SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RUBEN BECERRADA, Defendant and Appellant.	No. S170957 (Los Angeles County Superior Court No. LA033909)

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

HONORABLE WILLIAM R. POUNDERS, JUDGE

MICHAEL J. HERSEK
State Public Defender

ARNOLD ERICKSON, SBN 148358
Senior Deputy State Public Defender
erickson@ospd.ca.gov

Office of the State Public Defender
1111 Broadway, Suite 1000
Oakland, California 94607
Telephone: (510) 267-3300
Fax: (510) 452-8712

Attorneys for Appellant

DEATH PENALTY

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STATEMENT OF APPEALABILITY

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

STATEMENT OF THE CASE

On June 7, 2003, an information was filed in the Los Angeles County Superior Court charging appellant with eight counts. (5 CT 1354.)

The first four counts alleged that appellant committed crimes against Maria Arevalo on August 7 and August 8, 1999. Count 1 charged appellant with committing forcible rape in violation of Penal Code section 261, subdivision (a)(2). Count 2 stated that appellant raped by threat in violation of Penal Code section 261, subdivision (a)(6). It was alleged that appellant committed the first two counts while being armed with a deadly weapon, a pair of scissors, under Penal Code section 12022.3, subdivision (b). Count 3 alleged that appellant committed false imprisonment by violence in violation of Penal Code section 236. Count 4 charged appellant with

assault by means likely to produce great bodily injury under Penal Code section 245, subdivision (a)(1). (5 CT 1355-1357.)

Count 5 charged appellant with dissuading a witness by force or threat in violation of Penal Code section 136, subdivision (c)(1), by using force and threatening Maria Arevalo and another person between August 7, 1999, and August 11, 1999. Count 6 alleged that appellant dissuaded a witness by force or threat in violation of Penal Code section 136, subdivision (c)(1), by using force and threatening Juan Arevalo and another person between August 8, 1999, and August 11, 1999. (5 CT 1358.)

Count 7 charged appellant with the murder of Maria Arevalo on March 4, 2000, in violation of Penal Code section 187, subdivision (a). It was further alleged that appellant committed three special circumstances under Penal Code section 190.2: murder of a witness, murder in the commission of a kidnaping, and murder by means of lying in wait. It was also alleged that appellant used deadly weapons – a knife, bottle, and ligature – in the commission of the murder within the meaning of Penal Code section 12022, subdivision (b)(1). Count 8, alleged that appellant kidnaped Maria Arevalo in violation of Penal Code section 207, subdivision (a). Appellant was charged with using deadly weapons – a knife and bottle – in the commission of the kidnaping in violation of Penal Code section 12022, subdivision (b)(1). (5 CT 1358-1359.)

On December 14, 2004, appellant's attorney, the Los Angeles County Public Defender, declared a conflict. (8 CT 2307.) A new attorney was appointed on December 28, 2004. (8 CT 2039.) This attorney was replaced with appellant's trial counsel on March 16, 2005. (8 CT 2058.)

On July 23, 2008, the trial court dismissed Counts 2, 3, 4, and 6 on the prosecutor's motion. (8 CT 2196.)

Jury selection began on August 21, 2008. (9 CT 2252.) The jurors were chosen and sworn on September 10, 2008. (9 CT 2284.) The prosecution began its case-in-chief on September 11, 2008, and rested on September 23, 2008. (9 CT 2286, 2311.) Appellant rested his case the same day without presenting any witnesses. (9 CT 2311.) The jury began deliberations on September 25, 2008. (9 CT 2321.) On September 29, 2008, the jury found appellant guilty of counts 1, 5, 7, and 8. The jury found that the murder was committed in the first degree and that the special circumstances were true. (9 CT 2367-2369.)

The penalty phase of the trial began on October 3, 2008. (9 CT 2372.) The jury began penalty deliberations on November 3, 2008. (9 CT 2453.) On November 4, 2008, the jury delivered a judgment of death. (9 CT 2459.)

On February 23, 2009, the trial court denied appellant's motions for a new trial and modification of the verdict. (27 CT 7562.) The trial court imposed a sentence of death. (27 CT 7563.) Appellant was sentenced to a 15-year prison term for Counts 1, 5, and 8. (27 CT 7594.)

INTRODUCTION

Appellant had a relationship with Maria Arevalo over the course of a few years. In August 1999, she accused appellant of raping her and filed charges against him. Appellant threatened Maria if she did not drop the charges, but over the next several months, Maria continued to see appellant and did not tell the police where he was living.

On March 3, 2000, Maria met with the prosecutor handling the rape case. Appellant expected Maria to drop the charges at that time, but instead she decided to continue to press the case against him. The next morning, appellant and Maria spoke on the phone, as they did every day. Shortly

afterwards, appellant met with Maria and erupted in rage, beating her severely until he forced Maria into a car and drove away to where she ultimately was killed.

Appellant did not deny killing Maria, but contended that it occurred as a spontaneous act, during an outburst of intense anger, rather than through a planned murder that was committed while lying in wait. The prosecutor speculated that appellant lured Maria to meet with him in order to murder her, but there was no evidence that appellant suggested the meeting or that he knew that Maria had not dropped the charges before they met – without this knowledge, appellant would have had no reason to kill her. To overcome this evidentiary gap, the prosecutor needed to convince the jurors that appellant was disposed to plan Maria's murder regardless of whether she proceeded with the case.

Throughout the trial, the prosecutor painted a striking picture of appellant as being a hardened member of a street gang. Beginning with her opening statement, the prosecutor identified appellant as being a member of a "dangerous gang," the Jokers clique with the Venice 13. This identification was vividly portrayed through pictures of appellant with large tattoos referring to the gang on his front and back side, along with other tattoos that the trial court found were "interesting, perhaps frightening." Testimony was introduced that appellant flashed a gang-related sign during a pretrial hearing and that Maria's address book, which police found in appellant's room in the house where he was staying, had writing in it that referred to gangs. An investigating detective testified that Jokers were part of the Venice 13 criminal street gang, which went back at least two generations, using guns to commit crimes, and selling drugs,, and other unlawful acts. The detective described appellant's tattoos as being the

largest gang tattoos that he had ever seen. The trial court also allowed testimony that before the alleged rape occurred, appellant had bragged to one of Maria's coworkers that he was a hit man for the Mexican Mafia and had committed several uncharged murders.

The gang evidence was not necessary for the prosecutor's case, but became the lens through which the jurors viewed appellant in both the guilt and penalty phases. Jurors likely believed that a member of a dangerous gang would find it easy to kill for his own ends; to lie in wait in order to accomplish the killing; had committed other uncharged crimes; and, presented a continuing danger as long as he lived. Both the lying-in-wait finding and the death verdict were all but inevitable.

STATEMENT OF FACTS

A. The Homicide

Maria Arevalo met appellant before he was sent to state prison during the late 1990's. Maria believed that appellant had gotten into trouble because he was under the influence of drugs. (12 RT 1717.) At some point, when appellant was in prison, Maria asked Noemi Hernandez, a friend who also knew appellant, whether she should date him when he was released. (16 RT 2311, 2324-2325.) In 1998, Maria told her sister that she was dating appellant. Appellant went to church with Maria so her family could see that he had changed. (12 RT 1719.)

