conscious disregard for human life. Serious bodily injury certainly includes conduct such as breaking a bone. A person can intend to break the bone of another person with no expectation whatsoever that death would result or was even likely.

Case law confirms Justin's interpretation of section 19.02, subdivision (b)(2). In a prosecution under section 19.02 , subdivision (b)(2), an intent to kill is not required. (*Ussery v. State* (Tex. Crim, App., 1983) 651 S.W.2d 767, 773) It is only necessary to show an intent to cause serious bodily injury. (*Garcia v. State* (Tex. Crim, App. 1976) 541 S.W.2d 428, 430.) This mental state falls far short of the mental state required for implied malice in California.

4. This Court's Decision in *People v. Martinez* (2003) 31 Cal.4th 673, does not Support Upholding the True Finding to Justin's Murder Conviction from Texas.

In *People v. Martinez, supra*, 31 Cal.4th 673, this Court addressed whether the defendant's murder conviction from Texas contained all the elements of murder as defined under California law. The defendant had pled guilty in Texas and admitted to intentionally and knowingly shooting the victim. The special circumstance allegation based on the Texas conviction was originally set aside by the Superior Court prior to trial, but reinstated by the Court of Appeal following the filing of a writ. The defendant was convicted of murder. The case came before this Court pursuant to the automatic appeal. *People v. Martinez* does not support the conclusion that Justin's Texas conviction for murder contained the elements of murder, as defined under California law, because: (1) *People v. Martinez* addressed only the

language in section 19.02, subdivision (b)(1), regarding intentionally or knowingly causing the death of another; and (2) the defendant's Texas murder conviction was based on a guilty plea in which he specifically admitted to intentionally and knowingly shooting the victim.

This Court first discussed the ruling of the trial court and the opinion of the Court of Appeal. The trial court had dismissed the special circumstance allegation because Texas did not recognize the doctrine of imperfect self-defense. The Court of Appeal concluded that fact was irrelevant. It also concluded that the requirement in the Texas murder statute that the defendant intentionally and knowingly cause death in section 19.02, subdivision (b)(1), was the functional equivalent of killing with malice aforethought under California law. It included the concepts of express and implied malice.

The defendant in *People v. Martinez* argued in this Court that the Court of Appeal had erred by concluding that the Texas murder statute contained all the elements of murder as defined under California law. The Court first reviewed the definition of implied malice under California law. It concluded, "by pleading guilty to intentionally and knowingly causing death by shooting, defendant acknowledged at the least committing an act meeting the foregoing California definition of implied malice." (*People v. Martinez, supra*, 31 Cal.4th at p. 684.) The Court found it irrelevant under the facts of the case that Texas did not recognize doctrines such as implied malice, or voluntary intoxication, because those concepts were not elements of the crime of murder, but doctrines in mitigation which reduced the killing to manslaughter. (*People v. Martinez, supra*, 31 Cal.4th at p. 685.) Those concepts

were of no consequence because the defendant had pled guilty and the Court had "no way of knowing whether a successful defense to murder could have been raised." (*People v. Martinez, supra*, 31 Cal.4th at p. 685.)

The Court then discussed whether the Texas murder statute contained the elements of murder as defined under California law. The Court noted section 19.02, subdivision (b)(1), defined murder as, "intentionally or knowingly caus[ing] the death of an individual." (*People v. Martinez, supra*, 31 Cal.4th at p. 686.) The decision made no reference to the "intends to cause serious bodily injury," language in section 19.02, subdivision (b)(2). It was clear from the decision in *People v. Martinez* that the Court addressed only whether the language in section 19.02, subdivision (b)(1), contained the elements of murder as defined under California law. The Court looked only to the language of section 19.02, subdivision (b)(1), because the defendant had pled guilty to intentionally and knowingly causing the death of the victim by shooting him. (*People v. Martinez, supra*, 31 Cal.3d at p. 681, 684-686-688.) The Court stated, "we have found no decisions squarely equating the Texas murder statute's reference to intentionally or knowingly causing death with California concepts of express or implied malice." (*People v. Martinez, supra*, 31 Cal.4th at pp. 686-687.) This Court looked to the language of section 19.02 because the Texas case law did not provide clear guidance. The Court stated, "[c]onsciously intending to shoot or kill someone, with knowledge that death is reasonably certain to occur, seems an even more culpable act than merely shooting someone with a conscious disregard for his life, an act that would be

sufficient to constitute implied malice in California." (*People v. Martinez, supra*, 31 Cal.4th at p. 687.) Hence, "the defendant's guilty plea included, and possibly exceeded, all the elements required by California law to constitute implied malice and second degree murder." (*People v. Martinez, supra*, 31 Cal.4th at p. 688.) The Court stated that it was proper to consider the wording of the Texas indictment because it was necessary to know the crime to which the defendant pled guilty in order to apply the elements test from *People v. Andrews*. (*Ibid.*)

Justin, conversely, did not plead guilty in the Texas case. In *People v. Martinez*, the Court was able to determine that the crime to which the defendant pled guilty in Texas met the definition of murder under California law from the facts admitted during the plea. In Justin's case, this Court does not have the benefit of a guilty plea from which it can be determined Justin's conviction contained all the elements of murder as defined under California law. The least adjudicated element of murder, as defined under section 19.02, does not include all the elements of murder as defined under California law because subdivision (b)(2) of the statute included the "intends to cause serious bodily injury . . ." standard as the basis for a finding of guilt. As discussed above, section 19.02, subdivision (b)(2), permits a violation of section 19.02 to be established based on a lesser state of mind that required for implied malice in California.

For the reasons above, the trial court erred by finding true the special circumstance allegation of murder.

D. *APPRENDI V. NEW JERSEY* (2000) 530 U.S. 466 [120 S.CT. 2348, 147 L.ED.2D 435], AND ITS PROGENY, REQUIRED THE JURY TO DETERMINE WHETHER THE TEXAS MURDER CONVICTION CONTAINED ALL THE ELEMENTS OF MURDER AS DEFINED UNDER CALIFORNIA LAW.

The trial court judge made the factual determination that Justin's conviction from Texas for murder contained all the elements of murder as defined under California law. (12RT 2770.) *Apprendi v. New Jersey, supra,* 530 U.S. at 490, stated, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." In *People v. McGee* (2006) 38 Cal.4th 682, this Court concluded that the trial court judge had the responsibility to determine whether a foreign conviction contained the elements of a serious felony as defined under section 1192.7, subdivision (c). The Court rejected the argument that the defendant had a federal constitutional right to have the jury make this determination. (*People v. McGee, supra*, 38 Cal.4th at pp. 708-709.) The Court recognized that the holding of *Apprendi v. New Jersey* could someday be extended to a prior conviction, but was reluctant to do so in light of the currently existing state of the case law. *(People v. McGee, supra*, 38 Cal.4th at p. 709.)

The Supreme Court extended the holding of *Apprendi v. New Jersey* to prior convictions in *Descamps v. United States* (2013) ____U.S.____ [133 S.Ct. 2276, 186 L.Ed.2d 438].) [34] The defendant's sentence in that case was enhanced under the Armed

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[34] Justice Kagan's majority opinion in *Descamps v. United States* was joined by six other justices.

Career Criminal Act ("ACCA) because he had three prior convictions, including a burglary conviction in violation of California Penal Code section 459. The trial court applied the "categorical approach" to determine whether the prior convictions qualified as "violent felonies" under the ACCA. This approach compared the elements of the statute with the elements of a generic crime, i.e., the offense as commonly understood. *Descamps v. United States* addressed whether the trial court could consult documents from the prior conviction to establish that it was a violent felony within the meaning of the ACCA when the statute for the prior crime could be violated by a broader range of conduct than encompassed within the generic crime. The Court noted that the Ninth Circuit has been using a methodology to determine whether prior conviction qualified as violent felonies under the ACCA by looking to documents to determine what the defendant actually did. The Supreme Court concluded that this approach violated the holding of *Apprendi v. New Jersey*:

> Under ACCA, the court's finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction. Those concerns, we recognized in *Shepard*, counsel against allowing a sentencing court to "make a disputed" determination "about what the defendant and state judge must have understood as the factual basis of the prior plea," or what the jury in a prior trial must have accepted as the theory of the crime. (Citation omitted.) Hence our insistence on the categorical approach.
>
> Yet again, the Ninth Circuit's ruling flouts our reasoning—here, by extending judicial factfinding beyond the recognition of a prior conviction. Our modified categorical approach merely assists the sentencing court in identifying the defendant's crime of conviction, as we have held the Sixth Amendment permits.

> But the Ninth Circuit's reworking authorizes the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct. See *Aguila-Montes*, 655 F. 3d, at 937. And there's the constitutional rub. The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances.

(*Descamps v. United States, supra*, 133 S.Ct. at p. 2288.)

The trial court concluded that Justin's conviction for murder from Texas contained all the elements of murder, as defined under California law, by examining the record of the Texas conviction, including the trial transcript.[35] This was precisely the analytical approach to determining whether a prior conviction could be used to enhance a sentence that was condemned in *Descamps v. United States*. As argued above, the elements of murder under Texas law did not include all the elements of murder as defined under California law because of the intends to cause bodily injury clause in section 19.02, subdivision (b)(2). Under *Descamps v. United States*, the trial court's inquiry should have been limited to comparing the elements of section 19.02 to California's definition of murder.

The defense counsel objected under due process, the right of confrontation, and the prohibition against the imposition of cruel and unusual punishment, to the trial court considering the documents offered by the prosecution to prove the Texas murder conviction.

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[35] Justin, of course, still maintains the true finding to the Texas murder conviction cannot be affirmed based on the trial transcripts having been admitted as exhibits because the trial court did not read those transcripts.

(12RT 2768.) Because of this Court's decision in *People v. McGee*, an objection based on *Apprendi v. New Jersey* would have been futile. Hence, the requirement for an objection was excused. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820 [a defendant will be excused from the necessity of a timely objection if it would have been futile].)

For the reasons above, the holding of *Descamps v. United States* required the jury to make the factual determination whether Justin's conviction in Texas for murder contained all the elements of murder as defined under California law. Hence, the true finding to the murder special circumstance allegation must be reversed.

E. PREJUDICE

The reversal of the true finding to the murder special circumstance allegation requires reversal of the judgment of death unless that true finding was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The true finding to this allegation was not harmless beyond a reasonable doubt. The prosecution alleged robbery and the Texas murder conviction as the two special circumstance allegations which made Justin eligible for the death penalty. The true finding to the robbery special circumstance allegation must be reversed because the trial court failed to instruct the jury with the lesser included offense of theft for that allegation. (See Issue IX.) The reversal of the robbery, and murder, special circumstance allegations means that Justin was not eligible for the death penalty. Hence, the

judgment of death must be reversed.

IV

THE FEDERAL AND STATE DUE PROCESS CLAUSES, PENAL CODE SECTION 190.2, SUBDIVISION (A)(17)(A), AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION, REQUIRE REVERSAL OF THE TRUE FINDING TO THE ROBBERY SPECIAL CIRCUMSTANCE ALLEGATION BECAUSE THE ROBBERY WAS INCIDENTAL TO NORIEGA'S MURDER.

A. SUMMARY OF ARGUMENT

The jury found true the special circumstance allegation that Justin committed murder while engaged in the commission of a robbery. (14RT 3087.) A felony alleged as a special circumstance allegation must be committed for an independent felonious purpose. A special circumstance allegation based on the commission of robbery cannot be affirmed if the robbery was incidental to the murder. (*People v. Green* (1980) 27 Cal.3d 1, 59.) The prosecution theory of the case was that Justin killed Noriega because he believed that Noriega intended to report his narcotics activity to the police. Under this theory, the robbery of Noriega was incidental to his murder. The true finding to the robbery special circumstance allegation must be reversed. The reversal of this allegation required reversal of the judgment of death.

B. SUMMARY OF LEGAL STANDARDS GOVERNING FELONY SPECIAL CIRCUMSTANCE ALLEGATIONS

Section 190.2 , subdivision (a)(17)(A), provides that murder committed while the

defendant was engaged in the commission of robbery is a special circumstance making the defendant eligible for the death penalty. Section 190.4, subdivision (a), requires the trier of fact to find true beyond a reasonable doubt the special circumstances alleged in the information. This Court has ruled that the commission of acts listed in section 190.2, when merely incidental to a murder, cannot support true findings to special circumstances.

In *People v. Green, supra,* 27 Cal.3d 1, the defendant murdered his wife. The jury found the murder was committed during the course of a robbery and a kidnaping. The defendant was sentenced to death. The defendant drove his wife to a secluded area where he had intercourse with her and then shot her. To support the robbery special circumstance finding, the prosecution argued the defendant had taken his wife's clothes, purse, and ring. The defendant challenged on appeal the sufficiency of the evidence to support the special circumstances findings. *People v. Green* concluded the evidence was technically sufficient to support the defendant's robbery conviction. However, section 190.2 required the defendant to commit the murder "during the commission or attempted commission" of the crime constituting the special circumstances.[36] (*People v. Green, supra,* 27 Cal.3d at p. 59 [quoting former§ 190.2, subd. (c)(3)].) The occurrence of a crime listed as a special circumstance, and a murder, did not necessarily satisfy the "during the commission or attempted commission" requirement of the statute:

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[36] Similar language appears in section 190.2, subdivision (a)(17), which provides in pertinent part "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of . . . the following felonies: . . ."

> [I]n his closing argument the district attorney correctly told the jurors that in order to find the charged special circumstances to be true they must first find defendant guilty of the underlying crimes of robbery and kidnaping. After discussing the evidence bearing on those crimes, however, the district attorney in effect told the jurors that was *all* they needed to do: i.e., that if they found defendant guilty of the underlying crimes, the corresponding special circumstances were ipso facto proved as well. The latter reasoning was unsound, as it ignored key language of the statute: it was not enough for the jury to find the defendant guilty of a murder *and* one of the listed crimes; the statute also required that the jury find the defendant committed the murder "during the commission or attempted commission of" that crime. (Former §§ 190.2, subd. (c)(3).) In other words, a valid conviction of a listed crime was a necessary condition to finding a corresponding special circumstance, but it was not a sufficient condition: the murder must also have been committed "during the commission" of the underlying crime.