Maria had separated from her Juan Arevalo, her husband, by the time that she started to date appellant. Maria and Juan married after she graduated from high school and remained together for 18 months before separating. (10 RT 1501-1502.) They remained close friends, however, and when Juan heard that Maria was dating appellant he was glad for her because he wanted her to be happy. (10 RT 1503, 1551.) Juan noticed that

Maria had a tattoo with appellant's name on it. (10 RT 1551.)

Juan grew concerned after he saw bruises on Maria's arms and neck. (10 RT 1505.) He went to appellant's home and confronted him about the injuries and bruising. Appellant denied committing any violence. He showed Juan his tattoos and said that he was a member of a gang, but the visit was civil. Juan told appellant not to hurt Maria again. (10 RT 1508-1510.)

Maria became afraid when Juan tried to get her to end the relationship with appellant. (10 RT 1506.) Maria told Juan about being threatened by appellant and the physical injuries that she received because of abuse. She said she was afraid for herself, her family, and for Juan. (10 RT 1512.) She also said that appellant might change and that he deserved a second chance. (10 RT 1513.)

Gerilind Taylor, who worked with Maria at Manpower, saw bruises on Maria's arms and neck. Maria sometimes wore turtlenecks to hide the bruises, even in the summer when the weather was hot. (10 RT 1562-1563.)

Chris Eck also worked in the Manpower office. (11 RT 1609.) Once every two weeks, Maria came to work with bruises on her hands, wrists, and forearms. (11 RT 1614.) Appellant came to the office two or three times while Maria worked there. During the course of a casual conversation with Eck, appellant talked about how he had been incarcerated as a juvenile for homicide and later as an adult for a double attempted homicide. Appellant discussed his time in prison and his cellmates. Appellant also claimed that he was a hit man for the Mexican Mafia and had killed people before, getting away with the crimes. This shocked Eck and made an impression upon him. Maria was standing there at the time. (11 RT 1612-1613.)

When Maria talked to Eck about her bruises she said that she had fallen or that appellant would be rough when they were playing together. She made excuses. Sometimes she broke down and said it was too rough, but she did not volunteer much information. (11 RT 1622.)

Maria called Juan from a supermarket parking lot, early in the morning on August 8, 1999. She sounded scared and was almost crying. Juan met her about ten to fifteen minutes later. Maria was mumbling half words while shaking and crying. (10 RT 1515.) She had long greenish bruises on both sides of her neck and bruises on her legs and wrist. (10 RT 1520.) Maria said that appellant had raped her because she wanted to leave the relationship.[1/] She stated that appellant had choked her around the neck and put her in a closet. She "faded out" and stopped fighting. Appellant tied her to the bed and she could not leave. (10 RT 1517-1518.) Maria said that in the morning, appellant took her keys and let her go. He told her not to tell anybody about it. Appellant said that he knew where she and her family lived. (10 RT 1519.)

Juan took Maria to the police, but she refused to go into the station because she was afraid of what appellant might do. (10 RT 1520.) Juan called appellant the next day and said that he planned on reporting the matter to the police. Appellant warned Juan that he should be careful – that appellant knew where Juan and his family lived and what kind of car he drove. (10 RT 1523.)

[1/] According to Gerilind Taylor, Maria said that appellant had tied her up and repeatedly raped her over a period of a few days because Maria would not participate in a "threesome," a sexual act involving three people. (10 RT 1575.) Taylor testified in the preliminary hearing that Maria had said that she was tied up for hours rather than days. (10 RT 1577.)

Chris Eck was concerned that Maria did not come to work on August eighth. This was out of character, so Eck tried calling her several times but got no answer. She came in the next day and Eck asked her what had happened. (11 RT 1615.) Maria broke down and said that appellant had taken her, tied her up, and repeatedly raped her. Maria said she was beaten, but managed to escape. She pulled down her turtleneck and showed Eck and Taylor bruises, including handprints around her neck. (10 RT 1574; 11 RT 1616.) Maria said that appellant pulled her up by the neck and told her that he could easily kill her. (10 RT 1590.) Maria was crying, very upset, and said that she was scared. She had not yet reported the rape to the police. Eck encouraged Maria to do so, but she was afraid of appellant. (11 RT 1617.)

On August 11, 1999, Juan took Maria back to the police station. Maria's sister, Maria Eugenia Herrera, and her husband met them at the station. Maria was bruised and shaking. She said that she did not want to die. (12 RT 1705.) Juan testified that they made Maria report the incident to the police. (10 RT 1525.) As Maria left the station with Juan, she said that she was afraid. (12 RT 1718.)

The next morning, Juan saw appellant standing at the front door of his aunt's house, where he and Maria were living. Maria began to scream at appellant to leave. She showed appellant a restraining order that she had obtained. Juan took out his phone to call the police, but appellant turned around and left. (10 RT 1529-1530.)

At some time during the following day or two, Juan saw two men going to the back gate of his aunt's house. Juan thought that they looked like gang members and hid behind a tree and a gate to the yard. His cousin Wendy answered the door and the men asked for Juan. They left a phone

number and told Wendy that Juan should drop the charges. (10 RT 1530-1532.)

A woman came to the house and spoke with Juan's aunt. The woman said that she had two children with appellant and if the charges were not dropped, they would be left without a father. (10 RT 1534.) As a result of these incidents, Juan and Maria left his aunt's house and moved into their own apartment. (10 RT 1535.)

Maria continued to work at Manpower for a short time after she reported being raped. Maria told Gerilind Taylor that appellant would kill her in seven to eight months, after things had quieted down. (11 RT 1594.) She told Chris Eck that appellant had threatened to send a sex video of her to her family and friends if she did not drop the charges. (11 RT 1621.)

Shortly after this, Maria's family received a sex video showing Maria and appellant. (12 RT 1714.) A video sent to Maria's brother had a return address of "Guess Who." (16 RT 2389.) Maria was a religious person and she was upset that the video had been sent to everyone in her family. (11 RT 1658.)

In late 1999, after Maria reported being raped, she left her job at Manpower and began to work for Washington Mutual. (10 RT 1536; 11 RT 1641.) Juan bought her a used Nissan car that was registered in both their names. (10 RT 1546.) Maria continued to drive the car after she again separated from Juan. In October, 1999, Maria moved back to her mother's house. (10 RT 1535.)

Rosie Guzman, who worked with Maria at Washington Mutual, testified that she once saw bruises on Maria in December 1999 or January 2000. Maria said that the bruises came from appellant. They looked like handmarks that were left after being grabbed. (11 RT 1655.) Maria told

Rosie that appellant had abused and raped her in the past and that rape charges were pending against him. Maria said that appellant threatened to kill her if she did not drop the charges. She was uncertain about what to do. (11 RT 1656, 1668.)

Another one of Maria's coworkers at Washington Mutual, Juliette Shakhbazyan, testified that Maria often came to work bruised. One time Maria's head was almost entirely black and blue from the forehead and she often wore turtlenecks. Maria did not tell Juliette where she got the bruises. (11 RT 1644.) Juliette thought that Maria was scared of her former boyfriend but still saw him from time to time. (11 RT 1645-1646.)

Maria also spoke about appellant to Jennifer Rodriguez, a friend she had known since 1997. (11 RT 1685.) Maria had been dating appellant for as long as Jennifer knew her. (11 RT 1692.) At some point in 1999, Maria said that her relationship with appellant had become abusive, but when she tried to end it he had raped and choked her. She filed charges, but appellant had threatened to kill her unless she dropped the charges. Maria was worried for her family. (10 RT 1688-1689.)

Maria's cousin, Laura Arreguin, moved into Maria's family home in January 2000. She shared a room with Maria. (12 RT 1760.) Maria usually got up at 4:00 a.m. to go to work . She received a phone call every day around that time; Maria said it was from appellant. (12 RT 1761.) Maria's mother, Isabel Mejia, asked Maria to tell appellant not to call so early, but he continued to call every day. (12 RT 1733.)

Maria told Laura that appellant had raped and choked her. Maria realized that the relationship was a mistake and was trying to get out of it. Maria said that a detective often spoke with her in order to find out where appellant lived. She was afraid to tell the detective and thought she could

get appellant to forget about her. (12 RT 1764-1765.)

Maria told Juan that appellant knew how to find out things. At one point, she said that appellant called her at work and asked to meet her. They drove past her parents' house and Juan's apartment. Appellant pointed out parked cars that he said were "hit cars" that he could use to get away. (10 RT 1538-1539.) Maria also said that appellant showed her either a gun or a knife. Appellant told her that he had shot someone before and got away with it. (10 RT 1539.)

According to Juan, Appellant told Maria that if he were taken down because of the case, he would not go alone, referring to Maria's family and Juan. Maria told Juan that she did not want to tell the police where appellant was living because she was afraid for her family. She stated that appellant would turn himself in if she claimed that she had lied about the rape. (10 RT 1543-1544.)

Vanessa Finn testified that in September 1999, appellant started to live in a house with her mother, Rosa Marquez, and other family members at 9651 Dorrington in Los Angeles. Rosa referred to appellant as "Crow" and knew that the police were looking for him when he moved to the house. (16 RT 2347, 2351.) Maria sometimes visited and she never saw appellant argue or fight with her. (16 RT 2375.)

Noemi Hernandez, Rosa Marquez's sister, grew up in Venice and had a number of brothers involved in the Venice 13 gang. (16 RT 2307.) Hernandez knew Maria. (16 RT 2311.) At the time, Hernandez worked as a paralegal for a criminal defense firm. Appellant asked her what she thought of the situation. He said, "This is what Maria is doing to me. She's doing rape charges. How can that be when she lives with me?" (16 RT 2313.) Noemi tried giving him advice, but appellant was angry. He grew

angrier as time went on because he knew that the police were looking for him. (16 RT 2314-2315.) He said he had two strikes and that he was not going to do life for her. He threatened to kill Maria and "get that bitch because I'm not going back to jail." (16 RT 2317-2318, 2319.) Shortly before Maria was killed, appellant gave Noemi a duffel bag and asked her to keep it since he knew that he would be arrested for rape. (16 RT 2320.)

On March 3, 2000, Maria met with the prosecutor, Peggy Beckstrand, and the investigating officer for her case, Bernard Pullman. (10 RT 1490.) According to Noemi Hernandez, appellant believed that Maria was going to drop the charges during the meeting. (16 RT 2319.) Beckstrand testified that Maria's demeanor changed after she received a telephone call during the meeting. Maria grew anxious or afraid. (10 RT 1494.) Maria decided to continue with the case. Beckstrand expected that Maria was going to testify against appellant since they could not proceed without her. (10 RT 1497.)

The next morning, Maria received the usual telephone call before she left for work. Maria's demeanor did not change when she was speaking on the phone. (12 RT 1763.) She made her lunch and left the house. (12 RT 1749.) Around 4:45 a.m., she stopped at a Sav-On drug store and purchased water, a pack of Marlboro Reds, and a cigarette lighter. (12 RT 1770, 1774, 1787.) Maria did not smoke. (10 RT 1568; 11 RT 1645; 12 RT 1711, 1741.) Appellant smoked Marlboro Reds. (10 RT 1561; 16 RT 2347.) Maria knew people who worked in the store, but seemed to be in a hurry. (12 RT 1770, 1779.)

The Gonzalez family lived at 9633 Dorrington Avenue in Los Angeles. On March 4, 2000, Margabeth Gonzalez was sleeping in the bedroom that she shared with her sister Lizabeth. They woke up when

someone screamed for help. It seemed to come from an alley towards the back of the house. (12 RT 1796; 14 RT 2032.) They turned on the lights but did not see anybody in the back. They went to the front of the house, opened the door, and saw a man hitting a woman. (12 RT 1801, 1803; 14 RT 2036.)

Luz Garcia, Margabeth and Lizabeth's mother, woke up and ran to the front door. Her daughters were already there and her husband, Jorge, also came out. (14 RT 2075, 2081.) During the attack, a neighbor went outside and stood behind his fence. (14 RT 1831.) At some point, Margabeth called 911. (12 RT 1853.)

The woman was in the back passenger's side of a car against the curb. She tried to turn away, but the man kicked and hit her from the driver's side of the car. (12 RT 1806.) Her hands were above her head and her legs were turned to the door. (12 RT 1810.)

The woman being hit continued to plead for help. She opened the door of the car and got out. She looked at Margabeth and her sister but did not move. (12 RT 1812; 14 RT 2041.) The woman froze when the Gonzalez family called for her to come to the house. The man came around, grabbed the woman, and hit her harder than before. (12 RT 1813; 14 RT 2042.) He took a clear glass beer bottle and hit her hard on the back about three times. (12 RT 1816, 1820.)

Luz and Jorge were closest to the man. Luz clapped her hands and told him to stop. (14 RT 2047, 2080, 2098.) Luz wanted Jorge to help the woman, but Jorge was afraid and thought that the man might have a gun. (14 RT 2082.) The man looked at Jorge and made eye contact, but did not appear to notice Luz telling him to stop. (12 RT 1818, 2043, 2083, 2097.) The man was extremely angry and did not notice the family. (12 RT 1817,

1848; 14 RT 2059.) He was totally engaged and did not stop beating the woman. (12 RT 1848, 14 RT 2043.) None of the witnesses saw the man use a knife or tie a cord around the woman's neck. (12 RT 1826, 1866; 14 RT 2046; 14 RT 2098.)

The man grabbed the woman and threw her back into the car. Lizabeth testified that the man again hit the woman in the head with a beer bottle. (14 RT 2043.) By then, she had stopped fighting and screaming. (14 RT 2460.) Margabeth stated that the woman's eyes were open, and she did not appear to be dead, but the woman had given up. The man drove off just as the police arrived. (12 RT 1823-1825, 1846, 1863.)

David Hunt, a Los Angeles police officer, was the first patrolman to respond. He received a dispatch call at 5:00 a.m. and arrived at the scene three minutes later. (13 RT 1874.) Hunt spoke with witnesses and found blood, fingernail fragments, and broken glass on the street. (12 RT 1836; 13 RT 1878.)