(*People v. Green, supra*, 27 Cal.3d at p. 59.)

This Court required the felony to have been committed for "an independent felonious purpose" in order for the special circumstance allegation to be proven. (*People v. Green, supra*, 27 Cal.3d at p. 61.) *People v. Green* explained:

> The Legislature's goal is not achieved, however, when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder -- "a second thing to it," as the jury foreman here said -- because its sole object is to facilitate or conceal the primary crime.

(*People v. Green, supra*, 27 Cal.3d at pp. 61-62.) *Green* thus found the evidence insufficient as a matter of law to prove the special circumstances. (*Id.*, at p. 62.)

People v. Green remains controlling authority, and has been consistently applied by this Court and the Legislature. (See e.g., *People v. Brents* (2012) 53 Cal.4th 599, 608-609;

People v. Valdez (2004) 32 Cal.4th 73, 113-114; 27 Cal.3D 303, 321-326.) A concurrent intent to kill and commit the felony satisfies the independent felonious purpose requirement. (*People v. Brents, supra*, 53 Cal.4th at p. 609.) *People v. Ainsworth* (1988) 45 Cal.3d 984, 1026, concluded, "*Green* and *Thompson* stand for the proposition that when the underlying felony is merely incidental to the murder, the murder cannot be said to constitute a 'murder in the commission of' the felony and will not support a finding of felony-murder special circumstance."

The holding of *People v. Green* was implicitly adopted and approved of by the Legislature when it amended section 190.2 in 1998 to create an exception to the *Green* rule for only kidnaping and arson by the enactment of subdivision (a)(17)(m). (Stats. 1998, ch. 629, §1; cf., *Red Lion Broadcasting Co. v. FCC* (1969) 395 U.S. 367, 381-382 [89 S.Ct. 1794; 23 L.Ed.2d 371] [applying the legislative- reenactment doctrine].) The holding of *People v. Green* has also been incorporated in the last paragraph of CALCRIM No. 730 and the second paragraph of CALJIC No. 8.81.7.

C. STANDARD OF REVIEW

Justin's argument is that the commission of the robbery for an independent felonious purpose was an element of the crime of capital murder. The basis for this conclusion is explained in more detail below. Hence, the due process clause, the right to a jury determination of the facts under the Sixth and Fourteenth Amendments and Article I, section 16 of the California Constitution, and the prohibition against the imposition of cruel and

unusual punishment in the Eighth and Fourteenth Amendments and Article I, section 17 of the California Constitution, required the prosecution to prove beyond a reasonable doubt that the robbery was committed for an independent felonious purpose. The substantial evidence standard of review applies.

The critical inquiry upon a challenge to the sufficiency of the evidence to support a criminal conviction is whether the record, when read in a light most favorable to the judgment, contains substantial evidence from which a reasonable trier of fact could reasonably have found defendant guilty of the crime beyond a reasonable doubt. (*People v. Ferrara* (1988) 202 Cal.App.3d 201, 207, citing *Jackson v. Virginia* (1970) 443 U.S. 307, 314-315 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Silva* (1988) 45 Cal.3d 604, 625.) "Substantial evidence" is evidence which, when viewed in light of the entire record, is of solid probative value, maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined. (See *People v. Lucero* (1988) 44 Cal.3d 1006, 1020; *People v. Conner* (1983) 34 Cal.3d 141, 149.)) "What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277 [113 S.Ct. 2078, 124 L.Ed.2d 182].) "The prosecution bears the burden of proving all elements of the offense charged." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 277.)

D. THE HOLDING OF *APPRENDI V. NEW JERSEY,* AND ITS PROGENY, REQUIRED THE PROSECUTION TO PROVE BEYOND A REASONABLE DOUBT THAT JUSTIN KILLED NORIEGA FOR AN INDEPENDENT FELONIOUS PURPOSE IN ORDER FOR THE ROBBERY SPECIAL CIRCUMSTANCE

ALLEGATION TO BE AFFIRMED.

Under *Apprendi v. New Jersey, supra*, 530 U.S. at p. 490, Ring v. Arizona, *supra,* 536 U.S. 584, 536, *Blakely v. Washington* (2004) 542 U.S. 296, 303-304 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Booker v. United States* (2005) 543 U.S. 220, [125 S.Ct. 738, 160 L.Ed.2d 621], *Cunningham v. California* (2006) 549 U.S. 270, 292-294 [127 S.Ct. 856, 166 L.Ed.2d 856], and *Descamps v. United States, supra*, 133 S.Ct. at p. 2288, the requirement of an independent felonious purpose constituted an element of an offense which the prosecution had to prove beyond a reasonable doubt.

In *People v. Kimble* (1988) 44 Cal.3d 480, the jury found true special circumstance allegations of two counts of robbery, and one count of burglary and rape. The defendant argued that the special circumstances had to be reversed for instructional error and insufficiency of the evidence. The defendant argued that the instructions should have been tailored to incorporate the holding of *People v. Green*. The Court rejected the defendant's argument that Green's clarification of the felony-murder special circumstances had become an element of special circumstance findings which required instructions in all cases regardless of the evidence. (*People v. Kimble, supra*, 44 Cal.3d at p. 50; see also *People v. Monterroso* (2004) 34 Cal.4th 743, 767 [citing *People v. Kimble* for the proposition the *People v. Green* did not add an element to felony-murder or special circumstance allegations but simply clarified the scope of those doctrines]; *People v. Cavitt* (2004) 33 Cal.4th 187, 203-204.) The Ninth Circuit has not agreed with this Court's characterization of the "independent felonious purpose" requirement, and suggested that an "independent felonious

purpose" is an element of a special circumstances finding. (*Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1476 [stating that the requirement of an independent felonious purpose for a special circumstance finding provides the narrowing function required to make California's death penalty statute constitutional].)

Under *Apprendi v. New Jersey* and its progeny, the trier of fact had to find beyond a reasonable doubt the facts which make the defendant eligible for the maximum sentence that may be imposed for the crime of which or she was convicted. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 490.) *Ring v. Arizona* clearly demonstrates that the "independent felonious purpose" requirement constitutes an element of an offense with regard to the special circumstance allegation. The Court decided in that case that special circumstance allegations which made a defendant eligible for the death penalty had to be found by the jury beyond a reasonable doubt rather than the trial judge. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.) "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury." (*Ibid.*)

The robbery special circumstance allegation operated as the functional equivalent of a greater offense. Hence, the jury had to find beyond a reasonable doubt that Justin had an "independent felonious purpose" when he robbed Noriega in order to find true the robbery special circumstance allegation.

E. APPLICATION TO THE INSTANT CASE

The prosecutor, during his opening statement, stated that he would present evidence that Justin killed Noriega because he believed he was a "narc, a snitch." (6RT 1770.) Brown

testified that Justin shot Noriega multiple times. (6RT 1913, 1938.) She also testified that Justin did not meet Noriega for the purpose of robbing him. (6RT 1955.) Reeder testified several times that Justin said he killed Noriega because he was a "narc." (7RT 2022, 2144; 8RT 2276.)

The trial court instructed the jury, "if you find that the defendant only intended to commit murder and the commission of the robbery was merely part of or incidental to the commission of the robbery, then the special circumstance has not been proved. /P/ If however, you find that the defendant had a purpose for the commission of the robbery apart from murder, and also had a purpose for the commission of murder during the course of the robbery, that is, concurrent intent to kill and to commit the robbery, then the special circumstance has been proved." (13RT 2989-2900.) The prosecutor, during his opening argument, argued, "Mr. Thomas got it into his head that Rafa, Rafael Noriega, was a narc, a snitch, someone who was going to turn him in. Was he a snitch? We'll never know. It doesn't really matter. The only thing that matters is Mr. Thomas thought so, and for Mr. Thomas the mere suspicion that someone is a snitch warrants their execution." (13RT 2905-2906.) The prosecutor later argued Justin shot Noriega to murder and rob him, (13RT 2908), and Justin was not ashamed of stealing Noriega's dope. (13RT 2910.) The prosecutor later tried to explain the concept of the robbery not being incidental to the murder. He argued, "if there are dual motives, the special circumstance applies and it has been proved. That's what that means. He intended to commit the robbery independent of the killing." (13RT 2927.)

The overwhelming weight of the evidence established that Justin shot Noriega to silence him. The motive for the crime was clearly not robbery. Brown was the only witness

to the incident to testify. She denied that Justin met Noriega for the purpose of robbing him. (6RT 1955.) Reeder testified multiple times that Justin said he killed Rafa because he was a "narc." (7RT 2022, 2144; 8RT 2276.) The only evidence to the contrary was Justin's statement to John Sams that he had shot someone for drugs. (9RT 2368-2369.) This statement must be placed in the context of all the evidence. Justin obviously did not understand the difference between a robbery incidental to a murder and a robbery committed for an independent felonious purpose. The statement was made at least two years after the incident. All the remaining evidence clearly established that Justin did not shoot Noriega to rob him, but to silence him.

In *People v. Thompson, supra*, 27 Cal.3d 303, the defendant entered the victim's residence. He shot and killed one victim, and injured a second victim, took car keys from one of the victims and drove the victim's car away from the scene. The jury found true the special circumstances of robbery and first degree burglary, and sentenced the defendant to death. According to this Court, "[t]he question presented under *People v. Green* is whether the shootings were done to advance an independent felonious purpose of stealing the car and keys or whether instead such thefts were `merely incidental to the murder.'" (*People v. Thompson, supra*, 27 Cal.3d at p. 324.) After reviewing the evidence, the Court concluded that "[w]hen the whole record is viewed in a light most favorable to the verdict, it establishes at most a suspicion that appellant had an intent to steal independent of his intent to kill." (*Ibid.*) Hence, the evidence was insufficient as a matter of law to prove the true findings to the special circumstances.

In *People v. Michaels* (2002) 28 Cal.4th 486, the defendant murdered his girlfriend's

mother. He presented evidence that he did so to protect his girlfriend from abuse by the mother. The murder scene showed signs of robbery. Before the robbery, the defendant claimed he was going to get jewelry from an old lady. Later, the defendant claimed he had furs and jewelry. (*Id.* at pp. 517-518.) The prosecution's theory was "the defendant entered the apartment and killed [the mother] with the intention of stealing her property, but was interrupted when the police arrived and escaped without taking anything." (*Id.* at p. 518.) The concurrent intent of robbery, burglary and murder supported the felony special circumstances.

In Justin's case, the evidence did not establish a concurrent intent to rob and kill Noriega. The evidence established that Justin's motive was to silence Noriega because he believed he was a "narc." There was at most a mere suspicion that Justin's intent was to rob Noriega. This was not sufficient to prove the robbery special circumstance allegation. That true finding must be reversed.

F. PREJUDICE

In *Brown v. Sanders* (2006) 546 U.S. 212, 126 S.Ct. 884, 163 L.Ed.2d 723, the Supreme Court articulated a new standard for determining prejudice when a special circumstance factor is reversed. *Brown v. Sanders* was an appeal from a judgment of death in California. Under that case, the reversal of the robbery special circumstance allegation must result in reversal of the judgment of death.

In Brown v. Sanders, the defendant and his companion invaded a home where they bound and blindfolded the male inhabitant and his girlfriend. Both individuals were struck in the head with a blunt object. The girlfriend died from the blow. The jury found four

special circumstances listed in Penal Code section 190.2 to be true. The special circumstances were robbery, burglary, the killing of a witness to a crime, and the commission of a murder in a heinous, atrocious, and cruel manner. This Court set aside the burglary special circumstance under the merger doctrine, and set aside the heinous, atrocious, and cruel manner of killing special circumstance based on unconstitutional vagueness. (*Brown v. Sanders, supra*, 546 U.S. at p. 223.) Because the jury properly considered the two remaining special circumstances, this Court affirmed the judgment of death.

The defendant argued in the United States Supreme Court that reversal of the two special circumstance findings required reversal of the judgment of death. When deciding what sentence to impose, the jury was instructed to consider the existence of any special circumstances found to be true. The defendant argued the jury's sentencing decision was erroneously skewed by the jury's consideration of the special circumstance factors reversed by this Court. The Supreme Court considered "the circumstances in which an invalidated sentencing factor will render a death sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the jury's weighing process." (*Brown v. Sanders, supra*, 546 U.S. at p. 214.)

Brown v. Sanders rejected the distinction made in the Court's prior cases between weighing and non-weighing states. (546 U.S. 214-219.) The Court concluded "[t]his weighing/non-weighing scheme is accurate as far as it goes, but it now seems to us needlessly complex and incapable of providing for the full range of possible variations." (*Id.*, at p. 219.) It adopted a new test for when a judgment of death must be reversed:

> An invalidated sentencing factor (whether an eligibility factor or

> not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

(*Brown v. Sanders, supra*, 546 U.S. at p. 220.)

Justice Breyer filed a dissenting opinion. He concluded the sentencer's consideration of an invalid aggravator, regardless of the state's death penalty scheme, must result in reversal unless it was harmless beyond a reasonable doubt. (*Brown v. Sanders*, *supra*, 546 U.S. at p. 228 [J. Breyer dissenting].) The majority opinion in *Brown v. Sanders* addressed Justice Breyer's arguments. The Court first noted, "[I]f the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here." (*Brown v. Sanders, supra*, 546 U.S. at pp. 220-221.) The Court distinguished the situation in the case before it. "The issue we confront is the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have weighed in favor of the death penalty." (*Id.* at p. 221) The test for prejudice under that situation was as follows:

> such skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor.

(*Brown v. Sanders, supra*, 546 U.S. at p. 221.)

The Court then applied the above test to the case before it. The Court noted the special circumstances listed in section 190.2 are the eligibility factors that satisfy *Furman v. Georgia*

(1972) 408 U.S. 238 [192 S.Ct. 2736, 33 L.Ed.2d 346]. (*Brown v. Sanders, supra*, 546 U.S. at pp. 221-222.)[37] Reversal of the judgment of death was not required for the following reason:

> the jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish the "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors.