Later that day, Ana Brunes went to the dumpster in a Van Nuys Boulevard apartment complex and saw a car in her assigned spot that she had not seen before. There was blood on the seats and steering wheel and the driver's side window was broken. (13 RT 1960-1961.) She called 911 to report it. When she went down to the parking area again to leave for work, she saw a dark-skinned man wiping blood off of it. He was using a rag and was around the driver's door next to the dumpsters. (13 RT 1965-1966.) He wore a gray knit cap similar to one that was later found in appellant's bedroom. (13 RT 1968.) He was about six feet tall and had a goatee, but she did not get a good look at his face. (13 RT 1969-1970.)

Jorge Rebollar also saw the car next the dumpster when he came to pick up the trash, between 6:00 and 8:00 a.m. (13 RT 1921.) The car was

stained with blood. (13 RT 1923.)

Los Angeles police patrol officer Kenneth Snowden and his partner responded to a call about an abandoned car at an apartment complex on Van Nuys Boulevard. (13 RT 1886.) The car was a bluish gray Nissan Altima. It was backed into the last stall next to the trash dumpsters. The driver's side window was broken. There was broken glass inside the car and a large amount of blood on the back seat and exterior of the driver's side. The officers found the body of a Hispanic woman in the trunk. (13 RT 1892-1893.) There was a rope around her neck and her clothes were saturated with blood. She was not breathing. (13 RT 1895-1896.)

Michael Oppelt, a Los Angeles homicide detective, saw that there was a large amount of glass inside the car, indicating that the window had been broken into from the outside. (13 RT 1906.) Blood was smeared on the outside of the car, as if it had been wiped. There was a thick piece of glass on the bumper. The car appeared to have been parked haphazardly and hastily. There were no license plates on the car, but officers determined that it belonged to Juan and Maria Arevalo. (13 RT 1908, 1911.)

The victim had a ligature around her neck and several stab wounds and abrasions. Nails were missing from one of her hands. There was no identification, cell phone, or cigarettes in the car. (13 RT 1908-1910.) Oppelt believed that there had been a struggle inside the car at another location. He did not find a significant amount of blood or glass on the ground where the car was parked. (13 RT 1975.) Oppelt thought that there must have been a crime scene where the fatal wounds were inflicted, but he never found it. (15 RT 2251-2252.)

On the morning of March 4, 2000, appellant knocked on the window where Vanessa Finn was sleeping in the room that she shared with her

sister. Vanessa's sister opened the back door and they saw appellant wearing a gray beanie, as he regularly did. (16 RT 2353-2355.) Later in the morning, Vanessa noted that appellant was bleeding from his ankle through his sock. She did not remember seeing other scratches, but testified that if she told detectives about them, it must have been true. (16 RT 2356-2357.) Appellant told her that he cut himself shaving and laughed when Vanessa replied that he was "not a girl to be shaving his legs." (16 RT 2358.) She had never seen appellant with cuts before that morning. (16 RT 2359.)

Later in the day, appellant was in the bedroom watching the news on television. There was a story about a car that looked like Maria's. Appellant told Vanessa that it was not Maria's car and that she should get out of the room. (16 RT 2360-2361.) Vanessa recognized the car because she had seen it when Maria visited appellant. (16 RT 2366.)

Vanessa identified the apartments where the car had been found with Maria's body. When appellant was living with them, he drove her to the apartments and told her he had once lived there. (16 RT 2365.) The apartment manager confirmed that appellant had rented an apartment in the complex between 1994 and 1995. (13 RT 1949.)

Detective Oppelt learned that Maria had been the victim in a pending rape case. The detective assigned to the rape charge obtained a possible address for appellant. (13 RT 1977-1978.) Appellant was arrested on March 5, 2000, when he left the house with others to take his son home. He was taken into custody less than a mile from where Maria's body had been found. (13 RT 1381; 16 RT 2362.)

Appellant identified himself to the arresting officers as "Ruben Aguirre" and appeared to be nervous and agitated. He had fresh injuries on

his arm and scratches and abrasions on his face.[2/] (13 RT 1983.) After being taken to the station, the officers told appellant that he was being arrested for the outstanding warrant on the rape charge. They did not tell him that Maria's body was found or that he was being charged with murder. (15 RT 2242, 2276,) Appellant told them that he did not murder anyone or rape Maria. (15 RT 2246-2247.) He told one of the investigating officers that cuts to his ankle occurred as he was put in the police car at the time of his arrest. (16 RT 2385.)

Officers brought appellant to a hospital emergency room after his arrest because appellant reported that he may be having a precursor to a seizure. (14 RT 2124, 2128-2129.) Nya Murray was one of the nurses. She testified that appellant tested within normal limits and there was nothing obvious to indicate a seizure. (14 RT 2130.) While examining appellant, Murray noticed superficial slices, lacerations, and scratches. There was a puncture wound behind appellant's left ear. Appellant did not remember how this happened but stated that it must have been while shaving. (14 RT 2138.) Appellant refused further tests and pulled out his IV and monitor. (14 RT 2135.)

After appellant finished the examination at the hospital, Officer Michael Coogle escorted him to the restroom. Appellant said something about his girlfriend and asked why he was being arrested for a "187." Coogle told him he was being arrested for a warrant. Appellant said, "What's up with 187?" and "I know what 187 is, I'm not stupid." At no time did the officer tell appellant that he was arrested for murder or that

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[2/] Dr. Eugene Carpenter. a medical examiner for Los Angeles county, testified that the scratches on appellant were consistent with having been made by Maria. (15 RT 2188-2189.)

they had found Maria's body. (15 RT 2287.)

On March 5, 2000, officers searched appellant's room pursuant to a warrant. (13 RT 2009.) Detective Oppelt found a box of Marlboro Reds with blood on it. (13 RT 2010.) He also found a letter that appellant had addressed to his brother Gabriel, who was in prison at the time. It contained a photograph of Maria and appellant, with writing on the back, "This is the bitch, Ruben, JKS." Oppelt testified that JKS referred to the Jokers, which was a clique within the Venice 13 gang. (15 RT 2256.)

Oppelt returned to the Dorrington address where the beating had taken place. He found additional fingernail fragments and broken Corona beer bottles on the street. (13 RT 2018, 2020.)

Eugene Carpenter, Jr., was a medical examiner for the Los Angeles county coroner, who supervised Maria's autopsy. (14 RT 2143.) Carpenter testified that there were three main injuries that caused her death: ligature strangulation; a stab wound into the jugular vein on the left side of the neck and throat; and blunt force traumatic injury to the left side back of her head that caused bleeding under the scalp and on top of the brain. (14 RT 2149.)

The ligature was wrapped tightly around Maria's throat and neck and Carpenter was barely able to get a finger underneath the cord. (14 RT 2150-2151.) There were abrasions underneath the chin and near the ligature that were likely caused by Maria's own fingernails. They had the same dimensions and were about the size of a fingernail width. Carpenter testified that if a victim's hands are not bound, it is very common that the hand will come up, whether the person is conscious is not, and claw at the ligature in an attempt to live. (14 RT 2159.) Carpenter also found evidence of a trauma injury that was consistent with a partial manual strangulation, where someone puts their hands on the victim's neck and squeezes. (14 RT 2162.)

The stab wound was also on the throat, just below the ear and behind the angle of the victim's jaw. (14 RT 2164.) Part of a knife blade had broken off in the jugular vein, on Maria's left side of her neck and throat. (14 RT 2147, 2165.) Carpenter believed that the knife might have been stabbed into the neck while the ligature was wrapped around the throat. The blade could have then snapped when it hit hard bone. (14 RT 2166.) Carpenter believed that Maria was still alive when she was stabbed. (14 RT 2177.)

The blunt trauma wound to Maria's head was severe enough to have caused death if left untreated. (14 RT 2149.) It would have taken 10-24 hours for death to have occurred from this injury. (15 RT 2187.) All of the injuries that Carpenter noted were caused before Maria died. (15 RT 2188.)

Ronald Raquel, a criminalist for the Los Angeles Police Department, analyzed the trace evidence that had been gathered. (15 RT 2214.) He compared the acrylic nails found at the crime scene with those found on Maria. The red base coat, the clear coat, and the substrate found on Maria's hands matched the fragments from the crime scene. (15 RT 2219-2220.)

Harry Klann, a criminalist with the Los Angeles Police Department, tested items obtained during the investigation for DNA. (16 RT 2439.) He tested the blood found on the box of Marlboro Reds in appellant's room and determined that all six markers that he tested matched Maria's DNA. (16 RT 2342, 2347.) Klann also tested material obtained from the car and found that it matched Maria's DNA profile. (16 RT 2451-2452.)

Jody Hynds, a forensic supervisor and DNA analyst for an independent laboratory (Orchard-Cellmark), also tested the items. She confirmed that the blood found on the Marlboro Reds box matched Maria's genetic profile. (16 RT 2473.) She also tested material taken from the car

and found that Maria was a match for the DNA she obtained. (16 RT 2474.)

Sandra Baca worked with a domestic violence intervention project. She testified about Intimate Partner Violence, which is also known as Battered Woman's Syndrome. (16 RT 2486.) It is common for women in an abusive relationship to minimize the level of violence against them. They may assume responsibility for it or believe it is a one-time incident. When the violence continues, women believe that they can prevent it by changing something about themselves. (16 RT 2488.) Victims will go through traumatic bonding and soften their resistance to keep matters from escalating. After a fight, everything will appear to be nice, but eventually the relationship is nothing more than tension and battering. The victim may feel like her attacker needs her; she can change him. He becomes a project. He tells her that she is responsible if he goes to prison or loses his family. (16 RT 2494-2496.) Many victims love their abusers and cannot separate. (16 RT 2498.)

In reviewing the reports in this case, Baca believed that it was significant that Maria knew that appellant had a criminal history and belonged to a street gang. Maria would know that appellant was capable of carrying out threats. Baca believed that Maria tried to slowly separate herself or find a new relationship, but she went back to appellant. Maria was emotionally involved and hoped that appellant would change. (16 RT 2492, 2497.) As is common with victims of domestic abuse, Maria made her decisions based on how she felt rather than what she thought. (16 RT 2504.)

Baca stated that Maria was in over her head. Maria did not have any sophistication. Her life experiences never suggested that these things could

happen and she thought she could control the situation. Baca also opined that if Maria was told that appellant would know how to kill her and get away with it, she would feel helpless and hopeless. (16 RT 2500.) Baca believed that the sex video distribution would have further isolated Maria. (16 RT 2501.) She stated that the physical and verbal abuse Maria suffered laid the groundwork for her death. (16 RT 2504.)

B. Victim Impact Evidence

During the penalty phase, the prosecution presented several witnesses who testified about the impact that Maria's murder had on them and their family.

Saul Arreguin was Maria's uncle. The family was close. He remembered Maria's birth and watched her grow from a little girl into a young adult. (22 RT 3298-3299, 3304.) When Saul's wife was pregnant and often needed to visit the doctor, Maria offered her room for them to use and then went to the hospital to spend the night with them before the birth. (22 RT 3302-3303.) Maria's death affected him so much it was hard to talk about it. Although the family still gathers together, without Maria it is not the same. (22 RT 3305.)

Another uncle of Maria, Antonio Arreguin, testified about the closeness of the family. Maria was kind and affectionate. She often played with his daughters and the family shared holidays and special occasions. (22 RT 3308.) After Maria's death, he came from Phoenix to support the family. It affected them all and the family fell apart when she was killed. (22 RT 3309-3310.)

Maria's brother, George Mejia, stated that after Maria began to date appellant, she said that their parents disapproved of the relationship. George convinced their parents to meet appellant. Appellant told the family

that he had found God and was trying to get his life together. (22 RT 3313-3314.) George was concerned, however, that Maria and appellant acted "aggressively" with each other. Maria told George that she once had a huge argument with appellant and they started tearing each other's clothes. Another time, Maria was opening mail with a knife and put it up to appellant's neck. George warned Maria that such things can go overboard. (22 RT 3314-3315.)

On the day of the murder, Maria's boyfriend Francisco called George to ask if he had seen the news. There was a story about a girl who had been murdered and Francisco feared that it was Maria. George and his parents went to the police station and George told officers that he knew that appellant had committed the crime. George was the one responsible for identifying the body at the coroner's. (22 RT 3316-3317.) The coroner said that he would only show him a picture because he had never seen a body so gruesome. (22 RT 3319.)

Maria's death affected George. His parents sold their home because they did not know if appellant would send his friends to kill them. After that, George got married and moved to Mexico because he could not stand living in the area. He only thought about Maria. He now lives in Arizona, but if Maria had not been killed he probably would have stayed in the Los Angeles area. (22 RT 3319-3320.) Maria was the center of the family. After she died, George distanced himself from others and rarely calls his sisters. (22 RT 3321.)

Maria's father, Miguel Mejia, had six children. Maria was the youngest and he was close to her. (22 RT 3323-3324.) On the morning of the murder, he and his wife learned that Maria had not gone to work. They grew increasingly concerned and went to the police station, where they

learned what had happened to her. It was impossible for him to explain how he felt when he learned of her death. Maria's funeral was one of the most difficult days of his life. He thought that it would have been better if he had died instead of Maria. (13 RT 3327-3328.)

Maria Eugenia Herrera was Maria's older sister. She identified a photograph taken at her wedding when Maria was ten years old. Maria was the godmother to her daughter and her daughter's favorite aunt. (22 RT 3332, 3334.) On the day of the murder, Maria Eugenia tried to call Maria but there was no answer. She later got a call that her sister was dead. Maria Eugenia was at a restaurant with her family and started trembling when she heard about the murder. Her husband told her that she was crazy, that her sister was not dead. Her children also did not believe that Maria was dead. She confirmed that Maria had been killed. They went to the police station to be with her parents. (22 RT 3334-3335.)