(*Brown v. Sanders, supra*, 546 U.S. at p. 224.) In response to the defendant's argument that the instruction to the jury to consider the special circumstances found true in determining the penalty placed prejudicial emphasis on the invalid eligibility factors, the Court concluded any such impact was inconsequential. (*Id.*, at pp. 224-225)

The jury in this case found true the special circumstances that Justin robbed Noriega (14Rt 4022-3023.) In determining the penalty, the jury was instructed to consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (18 RT 3645.) Assuming this Court agrees that the robbery special circumstance must be reversed, the holding of *Brown v. Sanders* compels reversal of the judgment of death.

Brown v. Sanders concluded "[i]f the presence of the invalid sentencing factor

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[37] The Court concluded that the instruction to the jury to consider the circumstances of the crime had, "the effect of rendering all the specified factors nonexclusive, thus causing California to be in our prior teminology a non-weighing State." (*Brown v. Sanders*, supra, 546 U.S. at p. 222.) The Court analyzed prejudice, however, under the new standards it adopted in *Brown v. Sanders*.

allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here." (*Brown v. Sanders, supra*, 546 U.S. at pp. 220-221.) That is the situation in the instant case. The jury considered, in determining whether to impose the death penalty, the fact that Justin robbed Noriega. The jury's consideration of Justin's alleged robbing of Noriega was especially prejudicial. The prosecutor emphasized Justin's lack of shame in committing a robbery during his opening argument. (13RT 2910.)

Due process requires reversal of a judgment of death if an invalid sentencing factor allowed the sentencer to consider evidence that would otherwise not have been before it. (*Brown v. Sanders, supra*, 546 U.S. at p. 218.) The Court discussed the situations when an invalid aggravating factor requires reversal of a judgment of death in a non-weighing state. Those situations were when the jury was allowed to draw adverse inferences from constitutionally protected conduct, attached the label "aggravating" to constitutionally impermissible or irrelevant factors or factors which should militate in favor of a lesser penalty. (*Ibid.*)

In the instant case, the label "aggravating" was attached to the constitutionally irrelevant factor of a robbery. Assuming this Court reversed the true finding to the robbery special circumstance allegation, that true finding should not have been considered in aggravation of the sentence.

Brown v. Sanders concluded it was inconsequential that the jury had considered as aggravating the special circumstances which were found to be invalid. The key difference between *Brown v. Sanders,* and the instant case, is the basis upon which the special

circumstances were reversed on appeal. In *Brown v. Sanders*, the first special circumstance reversed on appeal was burglary. It was reversed because of the merger doctrine and not insufficiency of the evidence. The second special circumstance reversed on appeal was the commission of a murder in a heinous, atrocious, or cruel manner. It was reversed because of vagueness. The robbery special circumstance finding in this case applied a prejudicial label–robbery--to irrelevant conduct that should not have impacted whether the jury chose to sentence Justin to death. In *Brown v. Sanders*, "all of the facts and circumstances admissible to establish the `heinous, atrocious, or cruel' and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the 'circumstances of the crime' sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors." (*Brown v. Sanders, supra*, 546 U.S. at p. 224.)

Conversely, the reversal of the robbery special circumstance allegation for instructional error, and insufficiency of the evidence, means the facts and circumstances incident to the allegation should not have been considered as a "circumstance of the crime." The jury's finding that Justin committed robbery in association with the murder cannot be characterized as "inconsequential," (*Brown v. Sanders, supra*, 546 U.S. at pp. 224-225), when the jury was specifically told to consider that factual finding in determining the appropriate penalty.

Reversal of the judgment of death is required, furthermore, even if the harmless beyond a reasonable doubt test of *Chapman v. California, supra,* 386 U.S. at page 24, is applied. The jury's belief that Justin robbed Noriega was prejudicial. The prosecutor used the robbery allegation to characterize Justin as especially callous. (13RT 2910.)

For the reasons above, the judgment of death must be reversed.

V

THE JUDGMENT OF GUILT TO COUNT ONE MUST BE REVERSED BECAUSE: (1) THE TRIAL COURT FAILED TO FULLY AND PROPERLY INSTRUCT THE JURY FOR THE LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER; AND (2) THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT SECOND DEGREE MURDER COULD INVOLVE AN INTENTIONAL KILLING, IN VIOLATION OF JUSTIN'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION, AND THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

A. SUMMARY OF ARGUMENT

Justin was found guilty of first degree murder. Justin and Noriega had a heated argument prior to the shooting. The jury was instructed on murder based on the theories of express malice and felony murder. The jury was instructed that murders committed with premeditation and deliberation were first degree murder and all other murders were second degree murder. The jury was never told an intentional killing could be second degree murder.

The murder instructions were erroneous because: (1) the jury, in practical effect, was not instructed on the lesser included offense of second degree murder because the jury was not instructed that an intentional killing could be second degree murder; and (2) the jury lacked guidance for what acts constituted second degree murder. The flawed murder

instructions were prejudicial because the evidence that Justin premeditated and deliberated Noriega's death was not strong. The distinction between a murder committed with premeditation, and without premeditation, is elusive because the jury was instructed that "a cold calculated decision to kill can be reached quickly." (13RT 2897.) The giving of the erroneous second degree murder instruction was not harmless, despite the jury finding Justin guilty of first degree murder, because the flawed instruction left the jury with no practical option but to convict Justin of first degree murder.

B. STANDARD OF REVIEW

Issues pertaining to jury instructions are reviewed de novo. (*People v. Guiuan* (1998) 18 Cal.4th 588, 569.)

C. THIS COURT CAN REVIEW WHETHER THE TRIAL COURT'S MURDER INSTRUCTIONS WERE CORRECT DESPITE THE ABSENCE OF AN OBJECTION IN THE TRIAL COURT.

Defense counsel did not object to the murder instructions or request a modification of the second degree murder instruction. This Court, however, can review whether the murder instructions were correct pursuant to section 1259. It provides, "[t]he appellate court may . . . 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." This Court has applied section 1259 to review the correctness of jury instructions, despite the defendant's failure to make an objection in the trial court. (*E.g., People v. Cleveland* (2004) 32 Cal.4th 704, 749; *People v. Hillhouse* (2002) 27 Cal.4th 469, 505-506.) Hence, this Court can review whether the murder instructions were correct despite the lack of an objection in the trial court.

D. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

Brown testified that Justin met Noriega in a remote location and shot him. (6RT 1938.) Brown told Detective Silva that she heard a heated argument before shots were fired. (13RT 2871-2873.) Noriega was an armed drug dealer. (6RT 1868-1869, 1874.)

During discussion of jury instructions, the prosecutor stated he did not see any basis for imperfect self-defense instructions. (13RT 2814.) Defense counsel requested the jury to be instructed with manslaughter instructions. (13RT 2814-2815.)[38] The defense counsel argued, "one possible interpretation in Dorothy Brown's testimony could be sort of that there was some provocation, there was, Mr. Rafael Noriega, either a drug deal gone bad, or he pulled a firearm, something like that." (13RT 2815.) The trial court stated it could not find any evidence of self-defense, or provocation, based on Justin's statements when he was interrogated. (13RT 2815-2816.) The trial court stated it did not intend to give imperfect self-defense, or manslaughter, instructions. (13RT 2816.) The trial court also refused the defense request for self-defense instructions. (13RT 2817.)

The trial court and the attorneys then discussed the murder instructions. The trial court agreed with the prosecutor's request to omit the implied malice standard from the murder instruction. The defense counsel submitted on this modification. (13RT 2818.) The trial court then agreed to modify CALCRIM No. 521 to incorporate only the theory of premeditated and deliberate murder. (13RT 2818-2819.) The defense counsel did not comment regarding this

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[38] For purpose of brevity, Justin is summarizing in this argument the proceedings in the trial court which are relevant to Issues VI and VII. These issues all pertain to the jury instructions for murder, manslaughter, and self-defense.

modification. (13RT 2818-2819.) The defense counsel then objected to the felony murder instruction based on due process and the prohibition against the imposition of cruel and unusual punishment. (13RT 2819-2820.) The trial court overruled the objection. (13RT 2820.) The trial court then stated it would instruct the jury with CALCRIM No. 548, which told the jury it did not have to agree on whether Justin committed felony murder or murder with malice. The defense counsel had no comment. (13RT 2820.)

The defense counsel requested the trial court give CALCRIM Nos. 570 and 571. Those were manslaughter instructions based on imperfect self defense and provocation. The trial court again stated it would not give the instructions because of the lack of evidence to support them. The trial court repeated that its ruling also applied to the self-defense instruction in CALCRIM No. 505. (13RT 2820-2821.)

The trial court's murder instructions included murder based on an intentional killing and felony murder based on robbery. (13RT 2895-2898.) For the murder charge under section 187, the jury was instructed, "the People must prove that, one, the defendant committed an act that caused the death of another person; and two, when the defendant acted, he had a state of mind called `express malice aforethought'." (13RT 2895.) Justin acted with "express malice aforethought if he unlawfully intended to kill." (13RT 2895.) The trial court then gave the murder instruction:

> If you decide whether the defendant has committed murder, you must decide whether it is murder of the first or second degree. The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation.
>
> The defendant acted willfully if he intended to kill.

> The defendant acted deliberately if he carefully weighed the considerations for and against his choice, and knowing the consequences decided to kill.
>
> The defendant acted with premeditation if he decided to kill before committing the act that caused death.
>
> The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.
>
> All other murders except felony murder are of the second degree.
>
> The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first-degree murder.

(13RT 2896-2897; 17 CT 4326; CALCRIM No. 521.)

The prosecutor, during his opening argument, stated that Justin was guilty of murder under the felony murder rule and because he committed an intentional killing. (13RT 2912-2913.) He argued, "You shoot a man five times, there's no argument that this was an unintentional, accidental, or negligent killing." (13RT 2913.) He then argued an intentional killing with premeditation and deliberation was first degree murder. (13RT 2916.) The prosecutor stated, "express malice means, simply intent to kill. /P/ And aforethought just means before, before you actually kill. That's all you have to do. It's a mental state that must be formed before the act that causes death." (13RT 2916-2917.) The prosecutor argued Justin

must have killed Noriega with express malice aforethought because he shot him multiple times. (13RT 2917.)

The prosecutor then turned to the elements of premeditation and deliberation. He stated, "The defendant acted with premeditation if he decided to kill before committing the act that caused death. All that means is that it was before he killed again. Premeditation, he had to have gone through this thinking process. That's what we mean by deliberation, a thought process before you kill. If he considered and decided to kill, then it's first degree murder. That's it. It's very simple." (13RT 2918-2919.)

E. THE TRIAL COURT'S MURDER INSTRUCTIONS FAILED TO INSTRUCT THE JURY THAT SECOND DEGREE MURDER REQUIRED AN INTENTIONAL KILLING

1. The Definition of First and Second Degree Murder.

The trial court has a sua sponte duty to correctly define the elements of a crime. (*People v. Flood* (1998) 18 Cal. 4th 470, 480.) Sections 187 through 190.05 define the crime of murder. Murder is the unlawful killing of a human being "with malice aforethought." (§ 187, subd. (a).) The prosecution bears the burden of proving that the defendant acted with malice. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 112.) Section 188 states that malice may be express or implied. Malice is express when "there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." Malice is "implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§188.) Murder with implied malice is one form of second degree murder. (*People v. Knoller* (2007) 41 Cal.4th 139, 143; *People v. Swain* (1996) 12

Cal.4th 593, 601.) "Malice is implied when the killing is proximately caused by an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." (*People v. Knoller*, *supra*, 41 Cal.4th at p. 143.)

Section 189 defines first and second degree murder. It provides in part, "All murder which is perpetrated . . . by any other kind of wilful, deliberate, and premeditated killing . . . is murder of the first degree. All other kinds of murder are of the second degree." In order to support a finding of first degree murder, "the People bear the burden of proving beyond a reasonable doubt that the killing was the result of premeditation and deliberation . . .." (*People v. Anderson* (1968) 70 Cal.2d 15, 25.)

Second degree murder can be committed in three ways: (1) an intentional killing committed without premeditation;[39] (2) implied malice; and (3) second degree felony murder. (*People v. Swain*, *supra*, 12 Cal.4th at p. 601.) The jury instructions were deficient because they failed to instruct the jury that an intentional killing can be second degree murder.

2. The Murder Instructions Failed to Instruct the Jury that an Intentional Killing may Constitute Second Degree Murder.

The jury instruction for murder failed to instruct the jury that second degree murder may involve an intentional killing.[40] The concept of express malice–which was defined as

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[39] *People v. Swain* described this as unpremeditated murder committed with express malice. (*People v. Swain, supra*, 12 Cal.4th at p. 601.)

[40] The trial court omitted an implied malice instruction at the request of the prosecutor. (13RT 2818.) Hence, the jury was unable to find Justin guilty of second degree based on

an intentional killing—was never explicitly linked to second degree murder.

The jury instruction defining murder stated, "To prove that the defendant is guilty of this crime the People must prove that, one, the defendant committed an act that caused the death of another person; and two when the defendant acted he had the state of mind called ''express malice aforethought'." (13RT 2895.) This instruction did not tell the jury that express malice aforethought and an intentional killing could also be second degree murder.

The next instruction stated, "the defendant acted with express malice if he unlawfully intended to kill." (13RT 2895.) This instruction did not state whether express malice applied to first degree murder, second degree murder, or both. The jury was then instructed, "if you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree. The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation." (13RT 2896.) This instruction did not tell the jury that second degree murder could involve an intentional killing. In sum, there was nothing in the jury instructions which explicitly linked the concept of express malice to second degree murder. "Murder that is committed with malice, but is not premeditated is of the second degree." (*People v. Ramirez* (2006) 39 Cal.4th 398, 464.) The jury had no way of knowing, based on the instructions given by the trial court, that an intentional killing committed without premeditation, was second degree murder.

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a theory of implied malice.

3. A Comparison of CALJIC No. 8.30 with the Instructions Given in Justin's Case Demonstrates that the Jury was not Instructed that an Intentional Killing Could Constitute Second Degree Murder.

A review of the CALJIC instructions demonstrates the deficiency with the instructions given in Justin's case. CALJIC No. 8.30 states "murder of the second degree is the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation." The conversion table for the CALCRIM instructions references CALCRIM Nos. 520 and 521 for CALJIC No. 8.30. The manner in which the trial court edited CALCRIM Nos. 520 and 521 in Justin's case resulted in the instructions failing to instruct that second degree murder included an intentional killing. CALCRIM No. 520 told Justin's jury that murder required express malice aforethought and Justin acted with express malice if he intended to kill. (13RT 2895; 17CT 4324.) CALCRIM No. 521 told Justin's jury that first degree murder was a killing committed willfully, deliberately, and with premeditation, and all other murders were second degree murder. (13RT 2896-2897; 17CT 4326.)

In *People v. Rogers* (2006) 39 Cal.4th 826, the defendant was convicted of first degree murder and second degree murder. He shot and killed two prostitutes and dumped their bodies in a canal. The jury was given instructions for first and second degree murder, and voluntary manslaughter. It was instructed: (1) murder may be committed with express or implied malice; (2) first degree murder was a willful, deliberate, and premeditated killing;

and (3) with the definition of implied malice. The jury was not instructed with CALJIC No. 8.30. This Court concluded, "the trial court erred by omitting an instruction that second degree murder includes an intentional but unpremeditated murder." (*People v. Rogers, supra*, 39 Cal.4th at p. 866.) The trial court "failed to explain that a murder committed with express malice could constitute second degree murder. The omission of CALJIC No. 8.30 created an obvious gap in the instructions that was not filled by any of the other instructions given." (*People v. Rogers, supra*, 39 Cal.4th at p. 867.)

The instructions in Justin's case suffered from a similar deficiency. The instructions told the jury that second degree murder was something other than a willful, deliberated, and premeditated murder, but the instructions failed to tell the jury that second degree murder involved an intentional killing.

F. THE TRIAL COURT'S MURDER INSTRUCTION RESULTED IN THE JURY NOT BEING GIVEN COMPLETE JURY INSTRUCTIONS FOR THE LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER.

In a capital case, the due process clause requires the trial court to instruct the jury on lesser included offenses raised by the evidence. (*Beck v. Alabama* (1980) 447 U.S. 625, 632-635 [100 S.Ct. 2382, 65 L.Ed.2d 392].) California law requires the trial court to sua sponte instruct the jury for lesser included offenses that find substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155, 162.) Substantial evidence is evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*Id.* at p. 162)

The trial court's failure to adequately define second degree murder for the jury was the functional equivalent of failing to instruct at all on second degree murder. The jury could not have found Justin guilty of second degree murder if it believed that an intentional killing was not second degree murder. The evidence raised a question of fact regarding Justin's guilt of second degree murder. Justin shot Noriega during a heated argument. (13RT 2871-2873.) The jury could have concluded Justin shot Noriega, but did so without premeditation. Because the trial court gave an instruction for second degree murder, it must have believed the evidence raised the issue of Justin's guilt of that crime. (13RT 2896-2897.) The instructions were simply inadequate. Hence, Justin's right to federal and state due process of law was violated by the jury instructions which failed to properly define the elements of second degree murder.

G. THE TRIAL COURT'S FAILURE TO DEFINE SECOND DEGREE MURDER VIOLATED JUSTIN'S FEDERAL CONSTITUTIONAL RIGHTS.

The omission of an element of an offense from a jury instruction violates due process. *(Rose v. Clark* (1986) 478 U.S. 570, 580-581, [92 L.Ed.2d 460, 106 S.Ct. 3101].) Other courts have also reached this conclusion. (*Martinez v. Borg* (9th Cir. 1991) 937 F.2d 422, 423-425 [the trial court's failure to instruct the jury on an element of a crime deprives a defendant of due process because the jury is deprived of "the opportunity to find each element of the crime beyond a reasonable doubt."]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1312, fn. 54.) Furthermore, a defendant has the right to due process of law under Article I, section 15 of the California Constitution.

The trial court's instructions in effect omitted the element of an intentional killing for second degree murder. The fact that Justin was found guilty of the greater offense of first degree murder does not change the nature of the due process violation. The failure of the trial court to properly define second degree murder contributed to the jury erroneously finding Justin guilty of first degree murder.

The erroneous instruction also violated Justin's right to an accurate jury determination of the facts under the Sixth and Fourteenth Amendments and Article I, section 16, of the California Constitution. (*Ring v. Arizona* (2002) 536 U.S. 584, 536 [122 S.Ct. 2428, 153 L.Ed.2d 556] [the Sixth Amendment required the jury to find the aggravating facts necessary to impose the death penalty]; *United States v. Gaudin* (1995) 515 U.S. 506, 510, [115 S.Ct. 2310, 132 L.Ed.2d 444] [the right to a jury requires the trier of fact to determine the truth of every accusation].) Justin's jury could not have accurately determined whether he was guilty of only second degree murder when they were not provided instructions which told them what acts constituted second degree murder.

The prohibition against the imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments, and Article I, section 17 of the California Constitution require heightened reliability during the fact finding process in capital cases. (*Beck v. Alabama, supra*, 447 U.S. at p. 632; *People v. Ayala* (2000) 23 Cal.4th 225, 262-263.) Here, the reliability of the fact finding process was undermined by the erroneous murder instructions. As explained below, the jury likely would have found Justin guilty of second degree murder

if that option had been properly presented to it. Hence, Justin's jury did not return a verdict in which this Court can have confidence.

H. PREJUDICE

1. The Erroneous Jury Instructions were Prejudicial with Regard to the Theory of an Intentional Killing.

Because the trial court's failure to properly define second degree murder violated Justin's federal constitutional rights, the judgment of guilt must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].) For jury instruction errors, the test under *Chapman* is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [111 S.Ct. 1884, 114 L.Ed.2d 432].) "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt, supra*, 500 U.S. at p. 403.) The error also requires reversal under the more likely than not standard for state law error. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.) This standard requires Justin to demonstrate a reasonable chance the jury would have found him not guilty of first degree murder, and guilty of second degree murder, if the jury had been properly instructed for that lesser offense. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

This Court cannot conclude beyond a reasonable doubt, or under the more likely than not standard, that the flawed murder instructions did not contribute to the jury finding Justin

guilty of first degree murder. There was strong evidence the shooting occurred in the spur of a moment following a heated argument. Brown testified Justin told her he did not want to get ambushed in the middle of nowhere and asked Brown to act as a lookout. (6RT 1910, 1937.) This evidence did not establish a plan to kill Noriega. It reflected Justin's fear of either Noriega or some other third party. Brown heard a heated argument prior to shots being fired. (13RT 2872.) The argument suggested Justin shot Noriega on the spur of a moment and without premeditation. Justin likely would have simply shot Noriega without argument if the shooting was planned. Justin knew Noriega was a drug dealer and likely armed. It is a reasonable inference that Justin would not have risked Noriega shooting him first by arguing with him if he intended to kill Noriega all along. The trial court's failure to instruct the jury in clear language that second degree murder could involve an intentional killing resulted in the jury convicting Justin of the only crime that, according to the jury instructions, involved an intentional killing.

The jury was instructed to not return a verdict finding Justin guilty of second degree murder unless it unanimously agreed that he was not guilty of first degree murder. (13RT 2897.) Because the erroneous jury instruction for second degree murder deprived the jury of the option of finding Justin guilty of that crime, the jury's first degree murder verdict did not render harmless the flawed second degree murder instructions. The flawed second degree murder instruction pushed the jury to finding Justin guilty of first degree murder. The jury is under undue pressure to convict the defendant for the greater offense when it is not

instructed for the lesser offense. (*People v. Barton* (1995) 12 Cal.4th 186, 196.) The jury's inability to find Justin guilty of second degree murder because that crime was not adequately defined left the jury with no choice but to find Justin guilty of first degree murder.

Other than Brown's testimony, the evidence offered by the prosecution also failed to establish a premeditated shooting. Justin's statement to John Sams did not establish a premeditated plan to commit a shooting. Sams testified that Justin talked about killing people and said he shot someone for drugs. Justin never specifically stated that he killed anyone. (9RT 2368-2369.) Sams believed Justin was bragging and trying to impress people. Sams did not believe Justin. (9RT 2368-2369, 2384.). Reeder testified that Justin made a statement about killing Rafa because he was a "narc." (7RT 2022.) Reeder's testimony was consistent with the theory of an unpremeditated shooting because a heated argument occurred prior to shots being fired.

The prosecutor's opening argument aggravated the prejudice from the erroneous murder instructions. The prosecutor repeatedly argued that Justin killed Noriega with willfulness, premeditation, and deliberation if he merely formed the intent to kill before doing so. He also argued that shooting Noriega multiple times supported a finding of willfulness, premeditation, and deliberation. (13RT 2916-2917, 2918-2919.) The jury was not aware that an intentional killing also supported a second degree murder conviction. Shooting Noriega multiple times did not establish willfulness, deliberation, and premeditation. Many intentional killings that are not accompanied by the mental state of willfulness, deliberation, and premeditation, involve the victim being shot. (*E.g., People v.*

McCloud (2012) 211 Cal.App.4th 788, 792; *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1237.)

2. The Murder Conviction Cannot be Affirmed based on the Theory of Felony Murder.

The jury was instructed with the theories of a deliberate killing and felony murder. The jury found true the allegation that Justin committed murder while engaged in the commission of a robbery. (14RT 3022. The flawed murder instruction discussed above impacted whether the jury would have found the killing to be premeditated–and thus first degree murder—or second degree murder because it was an intentional killing without premeditation. Assuming this Court agrees that the jury instructions were flawed for the intentional killing theory, the first degree murder conviction cannot be affirmed based on the felony murder theory because the trial court failed to instruct the jury with the lesser offense of grand theft. (*See* Argument IV.) That argument is incorporated in this portion of the brief and will not be repeated for purpose of brevity.

3. The Judgment must be Reversed Because the Murder Conviction Cannot be Affirmed Based on any Theory Submitted to the Jury

The murder conviction cannot be affirmed based on the theory of a premeditated killing because the trial court's failed to properly instruct the jury for the lesser offense of second degree murder. The murder conviction cannot be affirmed based on the felony murder theory. These were the only two theories of murder properly submitted to the jury. Hence, the judgment of guilt must be reversed.

For the reasons above, the judgment of guilt must be reversed.

VI

JUSTIN'S CONVICTION FOR MURDER (COUNT ONE) MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT PROVOCATION WAS RELEVANT TO WHETHER JUSTIN SHOT NORIEGA WILLFULLY, DELIBERATELY, AND WITH PREMEDITATION, IN VIOLATION OF JUSTIN'S JUSTIN'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION, AND THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

A. SUMMARY OF ARGUMENT

Justin was found guilty of first degree murder. There was evidence that he was provoked to shoot Noriega. The jury was instructed on first degree murder based on the theories of express malice and felony murder. In order for the jury to find Justin guilty of first degree murder based on express malice, it had to find that he shot Noriega willfully, deliberately, and with premeditation. Provocation was relevant to whether Justin shot Noriega willfully, deliberately, and with premeditation, but the jury instructions did not inform the jury of this principle. Justin's conviction for murder must be reversed because this omission from the jury instructions was prejudicial.

B. STANDARD OF REVIEW

Issues pertaining to jury instructions are reviewed de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

C. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

Noriega owned a silver revolver. (6RT 1869.) Noriega sold drugs. (6RT 1868-1969, 1874-1875.) Justin allegedly shot Noriega when they met very late in the evening. During the prosecution case-in-chief, Brown's testimony from the Texas trial was read into the record. Brown testified that it appeared Noriega had brought Justin something. Justin said something to Noriega who opened the trunk of his vehicle. Brown saw a duffle bag. (6RT 1912.) Justin stood next to the door of his truck. He then shot Noriega. (6RT 1913, 1938.)

During Justin's case-in-chief, Detective Silva testified to statements made by Brown when he interviewed her. (13RT 2867-2879.) He testified as follows:

> Q. All right. Did she also tell you that Mr. Thomas and Mr. Noriega were arguing back and forth in some kind of heated argument in the language of Spanish?
>
> A. That's correct.

(13RT 2872.) Noriega's vehicle was found after the incident. A .22 caliber semi-automatic firearm was found under the driver's seat. It had a full magazine and a bullet in the chamber (6RT 1836-1837.) Silva interviewed Justin. During the interview, Silva told Justin that Kelly[41] said he perhaps saw two people shooting at each other. (16CT 4187.)

Justin's summary in Issue V of the discussion of the jury instructions by the attorneys and the trial court, and the instructions, is incorporated in this portion of the argument and will not be repeated for purpose of brevity. During discussion of jury instructions, the defense counsel noted, "One possible interpretation in Dorothy Brown's testimony could be sort of that there was some provocation, there was, Mr. Rafael Noriega, either a drug deal

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[41] The reference to Kelly was to the 17 or 18 year old male who was in the vehicle with Brown and Justin the evening Noriega was shot. (6RT 1910, 1937.)

gone bad, or he pulled a firearm, something like that. There's an insinuation of the statements of Mr. Thomas and Mr. Silva." (13RT 2815.) The jury was not instructed that the prosecution had the burden of proving beyond a reasonable doubt that Justin was not provoked by Noriega.

D. THE REQUIREMENT FOR THE JURY TO BE CORRECTLY INSTRUCTED ON EACH ELEMENT OF AN OFFENSE REQUIRED JUSTIN'S JURY TO BE INSTRUCTED THAT PROVOCATION WAS RELEVANT TO WHETHER JUSTIN SHOT NORIEGA WILLFULLY, DELIBERATELY, AND WITH PREMEDITATION.

Murder is of the first degree when it is "willful, deliberate, and premeditated. . . ." (§189), or when other factors listed in section 189 apply. If none of these factors apply, the offense is, *at most*, second-degree murder. (*Ibid.*) In order to support a finding of first degree murder, "the People bear the burden of proving beyond a reasonable doubt that the killing was the result of premeditation and deliberation . . . ." (*People v. Anderson* (1968) 70 Cal.2d 15, 25.)