Maria Eugenia thought about her sister almost every day. Maria was the joy of the household. At their last visit, Maria told the children that she would always love them and hold them in her heart. It was almost as if Maria was saying goodbye. (22 RT 3336-3337.)

Maria Eugenia bought Maria's dress for the funeral. It was hard and she fainted at the service. At first she visited Maria's grave almost every day. After three years, someone told her that she should go a little less frequently, but she still visits to leave flowers. Maria Eugenia identified a picture of the grave marker, which reads, "Dearest Daughter, Sister, and Friend." Nobody could replace Maria. (22 RT 3342-3343.)

Maria was Isabel Mejia's youngest daughter. The funeral was held on what would have been Maria's twenty-third birthday. On the day of the murder, Isabel had gotten phone calls from Maria's work because she was

missing. Isabel tried to reach Maria. Later that evening, they went to the police station and learned Maria had been killed. (22 RT 3345.)

Isabel's life changed after the murder. She no longer felt joy. She and her husband both suffered medical problems, such as high blood pressure. She believed that appellant did not just kill Maria, he killed the entire family. (22 RT 3346.) Isabel wanted to know where her daughter was killed because it would be important to place a cross, candle, and flower there. (22 RT 3350.) Maria died because she loved someone who did not deserve her. (22 RT 3351.)

C. Appellant's History

During the penalty phase, the prosecution introduced aggravating evidence pertaining to past crimes and violent acts committed by appellant. Appellant offered mitigating evidence to place these incidents in the context of his life's story.

Appellant's mother, Estella Aguirre, met his father, Ruben Becerrada, Sr., in 1962. Ruben was a black Cuban and from the start this created tension with Estella's family who regarded him as "just a nigger." (22 RT 3363.) Despite this, Estella and Ruben married and had four children together. Appellant was born in 1964 and was the eldest child. (22 RT 3363-3364.)

Appellant's childhood was marked by violence within his home. His father and mother often shouted at each other and Ruben hit Estella if she did not quiet down. The children sometimes saw this and told Ruben to leave their mother alone, but when this happened he yelled at them to go into the other room. (22 RT 3365.)

Ruben started to hit appellant with a belt when he was five or six. If the children did something to make him mad, he ordered them to get the

belt. Estella told the children that they had better do it. Appellant and his brother Carlos suffered the brunt of Ruben's anger. (22 RT 3366.) Appellant sometimes wore extra clothes so that he had some padding in case he was beaten. (26 RT 3990.)

The marriage finally ended in 1971, when Estella told Ruben that she would call the police if he did not leave. It was hard for her. She had four children and Ruben left her with only $35. It was almost Christmas and she hated him for it. (22 RT 3368.)

Estella was angry and took out her anger and frustrations on her sons, particularly on appellant since he was the oldest. She beat appellant with a belt or shoe. (22 RT 3368-3369, 3484.) The beatings left marks, but the boys did not complain and she did not take them for medical treatment. (23 RT 3485.) She hit the boys even when they had done nothing wrong. (22 RT 3371.) Estella testified that she finally stopped hitting her sons when appellant was ten years old. (22 RT 3378.)

Appellant's younger sister, Monica, described how their mother was often frustrated and upset. Estella yelled and cursed at her brothers and hit them with whatever she could find, such as extension cords or plastic tracks from a racing game. Estella hit them if they misbehaved, if she was upset, or if they asked about their father. Estella told them that their father could not stand them, that he did not want anything to do with them, and they should stop asking about him. (26 RT 3889.) Estella treated Monica differently and did not hit her. (23 RT 3484.) The problems seemed to get worse as the children got older – Estella struggled to take care of the

children and became more frustrated. (26 RT 3896.) Eventually, Monica moved to live with her father.[3/] (26 RT 3895.)

Money was hard to come by for Estella. She went on welfare and shoplifted food and clothing in front of her children. (22 RT 3372-3373.) At one time, appellant moved in with his father, but it did not last long because appellant told Estella that Ruben had beaten him. (22 RT 3375.)

During this period, Edward Corner, Estella's brother, sometimes watched the children. Corner spent almost every day in the apartment. Estella trusted him even though he was a heroin addict. (22 RT 3390.) Corner and his friends used drugs in front of the children. He did not think about what kind of impression this might have on them. (27 RT 3980, 3985.)

Corner made his living through theft and robbery. He would have done anything to get money to pay for heroin. The children were aware of his criminal activity. (27 RT 3981.) When appellant was 13 or 14 years old, Corner took him along on a robbery. Corner showed appellant his gun and had appellant knock on the door and pretend to be a paperboy. Appellant got out of the way while Corner committed the robbery. (27 RT 3982.)

Estella met her second husband Edward Aguirre in 1973. (22 RT 3390.) Edward used to sell drugs to Corner and met Estella through this connection. They began dating, but Edward was arrested for a parole violation shortly after they met. Following Edward's release in 1974, he

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[3/] Appellant remained close to Monica, even he was jailed for the present offense. He often wrote to her to ask about family, share scriptures, and let her know how he was doing. (27 RT 3913.)

was arrested for armed robbery. (27 RT 3931-3932.) Estella and Edward were married by the judge that sentenced him. She visited him with her children twice a month before he was released from prison in 1977. (22 RT 3391-3392.) At one point, both Aguirre and Corner served prison sentences in Soledad State Prison and appellant's family visited with them there. (22 RT 3393.)

Appellant visited Edward Aguirre in prison from the ages of 10 to 13. (23 RT 3483.) Edward introduced appellant to other prisoners. Some of the prisoners that he knew were part of the Mexican Mafia and other gangs. Edward wanted to show off to appellant that he knew them. Most of them exercised often and appellant was excited by their tattoos. (27 RT 3937.) Edward was "in the mix" and played two roles at a time. (27 RT 3938.) He knew he was not setting a good example for appellant, but the prison had its own environment and he could not isolate his family from that. Edward told appellant to avoid ending up like them, but appellant did not respond. (27 RT 3938-3939.) Edward did not return to prison after he was released in 1977. (23 RT 3469.)

Throughout his childhood, appellant had problems at school. Estella was told by the school that appellant was "hyper." (22 RT 3378.) Even at the age of five or six, appellant frequently lost his temper. (23 RT 3455.) Estella took appellant to a mental health clinic that referred her to a program that wanted to prescribe Valium for appellant. Estella refused the treatment since appellant was young and she did not want him to develop a drug habit. She never took appellant back to the clinic. (22 RT 3379-3380.)

Estella tried to talk to the teachers about the problems that the children were having, but the school did not do anything to help. The children never brought homework to do. She told the children to come

straight home from school, but it was like "talking to a brick wall." (22 RT 3386.) She stopped hitting the children because it was not doing any good. She had no control over them. (22 RT 3388.) Estella did not remember what grade appellant finished in school. He was probably in a juvenile detention camp and did not finish public school. (23 RT 3423.)

Appellant and his family lived in Venice in an area with many Hispanics and African Americans. There was significant racial tension between the two groups. (26 RT 3902.) Appellant had a number of problems with other children at school. (22 RT 3382.) He came home crying because other children had called him a "nigger." Estella told her children that she did not want any "sissies" and to "give them something to remember you by." (22 RT 3385.) After she married Edward, he also told the children that they would have a "tough way to go" because of their race and had to stick together. He told them that "if anybody messes with you, [the brothers] had better go over there and beat the shit out of them to let them know that they're not going to me messing with you." (27 RT 3943-3944.) Edward was trying to teach the boys how to survive. (27 RT 3946.)