Unreasonable heat of passion can reduce first-degree murder to second-degree. In *People v. Valentine* (1946) 28 Cal.2d 121, this Court reversed a first-degree murder conviction because the trial court failed to instruct the jury to consider whether provocation reduced the offense from first- to second-degree murder. *People v. Valentine* explained that provocation insufficient to reduce the murder to manslaughter "may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation." (*Id.* at p. 132; in accord *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1294-1296 [defendant who is subjectively prevented from deliberating because of provocation is guilty of second-degree rather than first-degree murder, even if a reasonable person would not have been so precluded].) The jury in *People v. Valentine* was

instructed that the intent to kill for first degree murder "must be formed upon a pre-existing reflection and not upon a sudden heat of passion sufficient to preclude the idea of deliberation." (*People v. Valentine, supra*, 28 Cal.2d at p. 132.) The court found the language problematic:

> The jury were also instructed (and the idea was emphasized by repetition) that the existence of "adequate provocation" reduces an intentional killing from murder to manslaughter. But they were not advised that the existence of provocation which is not "adequate" to reduce the class of the offense may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation. If they were not impliedly precluded from considering at all the matter of provocation in determining the degree of murder they were at best left to infer its materiality from instructions that to constitute murder of the first degree the intent to kill "must be formed upon a pre-existing reflection and not upon a sudden heat of passion sufficient to preclude the idea of deliberation" and that malice "is implied when no considerable provocation appears."

(*People v. Valentine, supra*, 28 Cal.2d at p. 132.)

Provocation is thus relevant to whether a defendant committed a killing willfully, deliberately and with premeditation and was therefore guilty of first degree murder. CALCRIM No. 522 is the standard instruction explaining this principle. Because provocation is relevant to whether a killing was first or second degree murder, due process requires the giving of jury instructions which clearly inform the jury of the role of provocation, and its absence, in determining whether the defendant killed willfully, deliberately, and with premeditation.

In *Mullaney v. Wilber* (1975) 421 U.S. 684 [95 S.Ct. 1881, 44 L.Ed.2d 508], the defendant was convicted of murder. The defendant claimed that he was provoked to assault the victim because of a homosexual advance. Maine recognized murder and manslaughter as two kinds of homicide. The jury was instructed that if the prosecution proved an

intentional and unlawful killing, malice aforethought was conclusively proven unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion or as the result of provocation.

The Supreme Court reviewed the historical origins of the crime of murder. *(Mullaney v. Wilber, supra*, 421 U.S. at pp. 693-695.) The Court then noted, "this historical review establishes two important points. First, the fact at issue here—the presence or absence of the heat of passion on sudden provocation–has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide. And, second, the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact." (*Mullaney v. Wilber, supra*, 421 U.S. at p. 696.) The Court rooted its analysis of the constitutionality of the Maine homicide statute in the principle articulated in *In re Winship* (1970) 397 U.S. 364 [90 S.Ct. 1068, 25 L.Ed.2d 368] that the prosecution must prove each element of an offense beyond a reasonable doubt. (*Mullaney v. Wilber, supra*, 421 U.S. at pp. 697-700.) The Court noted that "*Winship* is concerned with substance rather than formalism." (*Mullaney v. Wilber*, supra, 421 U.S. at p. 699.)

The prosecution in *Mullaney v. Wilber* argued the homicide statute did not violate the requirement that all elements of a crime be proven beyond a reasonable doubt because the jury was not required to consider the issue of provocation until the jury had already determined that the defendant was guilty and hence was subject to punishment for at least manslaughter. The prosecution "would limit *Winship* to those facts which, if not proved, would wholly exonerate the defendant." (*Mullaney v. Wilber, supra*, 421 U.S. at p. 697.) The Court rejected this argument:

This analysis fails to recognize that the criminal law of Maine,

> like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less "blameworthy," *State v. Lafferty*, 309 A. 2d, at 671, 673 (concurring opinion), they are subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in Winship.

(*Mullaney v. Wilber, supra*, 421 U.S. at pp. 697-698.)

Mullaney v. Wilber also rejected any effort by the state to avoid the command of *In re Winship* by how it defined the elements of a crime: "Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *(Mullaney v. Wilber, supra*, 421 U.S. at p. 698.) The fact that the State was required to prove a negative to convict the defendant of murder–i.e., the absence of provocation—did not alter the analysis. "In this respect, proving that the defendant did not act in the heat of passion on sudden provocation is similar to proving any other element of intent." (*Mullaney v. Wilber, supra*, 421 U.S. at p. 702.) Requiring the state to prove a negative was not unique to the criminal jurisprudence. (*Ibid.*)

Mullaney v. Wilber concluded the absence of provocation was an element of the offense which the prosecution had to prove beyond a reasonable doubt to sustain a murder conviction under the Maine statute. According to this Court's interpretation of section 189 in *People v. Valentine*, provocation could reduce first degree murder to second degree murder. This holding made the absence of provocation an element of the offense of murder

in the same way that the definition of a homicide by the State of Maine made the absence of provocation an element of murder. *Mullaney* dealt with provocation reducing murder to manslaughter. *People v. Valentine* dealt with provocation reducing first degree murder to second degree murder. The issue in each case was identical with the exception of the lesser crime at issue because of provocation.

In *Mullaney v. Wilber*, the instruction correctly described the effect of provocation in distinguishing murder and manslaughter, but erred by placing the burden of proving provocation on the defendant. In Justin's case, the murder instruction failed to address the effect of provocation in distinguishing first- and second- degree murder, and thus of necessity failed to place that burden on the prosecution.

Apprendi v. New Jersey (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], and its progeny support Justin's argument. Justice Thomas explained in his concurring opinion that "a crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). . .. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element." (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 501 (conc. opn. of Thomas, J.).) Justice Kennard likewise explained in her concurring and dissenting opinion in *People v. Martinez* (2003) 31 Cal.4th 673, 707 that, "[t]he elements of a crime are those constituent parts of a crime which must be proved by the prosecution to sustain a conviction." To sustain a conviction for first-degree murder under California law, the prosecution must prove premeditation and deliberation. Under the facts of this case, provocation was inseparable from the concept of willfulness, deliberation, and premeditation.

The terms willfully, deliberately, and premeditation were defined for the jury and

required Justin to intend to kill, to carefully weigh the decision to kill, and decide to kill before doing so. (13RT 2896.) None of these definitions addressed the element of provocation. To the extent a "carefully weighed" choice would be inconsistent with acting as the result of provocation, the remaining instruction allowed the jury to find that Justin killed Noriega with premeditation even if he was provoked and decided to kill in a matter of seconds. The jury was instructed, "a decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time." (13RT 2897.) This instruction did not say anything about the role of provocation for determining whether Justin killed Noriega willfully, deliberately, and with premeditation.

The trial court declined to give voluntary manslaughter instructions because it believed there was insufficient evidence of provocation. (13RT 2815-2816.) This ruling has no impact on the issue before the court. The provocation which reduces first degree murder to second degree murder is not the same provocation which reduces murder to manslaughter. (*People v. Valentine, supra*, 28 Cal.2d at p. 132.)

For voluntary manslaughter, provocation and heat of passion must be affirmatively demonstrated. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) Heat of passion and provocation has a subjective and an objective component. (*People v. Steele, supra*, 27 Cal.4th at p. 1252; *People v. Wickersham* (1982) 32 Cal.3d 307, 326-327.) The sudden quarrel or heat of passion "must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances . . . ." (*People v. Steele, supra*, 27 Cal.4th at p. 1252.) "The passion necessary to constitute heat of passion need not be rage or anger but may be any violent, intense, overwrought or enthusiastic emotion which causes a person to act rashly and without deliberation and reflection." (*People v. Berry*

(1976) 18 Cal.3d 509, 515.) The provocation that incites defendant to homicidal conduct must be caused by the victim, or reasonably believed by the defendant to be caused by the victim. (*People v. Avila, supra,* 46 Cal.4th at p. 705.)

Justin and Noriega had a heated argument prior to the shooting. There was provocation prior to the shooting. The trial court presumably declined to give voluntary manslaughter instructions because it concluded an argument was not sufficient provocation and because of the lack of evidence about how the argument started. (13RT 2820-2821.) Provocation for purpose of voluntary manslaughter is distinct from provocation which reduced first degree murder to voluntary manslaughter. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332 [stating that if the provocation would not cause an average person to experience deadly passion, but it precludes the defendant from subjectively deliberating and premeditating, the crime is second degree murder; if the provocation would cause a reasonable person to react with deadly passion, the crime is manslaughter]; see generally *People v. Beltran* (2013) 56 Cal.4th 935, 946-953 [discussing generally what constitutes provocation for purpose of voluntary manslaughter].) However, provocation was relevant to whether Justin shot Noriega willfully, deliberately, and with premeditation. The factors which the trial court relied upon to refuse to give voluntary manslaughter instructions were not relevant to whether the jury should have been instructed that provocation was relevant to whether Justin shot Noriega willfully, deliberately, and with premeditation.

People v. Valentine held that the jury instructions similar to the instructions given Justin's jury failed to present the issue of provocation to the jury. This Court suggested that the jury was "impliedly precluded from considering provocation because of the language in the instruction that the intent to kill for first degree murder must be formed upon a pre-existing reflection and not upon a sudden heat of passion sufficient to preclude the idea of

deliberation" (*People v. Valentine, supra*, 28 Cal.2d at p. 132.) Hence, the above language "at best left the jury to infer its [i.e., provocation] materiality" (*People v. Valentine, supra*, 28 Cal.2d at p. 132) regarding premeditation and deliberation. The instructions in Justin's case similarly failed to instruct the jury to consider provocation in deciding whether Justin killed Noriega willfully, deliberately, and with premeditation.

CALCRIM No. 522, the standard instruction for provocation, states:

> provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. /P/ If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also consider the provocation in deciding whether the defendant committed murder or manslaughter.] /P [Provocation does not apply to a prosecution under a theory of felony murder].

In *People v. Rogers* (2006) 39 Cal.4th 826, this Court held the instruction that provocation can reduce a homicide from first degree murder to second degree murder was a pinpoint instruction which the trial court did not have a sua sponte duty to give. The defendant had to request the instruction.[42] (*People v. Rogers, supra*, 39 Cal.4th at pp. 878-879.) *People v. Rogers* is not consistent with *Mullaney v. Wilber*. This Court should therefore overrule its holding in *People v. Rogers*. Justin is arguing that provocation was in substance an element of first degree murder and that principle should have been reflected in the jury instructions by the giving of CALCRIM No. 522. The trial court's failure to instruct the jury that provocation was relevant to whether Justin killed Noriega willfully, deliberately, and with premeditation, was statutory and constitutional error.

E. THE ISSUE RAISED HEREIN WAS NOT WAIVED BY THE DEFENSE

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[42] The instruction at issue in *People v. Rogers* was CALJIC No. 8.73. The instruction is now CALCRIM No. 522.

COUNSEL'S FAILURE TO REQUEST THE INSTRUCTION IN THE TRIAL COURT.

The trial defense counsel did not request the trial court to instruct the jury that the prosecution had the burden of proving that Justin did not kill Noriega as the result of provocation in order to find him guilty of first degree murder. A request for the instruction was not necessary for this Court to review the issue raised by Justin. Justin is arguing that lack of provocation is an element of the crime of first degree murder. The trial court has a sua sponte duty to instruct the jury regarding the elements of an offense. (*People v. Flood, supra*, 18 Cal. 4th at p. 480.) This requirement is imposed by federal due process of law. (*Estelle v. McGuire* (1991) 502 U.S. 62, 69 [105 L.Ed.2d 218, 109 S.Ct. 2419] [a defendant has a right under the Fifth and Sixth Amendments to sua sponte instructions correctly defining the elements of the crime].) This sua sponte duty required the trial court to give the jury instruction raised by Justin in this issue.

Furthermore, any prejudicially erroneous jury instruction can be reviewed on appeal despite the lack of an objection, or request for modification, in the trial court. Section 1259 provides as follows:

> The appellate court may . . . 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.

This Court has applied section 1259 to review the correctness of jury instructions, despite the defendant's failure to make an objection in the trial court. (*E.g., People v. Cleveland* (2004) 32 Cal.4th 704, 749; *People v. Hillhouse* (2002) 27 Cal.4th 469, 505-506.) Hence, this Court can review Justin's claim of instructional error.

F. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY REGARDING THE ROLE OF PROVOCATION IN DETERMINING WHETHER JUSTIN SHOT NORIEGA WILLFULLY, DELIBERATELY, AND WITH PREMEDITATION,

VIOLATED HIS FEDERAL CONSTITUTIONAL RIGHTS.

The omission of an element of an offense from a jury instruction violates due process. (*Rose v. Clark* (1986) 478 U.S. 570, 580-581 [92 L.Ed.2d 460, 106 S.Ct. 3101].) Other courts have also reached this conclusion. (*Martinez v. Borg* (9th Cir. 1991) 937 F.2d 422, 423-425 [the trial court's failure to instruct the jury on an element of a crime deprives a defendant of due process because the jury is deprived of "the opportunity to find each element of the crime beyond a reasonable doubt."]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1312, fn. 54.) Furthermore, a defendant has the right to due process of law under Article I, section 15 of the California Constitution. As argued above, the concept of provocation was inseparable from whether Justin shot Noriega willfully, deliberately, and with premeditation. Under the facts of this case, provocation was analogous to an element of an offense. Hence, Justin's right to federal and state due process of law was violated because the trial court failed to instruct the jury that provocation was relevant to whether he committed first degree murder based on express malice. .

The erroneous instruction also violated Justin's right to an accurate jury determination of the facts under the Sixth and Fourteenth Amendments and Article I, section 16, of the California Constitution. (*Ring v. Arizona* (2002) 536 U.S. 584, 536, 122 S.Ct. 2428, 153 L.Ed.2d 556 [the Sixth Amendment required the jury to find the aggravating facts necessary to impose the death penalty]; *United States v. Gaudin* (1995) 515 U.S. 506, 510, [115 S.Ct. 2310, 132 L.Ed.2d 444] [the right to a jury requires the trier of fact to determine the truth of every accusation].) Justin's jury could not have accurately determined whether he was guilty of first degree murder when there was evidence of provocation prior to the shooting and the jury did not know that provocation was relevant to whether Justin acted willfully, deliberately, and with premeditation.