Monica testified that when she was picked on at school for being biracial, she would tell her brothers. Appellant would let people know to leave her alone. (26 RT 3900-3901.)

Appellant began spending time with the same people who were calling him "nigger." (22 RT 3395.) At some point, appellant and his brothers became involved in gang activity. (26 RT 3902.) Estella stated that she pushed appellant towards the gangs. She believed that appellant was looking for someone to care about him, and he thought that the gang members were his friends. (22 RT 3398.) Estella was aware that appellant

was known as "Crow" within the Venice 13 gang, while his brother Gabriel was called "Shady." (22 RT 3409.)

The problems that appellant faced affected his whole family. Estella testified that her other two sons also served prison sentences. (22 RT 3399-3400.) Appellant's brother Gabriel was shot and killed in 2004 by a girlfriend's son. (22 RT 3399.) Appellant's sister Monica testified that although her brothers went to prison, she never did because things had been different for her. (26 RT 2899.)

In 1980, when appellant was 16 years old, the Venice 13 gang was at war with the Culver City Boys. (14 RT 2124; 20 RT 3032.) On August 18, 1980, Shirley McGuirre attended a small gathering with members of the Venice 13 gang. There was talk about retaliating against the Culver City Boys for a shooting of one of the Venice 13 members. (20 RT 3016.) The next day, Raul Garcia, a member of the Culver City gang, was shot and killed. (20 RT 3035; 21 RT 3239.)

McGuirre later told William Humphrey, a police officer who investigated gang-related crimes, that appellant was at that meeting, along with his brother and several other gang members.[4/] (20 RT 3045-3047.) McGuirre stated that there was a rifle kept in the ceiling of appellant's home. Two people volunteered to do the actual shooting. According to her statement, appellant gave a screwdriver to another gang member so that a car could be stolen for use during the shooting. (20 RT 3049-3051.) All of the gang members involved in the incident, including appellant, were

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[4/] At trial, McGuirre could not remember telling the police about the gang meeting. (20 RT 3020-3023.) However, she acknowledged that if her statement was in the police report, she must have stated it. (20 RT 3027.)

arrested and charged with murder or conspiracy to commit murder. (20 RT 3053.) Appellant was placed in a juvenile facility. (11 RT 1612.)

On March 25, 1984, after appellant was released from juvenile detention, there was a shooting in an area claimed by both Venice 13 and the Culver City gangs. (20 RT 3115.) Gene Solis, a Los Angeles police officer who patrolled the area, responded to the shooting. When Solis arrived at the scene, he found the victim, Frederico Rodriguez, bleeding from the hands and chest. Rodriguez told Solis, "Crow shot me." (20 RT 3118.)

Rodriguez testified that he did not call appellant "Crow" and that he was simply caught in a crossfire between African Americans when he left a party early. Rodriguez denied having an argument with appellant and stated that he did not know who shot him. (20 RT 3067-3070.) The prosecutor impeached Rodriguez with transcripts of his testimony from the preliminary hearing in 1984. At that time, Rodriguez did not state that he was caught in a crossfire. (20 RT 3073-3074.) Rodriguez testified that the transcripts were wrong. (20 RT 3078.)

Jimmy Preciada was a second victim at the party that night, after he came to pick up his stepdaughter. He was shot, but testified that he did not remember that part of his life very well because of problems with drugs, car accidents, and other misfortunes. (20 RT 3086-3087.) He did not see either appellant or Rodriguez that night. All that he remembered about the shooting is that he woke up in the hospital after it was over. (20 RT 3089.) He reviewed transcripts of his testimony during the preliminary hearing that was held at the time, but did not remember stating that appellant was in front of him, about 35 feet away. (20 RT 3101.) Preciada did not remember that Rodriguez had been involved in an altercation at the party or that he

was shot as he was leaving. (20 RT 3100.) He did not remember stating that appellant pointed a handgun at Rodriguez and shot him. (20 RT 3098.) Preciada did not remember saying that appellant turned around and fired at him. (20 RT 3104.)

Appellant was convicted of the two shootings, sent to prison, and was released on parole in 1987. (21 RT 3187.) Appellant continued to have problems with both crime and drugs. He was in an out of prison repeatedly and in 1992 he was received at the California Rehabilitation Center, a civil commitment for those who are addicted to narcotics. (21 RT 3188.) While in prison, appellant obtained his GED and was certified as a welder. (21 RT 3207.)

During the 1980's, appellant had a relationship with Myra Bian. Myra's niece, Jessica Bian, testified that Myra began to use drugs after she met appellant and that the family noticed that she had changed. (21 RT 3251.) Appellant verbally abused Myra. During one visit, Jessica overheard appellant threaten to beat Myra. Jessica also observed bruises on Myra throughout her relationship with appellant. Myra simply said that she had bumped into something or ignored Jessica's questions about the bruises. (21 RT 3250, 3252-3253.) Jessica, however, never saw appellant hit Myra. (21 RT 3262.) Myra died of a heroin overdose in 1994, several years after she stopped dating appellant. (21 RT 3256, 3263.)

Appellant had a son, Ruben, and stepdaughter, Angelina, with Chrissy Rosales. Appellant always treated Angelina as his natural daughter. (27 RT 3909.) Appellant and Chrissy were never married, although appellant tried to do so. Monica testified that Chrissy stood appellant up at a ceremony. (27 RT 3926-3927.) When appellant was in prison, Ruben

lived with Estella. Angelina lived with Chrissy's grandmother because Chrissy was often in prison herself. (23 RT 3458.)

Outside of prison, appellant worked several different jobs. He identified himself as a boxer in 1994. (13 RT 1949.) Estella testified that appellant worked for McDonalds, the city of Santa Monica, and with his stepfather Edward. (23 RT 3459.)

Appellant also tried to get disability benefits. Estella testified that appellant falsely claimed to have epilepsy and seizures in order to get the benefits. (23 RT 3445.) During one part of the application, Estella acted as an interpreter when appellant pretended not to understand English. Estella told doctors at the Canyon Medical Group that if appellant stopped taking Dilantin he would lose consciousness and have a seizure. (23 RT 3445, 3460-3463.)

D. Incidents in the County Jail

The prosecutor introduced 17 specific incidents that occurred in the Los Angeles County Jail between 2000 and 2004 as penalty phase aggravation under Penal Code section 190.3, factor (b). These incidents ranged from various types of threats and possession of dangerous contraband to assaultive behavior. Appellant offered evidence that after 2004 he had been helpful in the unit and presented no problems to officers that worked with him.