The prohibition against the imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments, and Article I, section 17 of the California Constitution require heightened reliability during the fact finding process in capital cases. (*Beck v. Alabama,* supra, 447 U.S. at p. 632; *People v. Ayala, supra*, 23 Cal.4th at pp. 262-263.) Here, the reliability of the fact finding process was undermined by the jury not understanding the relationship between provocation and first degree murder.

H. PREJUDICE

Because the trial court's failure to properly define the relationship between provocation and first degree murder violated Justin's federal constitutional rights, the judgment of guilt must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The test is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Yates v. Evatt, supra*, 500 U.S. at p. 403.) The error also requires reversal under the more likely than not standard for state law error. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.) This standard requires reversal if there was a reasonable chance, more than an abstract possibility, that the error was prejudicial. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

Justin incorporates the prejudice arguments from Issues I and V in this portion of the brief. The arguments will not be repeated for purpose of brevity. The "heated argument" preceding the shooting was strong evidence that Justin did not premeditate and deliberate the killing of Noriega. Because the jury was not instructed that provocation was relevant to whether Justin shot Noriega willfully, deliberately, and with premeditation, the jury did not understand that provocation could have reduced the crime to second degree murder. The observation in *People v. Valentine*, that the premeditation and deliberation instructions impliedly precluded the jury from considering provocation in determining the degree of

murder, applies to Justin's case. (*People v. Valentine, supra*, 28 Cal.4th at p. 132.) There was nothing in the jury instructions that addressed the issue of provocation despite evidence Justin shot Noriega in reaction to provocation. For the reasons in Issue IX, the first degree murder conviction cannot be affirmed based on the felony murder theory. Hence, the judgment of guilt must be reversed.

VII

JUSTIN'S CONVICTION OF MURDER (COUNT ONE) MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO GIVE JURY INSTRUCTIONS FOR: (1) SELF-DEFENSE; (2) VOLUNTARY MANSLAUGHTER BASED ON HEAT OF PASSION; AND (3) VOLUNTARY MANSLAUGHTER BASED ON UNREASONABLE SELF-DEFENSE, IN VIOLATION OF JUSTIN'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION, AND THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION

A. SUMMARY OF ARGUMENT

Noriega was a known drug dealer who had a firearm either on his person or in his vehicle when he was killed. A heated argument preceded the shooting. The defense counsel requested the trial court to instruct the jury with jury instructions for self-defense, voluntary manslaughter based on heat of passion, and voluntary manslaughter based on unreasonable self-defense. The trial court refused to give these instructions. The trial court erred by refusing to give these instructions. The evidence raised a question of fact whether Justin shot Noriega because Justin acted in reasonable, or unreasonable, self defense or because of provocation. Because the trial court's failure to give any of these instructions was prejudicial, the judgment of guilt must be reversed.

B. STANDARD OF REVIEW

Issues pertaining to jury instructions are reviewed de novo. (*People v. Guiuan, supra*, 18 Cal.4th at p. 569.)

C. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

The Summary of Proceedings from Issue V is incorporated in this portion of the brief. Noriega was a drug dealer who was known to be armed. (6RT 1568-1869, 1874-1875.) A firearm with a full magazine, and a bullet in the chamber, was found in Noriega's vehicle. (6RT 1836-1837.) Dorothy Brown told Detective Silva she heard a heated argument between Justin and Noriega prior to hearing shots. (13RT 2872.) The trial court and the attorneys discussed CALCRIM Nos. 505, 570, and 571. CALCRIM No. 505 is the instruction for self-defense to a homicide. CALCRIM No. 570 is the instruction for voluntary manslaughter based on heat of passion. CALCRIM No. 571 is the instruction for imperfect self-defense. The trial defense attorney requested that all three instructions be given. (13RT 2820.) The trial court refused to give any of these instructions because it did not see evidence to support them. (13RT 2820-2821.)

D. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY WITH THE SELF-DEFENSE INSTRUCTION IN CALCRIM NO. 505.

1. There was Sufficient Evidence Justin Acted in Self-Defense to Warrant Giving Self-Defense Instructions.

CALCRIM No. 505 is the instruction for self-defense to a homicide. A defendant is entitled to have the court instruct on a defense theory if it is supported by substantial evidence. (*People v. Wickersham* (1982) 32 Cal.3d 307, 324.) Substantial evidence

warranting a jury instruction means "evidence from which a jury composed of reasonable men could have concluded that the particular facts underlying the instruction did exist." (*People v. Wickersham, supra*, 32 Cal.3d at p. 324.)

The testimony of one witness constitutes substantial evidence to warrant a requested instruction. (*People v. Lemus* (1988) 203 Cal.App.3d 470, 477, citing Witkin, *Cal.Procedure* (2d ed. 1971) Appeal, Sec. 248, p. 4240.) In deciding whether there is substantial evidence to support a requested instruction, the trial court may not determine the credibility of witnesses. (*People v. Wickersham, supra*, 32 Cal.3d at p. 324.) All doubts as to the sufficiency of the evidence must be resolved in favor of the accused. (*People v. Flannel, supra*, 25 Cal.3d at p. 685.)

An individual must fear imminent harm in order to use deadly force in self-defense. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Although the belief in the need to defend must be objectively reasonable, the trier of fact must consider what "would appear to be necessary to a reasonable person in a similar situation with similar knowledge." (*People v. Humphrey, supra*, 13 Cal.4th at pp. 1082-1083.) Under CALCRIM No. 505, a defendant has the right to use deadly force in self defense when: (1) the defendant reasonably believed he was in imminent danger of being killed or suffering great bodily injury; (2) the defendant reasonably believed that the immediate use of force was necessary to defend against that danger; and (3) the defendant used no more force than was reasonably necessary to defend against that danger. Issues of self-defense, including whether the circumstances

would cause a reasonable person to perceive the necessity of defense, whether the defendant actually in the belief in the need to use force, and whether the force used was excessive, are questions of fact for the jury. (*People v. Davis* (1965) 63 Cal.2d 648, 655.)

There was sufficient evidence Justin acted in self-defense to warrant giving CALCRIM No. 505. The use of firearms by drug dealers is well known. (*People v. Bradford* (1995) 38 Cal. App. 4th 1733, 1739 [it is common knowledge that perpetrators of narcotics offenses keep weapons available to guard their contraband].) "Drug dealers are known to keep guns to protect not only themselves, but also their drugs and drug proceeds; ready access to a gun is often crucial to a drug dealer's commercial success." (*People v. Bland* (1995) 10 Cal. 4th 991, 1005.)

The sequence of events leading up to the shooting was not entirely clear. Brown had a limited view of the incident. However, all doubts as to the sufficiency of the evidence to warrant giving a jury instruction must be resolved in favor of the accused. (*People v. Flannel, supra*, 25 Cal.3d at p. 685.) Noriega had a firearm either in his possession or in his vehicle. (6RT 1836-1837.) Because drug dealers are commonly known to be armed (*People v. Bradford, supra*, 38 Cal.App.4th at p. 1739), Justin was likely aware of that fact. Noriega and Justin were engaged in a heated argument prior to shots being fired. Noriega and Justin knew each other prior to the shooting. (9RT 2358 [Exhibit 149—the audio recording of appellant's interview by Detective Silva was played for the jury]; 16CT 1457 [Exhibit 49B--the transcript of Justin's statement to Detective Silva].) It was unlikely Justin simply shot Noriega this particular evening without any provocation or cause. It was reasonable to infer

Justin shot Noriega for some reason other than he simply chose that evening to kill someone. Because Noriega was a known drug dealer who had a firearm accessible to him while engaged in a heated argument with Justin, there was sufficient evidence to raise a question of fact whether Justin shot Noriega in self-defense.

Justin did not testify during the guilt phase of the trial. Justin's out-of-court statement to Detective Silva was admitted into evidence when Silva testified. (9RT 2358-2360; 16 CT 4154-4220.) Justin denied any role in Noriega's death in his statement. (16CT 4197, 4203 [Exhibit 149B–the transcript of Justin's statement to Detective Silva].) The trial court was still required to give a self-defense instruction despite Justin's denial of having played any role in Noriega's death. Regardless of whether the defendant testifies, an instruction on a defense must be given even if the only supporting evidence is circumstantial. (*People v. Anderson* (1983) 144 Cal.App.3d 55, 61-62.) The issue of whether there was sufficient evidence to warrant giving a self-defense instruction must be based on both the prosecution and defense evidence. The prosecution evidence established that Noriega was armed during the encounter with Justin. A firearm was found in his vehicle. (6RT 1836-1837.) Noriega and Justin had a heated argument immediately prior to the shooting. (13RT 2871-2873.) Assuming the jury believed Justin shot Noriega, the combination of the prosecution and defense evidence, and the circumstantial evidence, suggested that he acted in self-defense. The trial court should have given Justin the benefit of any doubt and given a self-defense instruction.

2. The Trial Court's Failure to Give CALCRIM No. 505 Violated Justin's Federal and State Constitutional Rights.

The trial court's failure to give a self-defense instruction violated Justin's federal constitutional rights and his corresponding rights under the California Constitution. (*People v. Flood* (1998) 18 Cal.4th 470, 499 [instructional errors–whether misdescriptions, omissions, or presumptions - as a general matter fall within the broad category of trial errors subject to Chapman review on direct appeal]; *cf. Martin v. Ohio* (1987) 480 U.S. 228, 232-233 [107 S.Ct. 1098, 94 L.Ed.2d 267] [stating due process would be violated by jury instructions which told the jury that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case].)

The trial court's failure to give CALCRIM No. 505 prevented the jury from having any basis to determine whether Justin acted in self-defense and therefore violated his right to federal due process of law and right to due process of law under Article I, section 15 of the California Constitution. It also violated Justin's right to a jury determination of the facts under the Sixth and Fourteenth Amendments and Article I, section 16 of the California Constitution and the prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments.

Justin's right to a jury trial required the trier of fact to determine the truth of every accusation. (*United States v. Gaudin, supra*, 515 U.S. at p. 510.) Justin's jury obviously could not have determined if he acted in self-defense if they were not given jury instructions for that defense. The Eighth and Fourteenth Amendments, and Article I, section 17 of the California Constitution, require heightened reliability in the fact finding process in a capital prosecution. (*Beck v. Alabama,* supra, 447 U.S. at p. 632; *People v. Ayala, supra*, 23 Cal.4th at pp. 262-263.) Justin's jury did not return a reliable verdict because it failed to evaluate a

crucial defense which was raised by the evidence.

E. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY WITH VOLUNTARY MANSLAUGHTER BASED ON HEAT OF PASSION IN CALCRIM NO. 570.

Justin was charged with murder. Voluntary manslaughter based on heat of passion is a lesser included offense of murder. (*People Breverman* (1998) 19 Cal.4th 142, 154.) The trial court has a duty to instruct the jury on a lesser included offense "when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged." (*People v. Breverman , supra,* 19 Cal.4th at pp. 154-155.) The trial court should instruct the jury on "lesser included offenses that find substantial support in the evidence." (*Id.*, at p. 162.) Substantial evidence is evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*Ibid.*)

Voluntary manslaughter is the unlawful killing of a human being "upon a sudden quarrel or heat of passion." (Pen. Code, §192, subd. (a).) Provocation and heat of passion must be affirmatively demonstrated. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252; *People v. Sedeno* (1974) 10 Cal.3d 703, 719.) Provocation is the factor which distinguishes manslaughter from murder. (*People v. Avila* (2009) 46 Cal.4th 680, 705.) CALCRIM No. 570 is the standard instruction for voluntary manslaughter based on heat of passion.

The heat of passion required for voluntary manslaughter has a subjective and an objective component. (*People v. Steele, supra*, 27 Cal.4th at p. 1252; *People v. Wickersham* (1982) 32 Cal.3d 307, 326-327.) The defendant must actually kill under a heat of passion or as the result of a sudden quarrel. (See *People v. Wickersham, supra*, 32 Cal.3d at p. 327.)

However, the sudden quarrel or heat of passion "must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances . . . ." (*People v. Steele, supra*, 27 Cal.4th at p. 1252.) The reason is that "no defendant may set up his own standard of conduct and justify or excuse himself because his passions were aroused, unless further the jury believe the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man." (*Ibid.*, quoting *People v. Logan* (1917) 175 Cal.45, 49.) "The passion necessary to constitute heat of passion need not be rage or anger but may be any violent, intense, overwrought or enthusiastic emotion which causes a person to act rashly and without deliberation and reflection." (*People v. Berry* (1976) 18 Cal.3d 509, 515.) The provocation can occur in a single occasion. (*Id.*, at pp. 515-516.) No specific provocation is required. (*People v. Berry, supra*, 18 Cal.3d at p. 515; *People v. Valentine* (1946) 28 Cal.2d 121, 141-144.) The victim must taunt the defendant or otherwise initiate the provocation. (*People v. Spurlin* (1984) 156 Cal.App.4th 119, 126.) If sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder and not manslaughter. (*Ibid.*) The sufficiency of provocation to reduce murder to manslaughter, and whether the defendant acted pursuant to that provocation, are questions of fact for the jury. (*People v. Thomas* (1945) 25 Cal.2d 880, 894.)

This Court recently discussed the standard for provocation to reduce murder to manslaughter in *People v. Beltran* (2013) 56 Cal.4th 935. The defendant was convicted of second degree murder for stabbing his former girlfriend to death. The defense theory was that the defendant killed his girlfriend in the heat of passion after learning she had an abortion. The Court of Appeal reversed the defendant's conviction because it believed the voluntary

manslaughter instruction was prejudicially erroneous. The Attorney General argued on appeal the proper standard for voluntary manslaughter was whether the provocation would cause a person of average disposition to be moved to kill. This Court reviewed the common law development of voluntary manslaughter. (*People v. Beltran, supra*, 56 Cal.4th at pp. 946-948.) This Court stressed the role of the jury in deciding what constituted adequate provocation:

> Besides the consideration that the question is essentially one of fact, jurors, from the mode of their selection, coming from the various classes and occupations of society, and conversant with the practical affairs of life, are ... much better qualified to judge of the sufficiency and tendency of a given provocation, and much more likely to fix, with some degree of accuracy, the standard of what constitutes the average of ordinary human nature, than the judge whose habits and course of life give him much less experience of the workings of passion in the actual conflicts of life.

(*People v. Beltran, supra*, 56 Cal.4th at p. 948, quoting *Maher v. People* (Mich. S.Ct. 1862) 10 Mich. 212, 222.)

People v. Valentine had concluded the common law limitation that words alone could not constitute provocation had been repealed with the enactment of section 192, subdivision (a), and the Legislature had adopted a more liberal rule for what constituted provocation. (*People v. Valentine, supra*, 28 Cal.2d at p. 143.) *People v. Valentine* affirmed the standard for provocation adopted in *People v. Logan*. (*Ibid.*) Based on *People v. Valentine* and *People v. Logan*, this Court in *People v. Beltran* concluded the Attorney General's position was inconsistent with those decisions:

> Adopting a standard requiring such provocation that the ordinary person of average disposition would be moved to kill focuses on

> the wrong thing. The proper focus is placed on the defendant's state of mind, not on his particular act. To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply react, without reflection. To satisfy *Logan*, the anger or other passion must be so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene. Framed another way, provocation is not evaluated by whether the average person would act in a certain way: to kill. Instead, the question is whether the average person would react in a certain way: with his reason and judgment obscured.

(*People v. Beltran, supra*, 56 Cal.4th at p. 949.)

People v. Beltran has two important holdings relevant to whether the trial court should have given a voluntary manslaughter instruction. The first is that the jury is better suited to decide what constitutes provocation than the trial court. Noriega and Justin were obviously engaged in a heated discussion in which Noriega had a firearm accessible to him. The trial court should have allowed the jury to decide whether Justin shot Noriega as the result of provocation. The lack of clarity regarding exactly how the shouting match got started did not vitiate Justin's right to voluntary manslaughter instructions.

The second point from *People v. Beltran* is that the provocation was adequate to warrant voluntary manslaughter instructions if an ordinary person would be moved to react harshly. It was not necessary to show that the provocation would cause an ordinary person to kill, but merely to react without reflection. An ordinary person would react without reflection if he was being yelled at in a heated manner by an armed drug dealer.

Justin did not testify during the guilt phase of the trial. He denied any involvement in Noriega's death when he was interviewed by Silva. ((9RT 2358 [Exhibit 149—the audio recording of appellant's interview by Detective Silva was played for the jury]; 16CT 4197,

4203 [Exhibit 149B–the transcript of Justin's interview by Silva].) However, there was still sufficient evidence he acted in the heat of passion. The theory Justin shot Noriega as the result of heat of passion, was an alternative theory supported by substantial evidence. Justin's denial of involvement in the shooting did not preclude the jury from finding that Justin did shoot Noriega, but did so as the result of the heat of passion. The trial court has a duty to instruct on lesser included offenses raised by the evidence even though the lesser offense is inconsistent with the defendant's defense. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1345.) Voluntary manslaughter based on heat of passion was a lesser offense which was inconsistent with Justin's defense at trial, but was supported by substantial evidence.

For the reasons above, the trial court erred by failing to give a voluntary manslaughter instruction.

F. THE TRIAL COURT ERRED BY FAILING TO GIVE THE UNREASONABLE SELF-DEFENSE INSTRUCTION IN CALCRIM NO. 571.

A killing in the actual but unreasonable belief in the need for self-defense is a form of voluntary manslaughter and a lesser included offense of murder. (*People v. Beltran, supra*, 56 Cal.4th at p. 952.) "A killing in imperfect self-defense constitutes, by definition, unreasonable conduct because the belief in the need to defend is not reasonable. The killing is nevertheless mitigated because of the defendant's misguided but good faith belief." (*People v. Beltran, supra*, 56 Cal.4th at p. 952.)

CALCRIM No. 571 is the instruction for voluntary manslaughter based on unreasonable belief in the need for self-defense. It states that a defendant acted in imperfect self-defense if: (1) the defendant actually believed that he was in imminent danger of being

killed or suffering great bodily injury; (2) the defendant actually believed that the immediate use of deadly force was necessary to defend against the danger, but (3) at least one of those beliefs was unreasonable. The instruction further provides that: (1) the defendant's belief in future harm is not sufficient; and (2) in evaluating the defendant's beliefs, the jury should consider all the circumstances as they were known to the defendant.

Justin argued above that there was sufficient evidence to warrant giving a self-defense instruction. Justice Johnson, in a concurring opinion in *People v. Ceja* (1994) 26 Cal.App.4th 78, 88-89 [43](Johnson, J., concurring), stated, "if there is sufficient evidence of all the elements required to justify a perfect self-defense instruction, by definition there is sufficient evidence supporting an instruction for the lesser included defense of imperfect self-defense." *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1262, also reached this conclusion. (*But see People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1231-1232.) Courts from other states have also concluded that the giving of self-defense instructions necessarily meant there was sufficient evidence to give imperfect self defense instructions. (*E.g., State v. Cruz* (Ct. App. N.C. 2010) 203 N.C. App. 230, 242; *State v. Low* (S.Ct. Ut., 2008) 2008 UT 58, P32; *State v. Ganez* (1987) 141 Wis.2d 302 414 N.W.2d 626, 630]; *People v. Lockett* (1980) 82 Ill. 546 -413 N.E.2d 378, 381]; *Faulkner v. State* (1983) Md. App. 113 [458 A.2d 81, 84, fn. 5].) Because there was sufficient evidence to warrant giving self -defense instructions, there was sufficient evidence to give imperfect self-defense instructions.

There was sufficient evidence to warrant giving imperfect self-defense instructions

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[43] *People v. Ceja* was disapproved of on another point in *People v. Blakely* (2000) 23 Cal.4th 82, 91-92.

regardless of whether self-defense instructions should have been given. Justin denied having any role in Noriega's death when he was interviewed by Detective Silva. (16CT 4197, 4203.) "Substantial evidence of a defendant's state of mind, including an honest but unreasonable belief in the necessity to defend against imminent peril to life . . . may be present without defendant's testimony." (*People v. De Leon* (1992) 10 Cal.App.4th 815, 824.) With or without a defendant's testimony, an instruction on a defense must be given even if the only supporting evidence is circumstantial. (*People v. Anderson* (1983) 144 Cal.App.3d 55, 61-62.)

It was a logical inference that Justin must have shot Noriega for some reason. The prosecution theory was that Justin killed Noriega to prevent him from reporting Justin to the police. (13RT 2905.) The jury was not required to accept this theory. The jury could have concluded that Justin shot Noriega when he was provoked by him during the argument. Testimony from Justin about why he shot Noriega was not necessary to raise a question of fact whether he did so because of an unreasonable belief in the need to defend himself when there was evidence: (1) Noriega was an armed drug dealer; (2) drug dealers commonly use weapons as a tool of their trade; (3) Justin and Noriega engaged in a heated argument prior to the shooting; and (4) Justin's motive to shoot Noriega was conflicting and ambiguous.

People v. Barton (1995) 12 Cal.4th 186, demonstrates the trial court erred by not giving CALJIC 5.17 in this case. In *People v. Barton*, the defendant's 20-year-old daughter named Andrea had an unpleasant encounter with an individual named Marco Sanchez.

Andrea drove to the defendant's real estate business and told him about the incident. The defendant had a permit to carry a concealed weapon for business purposes. The defendant and Andrea drove to a nearby shopping center where they found Sanchez. Sanchez and the defendant argued. Sanchez walked to his car and entered it. The defendant assumed a police stance next to Sanchez's vehicle and told him to get out and drop the knife. *(People v. Barton, supra*, 12 Cal.4th at p. 192.) The police did not find a knife in Sanchez's vehicle, but did find a screwdriver. Some witnesses stated that Sanchez made a sudden movement before the defendant fatally shot him. The defense theory was that the shooting was an accident.

Over defense objection, the trial court instructed the jury on voluntary manslaughter based on the theories of sudden quarrel or heat of passion and unreasonable self-defense. The defendant was convicted of voluntary manslaughter. The defense argued on appeal that the trial court erred by giving voluntary manslaughter instructions because there was no evidence of sudden quarrel or unreasonable self-defense. The court rejected this argument because "[b]ased on all the evidence, the jury could reasonably conclude that Sanchez was unarmed, but that defendant, his judgment clouded by his anger, unreasonably believed that Sanchez was armed and trying to attack him, and that defendant deliberately fired his gun in response to this perceived threat." (*People v. Barton, supra,* 12 Cal.4th at p. 202.)

The record in Justin's case does not establish what happened prior to the shooting with the same precision as the record in *People v. Barton*. Nevertheless, *People v. Barton*

demonstrates why an unreasonable self-defense instruction should have been given. The victim in *People v. Barton* had a weapon available to him which was the screwdriver. Noriega had a weapon available to him which was a firearm. In *People v. Barton*, the defendant and the victim argued prior to the shooting. Justin and Noriega argued prior to the shooting. It was a reasonable inference that Justin shot Noriega in response to a perceived threat even though that belief may have been unreasonable.

G. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY WITH CALCRIM NOS. 570 AND 571 VIOLATED JUSTIN'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS

Voluntary manslaughter based on heat of passion and unreasonable self-defense are lesser included offenses of murder. (*People v. Beltran, supra*, 56 Cal.4th at pp. 942, 952.) A trial court violates a defendant's federal and state right to due process of law by refusing to give jury instructions for lesser included offenses raised by the evidence. (*Beck v. Alabama, supra*, 447 U.S. at pp. 632-635; Cal. Const., Art. I, §15.) Because the evidence raised a question of Justin's guilt of voluntary manslaughter based on the heat of passion and unreasonable self-defense, the trial court violated Justin's federal and state constitutional rights to due process of law.

Justin's right to a jury trial required the trier of fact to determine the truth of every accusation. (*United States v. Gaudin, supra*, 515 U.S. at p. 510.) Justin's jury could not have determined if he killed Noriega in the heat of passion or because of unreasonable belief in the need to defend himself, if jury instructions were not given for those defenses. The Eighth

and Fourteenth Amendments, and Article I, section 17 of the California Constitution, require heightened reliability in the fact finding process in a capital prosecution. (*Beck v. Alabama,* supra, 447 U.S. at p. 632; *People v. Ayala, supra,* 23 Cal.4th at pp. 262-263.) Justin's jury did not return a reliable verdict, or determine the truth of every factual issue in dispute, because it was not given the opportunity to decide whether Justin killed Noriega in the heat of passion or because of an unreasonable belief that he needed to defend himself.

H. PREJUDICE

Because the trial court's failure to instruct the jury with self-defense, voluntary manslaughter based on heat of passion, and voluntary manslaughter based on unreasonable self-defense, violated Justin's federal constitutional rights, the judgment of guilt must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The test is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Yates v. Evatt, supra,* 500 U.S. at p. 403.) The error also requires reversal if there was a reasonable chance it was prejudicial. (*People v. Wilkins, supra,* 56 Cal.4th at p. 351.)

1. The Trial Court's Failure to Instruct the Jury with CALCRIM Nos. 505 and 571 was not Harmless Beyond a Reasonable Doubt.

The trial court's refusal to give CALCRIM No. 505 deprived the jury of an opportunity to determine whether Justin acted in self-defense when he shot Noriega. The circumstantial evidence suggested Justin acted in self-defense. Noriega had a firearm

accessible to him and may have had it on his person. (6RT 1869, 1836-1837.) Justin shot Noriega during a heated argument. (13RT 2871-2873.) Brown did not see enough of the incident to establish that Justin did not act in self-defense when he shot Noriega. In order for Noriega to have been shot in self-defense, Justin: (1) had to reasonably believe he was in imminent danger of being killed or suffering great bodily injury; (2) had to reasonably believe the immediate use of deadly force was necessary to defend against the danger; and (3) had to use no more force than was reasonably necessary. (CALCRIM No. 505.) Justin had a reasonable belief that he was in imminent danger of suffering death or great bodily injury because he was involved in a heated argument with a drug dealer who was either armed or had a readily accessible firearm. Shooting Noriega was "using no more force than reasonably necessary," (CALCRIM No. 505, para. 3), because the evidence suggested Noriega was an armed threat to Justin.

The failure to give jury instructions can be found harmless when the factual issue presented by the omitted instruction was resolved adversely to the defendant under the trial court's remaining instructions. (*People v. Flood* (1998) 18 Cal.4th 470, 484.) The jury instructions for premeditated murder required the jury to determine whether Justin intentionally shot and intended to kill him when he did so. (13RT 2895-2897.) The jury was instructed that, "a cold calculated decision to kill can be reached quickly." (13RT 2897.) Assuming the jury concluded that Justin shot Noriega, it was not remarkable the jury found him guilty of murder notwithstanding evidence that he acted in self-defense. The murder

instructions did not require the jury to making any finding, or reach any conclusion, about whether Justin shot Noriega in self-defense.

The trial court's failure to instruct the jury with CALCRIM No. 571, the imperfect self-defense instruction, was also not harmless beyond a reasonable doubt. Under CALCRIM No. 571, Justin's shooting of Noriega was reduced to voluntary manslaughter if: (1) he believed that he was in imminent danger of being killed or suffering great bodily injury; (2) he actually believed the immediate use of force was necessary to defend against that danger; and (3) one of those beliefs was unreasonable. The same facts which suggested that Justin acted in actual self-defense also suggests that the first two prongs of unreasonable self-defense were established. Brown did not see whether Noriega made any threatening moves towards Justin. It was a question of fact for the jury whether Justin's belief that he needed to shoot Noriega to defend himself was unreasonable. Hence, the trial court's failure to give CALCRIM No. 571 was not harmless beyond a reasonable doubt.

2. The Trial Court's Failure to Give CALCRIM No. 570 was not Harmless Beyond a Reasonable Doubt.

Under CALCRIM No. 570, Justin's shooting of Noriega was reduced to voluntary manslaughter if: (1) he was provoked; (2) he acted rashly because of the provocation and under the influence of the emotion caused by the provocation; and (3) the provocation would have caused a person of average disposition to act rashly and without due deliberation. There was strong evidence Justin shot Noriega in the heat of passion. It was a reasonable inference

that Justin would have shot Noriega prior to the argument if he had always intended to shoot him. The evidence thus suggested that Justin shot Noriega because of the argument. Words alone were sufficient to constitute provocation to reduce the killing from murder to manslaughter. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1147; *People v. Moye* (2009) 47 Cal.4th 537, 550.) There was no direct evidence regarding the topic of the conversation. However, it was likely the conversation was about narcotics dealing because Noriega and Justin were in the drug trade together. Noriega was a drug dealer with a firearm either on his person or accessible to him. Assuming Justin did not shoot Noriega in valid self-defense, he clearly acted rashly by shooting Noriega. An average person would have acted rashly if he was in a heated argument with a drug dealer who likely was armed or had a firearm immediately accessible.

The issue of whether Justin shot Noriega as the result of provocation was not resolved under the trial court's remaining instructions. The murder instructions only required the jury to determine whether Justin intentionally shot Noriega. A shooting in the heat of passion is an intentional shooting. Because the jury was instructed "a cold calculated decision to kill can be reached quickly," (13RT 2897), and still constitute premeditated murder, the first degree murder conviction did not exclude the possibility that Justin killed Noriega by making a rash decision as the result of provocation.

3. The First Degree Murder Conviction Cannot be Affirmed Based on the Theory of Felony-Murder

The jury was given a single verdict form for murder. (17CT 4369.) The jury was given instructions for premeditated murder and felony murder. Based on the verdict form it is not possible to determine whether the jury found Justin guilty of first degree murder based on a theory of premeditation or felony murder. The first degree murder conviction cannot be affirmed based on the felony murder theory for the reasons set forth in Issue IX. Furthermore, if there was sufficient evidence to warrant giving CALCRIM Nos. 505, 570, and 571, then it was an issue of fact for the jury whether Justin shot Noriega to perpetrate a robbery or because he needed to either reasonably or unreasonably defend himself or acted because of provocation.

For the reasons above, the judgment of guilt must be reversed.

VIII

THE JUDGMENT OF GUILT MUST BE REVERSED BECAUSE JUSTIN WAS FORCED TO WAIVE HIS PRO-PER STATUS BECAUSE THE TRIAL COURT REFUSED TO PROVIDE ADEQUATE FUNDING TO HIS DEFENSE IN VIOLATION OF JUSTIN'S RIGHT TO REPRESENT HIMSELF UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATE CONSTITUTION, AND ARTICLE I, SECTION 15, OF THE CALIFORNIA CONSTITUTION, AND THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENT, AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION.

A. SUMMARY OF ARGUMENT

Justin waived his right to counsel and represented himself for several months before requesting reappointment of counsel on July 13, 2007. (2RTP 355.) When Justin was pro-per, he submitted several funding requests to the trial court which were either denied or only partially granted. Justin waived his pro-per status and elected to be represented by counsel because of the difficulty of obtaining adequate funding. Justin was denied his right to self-representation under the Sixth and Fourteenth Amendments and Article I, section 15, of the California Constitution. Because this error was prejudicial per se, the judgment of guilt must be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

1. Justin's Request for Self-Representation.

At the commencement of the hearing held on February 21, 2007, attorney Exum

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B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

1. Justin's Request for Self-Representation.

At the commencement of the hearing held on February 21, 2007, attorney Exum

informed the trial court that Justin wanted to represent himself and also file a Marsden[44] motion. (1RTP 123.) Justin filed documents for both requests. The Marsden motion was under seal. (1RTP 128.) The trial court determined in a sealed hearing that Justin wanted to represent himself. (1RTP 130-133.) The proceedings resumed in open court. (1RTP 135.) Justin stated that he believed his case was not being adequately funded and he believed he could fix that problem. (1RTP 145.) The trial court granted Justin's request to represent himself. (1RTP 164.)

2. Justin's Funding Requests.

The following is a summary of Justin's requests for funding while he was pro-per which were denied in whole or in part:[45]

- On March 29, 2007, Justin requested up to $18,000 to pay for investigator Jerry Monahan at a rate of $30 per hour. (1Conf. CST 202-204.) The motion set forth the various tasks Justin anticipated that Monahan would perform. (1Conf. CST 202-203.) On April 18, 2007, the pay judge denied the request because he believed it was too broad and certain expenses were not necessary for trial. (1Conf. CST 208.) There was no additional explanation for why the request was denied.

- During a hearing on April 30, 2007, Justin requested phone card privileges to be

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[44] *People v. Marsden* (1970) 2 Cal.3d 118.

[45] On April 3, 2007, the trial court authorized $2,500 for investigation services. (1Conf. CST 192-193.)

able to communicate with his investigator. (2RTP 270.) The trial court denied the request. (2RTP 273.)

• On May 4, 2007, Justin requested additional funds to pay for investigation and trial preparation. (2Conf. CST 319-341.) The motion requested $2,500 for Monahan to provide trial preparation support such as research. It requested $7,500 for Monahan to pay for witness interviews and crime scene investigation. (1Conf. CST 329.) The motion was supported by a declaration signed by Monahan stating the investigation he intended to conduct. (2Conf. CST 342-344.) .

• On May 9, 2007, Justin requested $480.50 to pay for legal research materials. (1Conf. CST 231-233.) The trial court approved only $323.90 of the request. (1Conf. CST 234.) During the hearing on May 10, 2007, Justin complained that he did not have adequate funding for legal research. (2RTP 329-330.)

•On May 13, 2007, Justin requested $4,200 to pay for witness investigation and preparation. He also requested $350 to pay for copying and legal research expenses. (1Conf. CST 94-97.) One purpose of the funding request was to locate alibi witnesses from Justin's military service for the guilt phase of the trial. (1Conf. CST 101.) Justin also wanted to contact former coaches and teachers.[46] (1Conf. CST 101.) On June 14, 2007, the request was denied because, "It seems that the defendant's military records can establish exactly where he was stationed in 1992 and 1993 , so you don't need any witnesses." (1Conf. CST 103.)

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[46] The motion does not specifically state the purpose of contacting former coaches and teachers. Presumably, they would have been mitigation witnesses.

The order did not make any reference to coaches, teachers, or specific military personnel. (1Conf. CST 103.)

• On May 25, 2007, the trial court authorized $323.90 to be spent for legal books and investigation services. (1Conf. CST 234.)

3. Justin's Request for Appointment of Counsel.

During the hearing on July 13, 2007, appellant requested the appointment of counsel. (2RTP 355.) Justin's basis for requesting counsel was the following: (1) he had filed a peremptory challenge under Code of Civil Procedure section 170.6 to remove Judge Zellerbach from the case; (2) Judge Zellerbach was participating in the section 987.9 panel; and (3) Justin believed that he could not receive a fair hearing for his funding request. (2RTP 356.) The trial court told Justin that it would make sure the proper people heard his request for funding and he should not give up his pro-per status because of some perceived violation of the law. Justin stated that it was in his best interest to be represented by counsel. (2RTP 357.) The trial court appointed counsel. (2RTP 358-359.)

The jury returned the guilt phase verdict on December 6, 2007. (14RT 3023-3024.) On December 10, 2007, the jury found the Texas prior conviction allegation to be true. (14RT 3087-3088.) Shortly thereafter, Justin requested to represent himself. (14RT 3090-3091.) Justin stated that the only reason he withdrew his prior pro-per status was because of the difficulty of obtaining funding. (14RT 3095.) The trial court the request. (14RT 3103.)

C. THE RIGHT OF AN INDIGENT DEFENDANT TO ANCILLARY SERVICES NECESSARY TO PRESENT A PROPER DEFENSE

The right to counsel may be waived by a defendant who wishes to represent himself or herself at trial. (*Faretta v. California* (1975) 422 U.S. 806, 815-816 [95 S.Ct. 2525, 45 L.Ed.2d 562].) *Faretta v. California* acknowledged "The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." (*Faretta v. California, supra*, 422 U.S. at p. 834.)

Section 987.9, subdivision (a), provides in part, "In the trial of a capital case . . . the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense." The right to the funding of ancillary services arises when the defendant demonstrates such funds are reasonably necessary for the defense. (*People v. Blair* (2005) 36 Cal.4th 686, 733.) The right to funding under section 987.9 applies to pro-per defendants. (*People v. Blair, supra*, 36 Cal.4th at p. 733.) A pro-per defendant is entitled to funding on parity with the funding provided to a defendant represented by counsel. (*People v. Blair*, supra, 36 Cal.4th at p. 733; *People v. Faxel* (1979) 91 Cal.App.3d 327, 330-331.)

An indigent defendant who is representing himself has the right to funding for ancillary services under the Sixth and Fourteenth Amendments. (*People v. Blair, supra*, 36 Cal.4th at pp. 733-734; *People v. Jenkins* (2000) 22 Cal.4th 900, 1040.) "Depriving a self-represented defendant of all means of presenting a defense violates the right of self-

representation." (*People v. Blair, supra*, 36 Cal.4th at p. 733.) "A defendant who is representing himself or herself many not be placed in the position of presenting a defense without access to a telephone, law library, runner, investigator, advisory counsel, or any other means of developing a defense." (*People v. Jenkins, supra*, 22 Cal.4th at p. 1040; *People v. Moore* (2011) 51 Cal.4th 1104, 1124.) The United States Court has recognized that due process, and equal protection under the law, guarantee a criminal defendant the right to the basic tools essential to present a defense. *(Ake v. Oklahoma* (1985) 470 U.S. 68, 76-85 [105 S.Ct. 1087, 84 L.Ed.2d 53] [recognizing the right of an indigent defendant to the appointment of expert witnesses]; *Brit v. North Carolina* (1971) 404 U.S. 226, 228-30 [92 S.Ct. 431, 30 L.Ed.2d 400] [recognizing the right of an indigent defendant to a transcript of prior proceedings, but holding that the availability of an adequate alternative satisfied equal protection].)

D. THE TRIAL COURT VIOLATED JUSTIN'S CONSTITUTIONAL AND STATUTORY RIGHT TO ADEQUATE FUNDING OF ANCILLARY SERVICES WHILE HE WAS REPRESENTING HIMSELF.

Justin relinquished his pro-per status only because he was denied his constitutional and statutory right to adequate funding to present his defense. Because Justin was incarcerated, he was forced to rely on his investigator to perform all tasks outside the jail such as witness interviews and crime scene investigation. Without adequate funding of the investigation, Justin had no ability, as a practical matter, to prepare his defense. Justin's funding request of March 29, 2007 was denied. (1 Conf. CST 202-204, 208.)

Justin's request was sufficiently specific to put the trial court on notice of how the funds were to be used. Justin needed the funds to: (1) secure exhibits; (2) obtain the attendance of witnesses at trial; (3) dress properly during the trial; (4) obtain assistance during the trial itself; (5) transcribe witness testimony during the trial; and (6) assist with diagrams and exhibits during the trial. (1Conf. CST 202-203.)

The trial court's denial of any funds for investigator Monahan denied Justin of the ability to prepare a proper defense. Justin's inability to utilize his investigator was exacerbated by the trial court's refusal to fund phone card privileges so Justin could communicate with his investigator. (2RTP 270-273.)

Justin's request of May 13, 2007, for witness investigation was denied because the trial court reached the remarkable conclusion that Justin did not need to secure the attendance of witnesses at trial because his military records showed his whereabouts during 1992 and 1993. (1Conf. CST 103.) The trial court had apparently prejudged that Justin's alibi defense was not viable. The conclusion that Justin's military records established his whereabouts, and he therefore did not need to conduct any investigation, was clearly erroneous. The authenticity of the military records had not been established. Even if the records were authentic, Justin was entitled to conduct a reasonable investigation to challenge whatever fact the military records appeared to establish. The relevance and admissibility of the alibi witnesses Justin intended to have testify had to be resolved at the trial and not during the investigatory stage of the case. The May 13, 2007, request also sought investigation costs to

interview Justin's former teachers and coaches. These individuals were relevant mitigation witnesses.

As argued above, Justin had a right to adequate funding of his defense while he was in pro-per pursuant to section 987.9, subdivision (a), and the Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 17 of the California Constitution. He was denied that right because he did not have adequate funding for an investigator to locate witnesses, conduct crime scene investigation, and other ancillary functions necessary for Justin to adequately prepare for trial.

E. PREJUDICE

In the instant case, two separate errors occurred. First, the trial court erroneously denied Justin's request for pro-per funding. This error can be tested for prejudice under the harmless beyond a reasonable doubt standard. (*People v. Mendoza* (2000) 24 Cal.4th 130, 159.) However, the trial court's denial of Justin's funding requests led to Justin relinquishing his right to represent himself. (2RTP 356.) Justin was forced to accept representation by counsel over his objection. The denial of a timely motion for self-representation is prejudicial per se. (*People .v Halvorsen* (2007) 42 Cal.4th 379, 434.)

Justin made a valid and timely waiver of his right to counsel and elected to represent himself. Justin had a constitutional right to adequate funding of his defense while he was representing himself, (*People v. Blair, supra*, 36 Cal.4th at pp. 733-734), and he waived his pro-per status only because of the denial of that constitutional right. (2RTP 356.) Justin's

forced relinquishment of his pro-per status should also be prejudicial per se.

Courts apply a rule of per se reversal to fundamental errors where prejudice cannot easily be measured, or to issues which prevent a criminal trial from reliably serving its function as a vehicle for the determination of guilt or innocence. (*Rose v. Clark* (1986) 478 U.S. 570, 577-578 [106 S.Ct. 3101, 92 L.Ed.2d 460]; *Gideon v. Wainwright, supra,* 372 U.S. 335, at pp. 344-345 [complete denial of right to counsel]; *People v. Bigelow* (1985) 37 Cal.3d 731, 744-745 [finding reversible error per se from the trial court's failure to appoint advisory counsel].) The prejudice from Justin's forced relinquishment of his pro-per status cannot be easily measured. Justin's relinquishment of his pro-per status prevented the trial from serving its function as a vehicle for the determination of guilt or innocence. The judgment of guilt must be reversed.