1. Gassing

"Gassing" involves throwing containers of urine or feces at other inmates or deputies working in the jail. (18 RT 2823.) Officers testified that on January 30, 2003, appellant gassed several deputies who were conducting a cell extraction next to where appellant was housed. (18 RT 2862-2863; 19 RT 2909-2911, 2916-2919, 2994-2995; 22RT 3295.) On

August 31, 2003, appellant threw urine and fecal matter at a trustee who was delivering food. (21 RT 3273-3274.) Appellant gassed a deputy on February 4, 2004, as the officer was checking a television. (19 RT 2930-2933.) On February 15, 2004, appellant gassed an officer and refused to give up a plastic tray. Officers wore bio-hazard suits to protect themselves and extracted appellant from his cell. Deputies found milk cartons filled with urine and feces in the cell. (18 RT 2864-2865, 2872, 2878.)

Apart from these specific incidents, officers testified that appellant typically gassed officers and stored urine and feces in his cell. (18 RT 2824; 19 RT 2986; 21 RT 3276.) For instance, Deputy Elizabeth Meyers testified that appellant had never gassed her (18 RT 2827), but she was aware that appellant gassed other officers on a regular basis. She was told that appellant wanted to be known as the "shit man." (18 RT 2823-2824.)

2. Possession of Contraband

Shanks are sharpened stabbing devices. (19 RT 2899.) Inmates in the county jail sometimes use shanks to attack others, but they will also use shanks to protect themselves, particularly when they have been attacked by others or have been threatened to be attacked by others. (19 RT 2900, 2972.)

On December 14, 2000, a deputy found several razors, razor blades, feces, and urine in appellant's cell. (18 RT 2841, 2843.) Deputies searched appellant's cell on October 6, 2001, and found a metal shank about two inches in length. (19 RT 2898-2890, 2971-2972.) Deputies also found razor blades, pruno (inmate-made alcohol), and cups of urine and feces in appellant's cell on December 4, 2002. (20 RT 3127-3128.) A comb with a razor attached to it was found in appellant's cell on May 13, 2013. (18 RT 2855-2856.) On January 28, 2004, deputies conducted a strip search of appellant and found a latex glove in his buttocks that contained five altered

razor blades. (19 RT 2978-2979; 20 RT 3135.) An officer reporting the incident noted that appellant recently had been attacked with razors by another inmate. (20 RT 3142.) On February 2, 2005, an x-ray technician spotted a metallic object that appeared to be a razor in appellant's rectum. The object was a large metal staple that could have been used either as a weapon or inserted into a handcuff. (18 RT 2818-2820.)

3. Threats and Other Misbehavior

Lieutenant Michel Rosson was aware that on December 3, 2002, appellant had threatened to gas deputies if he did not receive a special diet. Appellant routinely made such threats. (19 RT 2906.) Rosson served as the disciplinary hearing officer and appellant threatened to kill him during the course of a hearing. (19 RT 2905.)

On July 3, 2003, appellant was angry that a nurse would not give him some medication. Appellant stated that he did not want to have to "throw poop" on anyone and threatened to call "man down," which would require officers to take him to the clinic. As soon as officers left the unit, appellant yelled out "man down." (19 RT 2927-2928; 20 RT 3136.)

Appellant tied his cell bars with sheets and bedding on July 14, 2003, and threatened to gas anyone who came upon the cell row. (19 RT 2956-2957.) On September 11, 2003, appellant was being escorted as he returned from court. He wanted to get some shoe laces returned to him right away and told the escort officer to take his chains off so they could "go one on one." (21 RT 3127-3128.)

Several deputies also testified to manipulative conduct or other misbehavior in the county jail. Deputy Thomas Davis stated that if a request was not granted, appellant would threaten suicide in front of a nurse, who would have to document it and transport him to another unit for

evaluation. Davis believed that appellant faked mental illness. (20 RT 3129-3130.)

Deputy Mike Davis testified that appellant threatened to kill himself or made threats on a continual basis. (20 RT 3139.) Deputy Elizabeth Meyer stated that appellant repeatedly yelled out "man down" in the unit, which caused officers to focus attention on him instead of other things that they were doing. (18 RT 2825.) Deputy Michael Smith testified that it was common for appellant to do the opposite of what deputies asked. (19 RT 2960.) When appellant was in his unit, he would say he had a seizure disorder in an attempt to get what he wanted, but Smith never actually saw him have a seizure. (19 RT 2959.) It appeared to Smith that appellant repeatedly chose to cause problems for the deputies in the jail. (19 RT 2964.)

Smith's opinion was echoed by Deputy Brandon Love who thought that appellant faked seizures or acted crazy to get something or to get out of doing something. Love believed that appellant was one of the more difficult prisoners and ranked high in terms of security problems. (21 RT 3228-3229.)

4. Other Assaultive Acts

On February 23, 2004, appellant dropped to the floor as he was being escorted by three deputies. The officers tried to carry appellant back to the cell, but appellant's hand got loose, and he struck and kicked Deputy Rivera and Deputy Murshabash. (18 RT 2831-2836, 2847-2849.)

Lieutenant Rosson was aware that appellant had attacked other inmates, including Marcus Adams. (19 RT 2905.) Deputy Mike Davis testified that appellant admitted to slashing Adams. Adams suffered a four to five-inch cut in his upper chest area. (20 RT 3137-3138.)

Appellant had also been the victim of attacks by inmates who used razors against him. (20 RT 3142.) On at least one occasion, he had to be escorted to the clinic after a knife wound. (18 RT 2827.)

Deputy David Florence testified that appellant commonly acted in a violent manner, including threats, gassing, and possession of razor blades. (18 RT 2988.) Appellant was moved into a unit where there was a plexiglass or hard front to the cell instead of bars. Individuals are placed in the unit because they have a propensity for violence, gassing, or trying to attack deputies. (19 RT 2989.)

5. Mitigation Concerning the County Jail

Deputy Sheriff Matt Ahrari testified he worked in the "high power" security unit at the county jail, housing prisoners who had been violent, gang members, gang dropouts, and those who were targeted by the Mexican Mafia. (23 RT 3426-3427.)

Ahrari had regular contact with appellant in the unit during the 14 to 15 months before trial. Appellant worked for him doing linen exchange. Appellant volunteered to clean up the whole pod, including the shower and his own cell; get rid of extra food and dishes after lunch; and collect food trays and trash. Most prisoners to not volunteer to do these things. He never had a problem with appellant or heard him threatening any deputy or staff. (23 RT 3422-3423.) Ahari never found any shanks, altered razors, urine or razors in appellant's cell. (23 RT 3425.)

Deputy Sheriff Michael Wilhite also knew appellant from working in the county jail over the year before trial. (23 RT 3436.) He never knew appellant to be violent, possess contraband, make a threat, or try to break free while being escorted. (23 RT 3438-3441.)

E. Neuropsychological Evidence

1. Testimony of Dr. Roger Light

During the penalty phase, appellant relied on the testimony of Dr. Roger Light, a board-certified clinical neuropsychologist who was a professor at the University of California, Los Angeles. (24 RT 3503; 29 RT 4237.)

In 2003, Light reviewed a number of materials that had been sent to him about this case by the public defender who represented appellant at that time. (24 RT 3542.) The first assessment that Light conducted with appellant was in the attorney room at the central jail. Appellant was restrained during the testing and they met behind a glass partition that separated them. (24 RT 3567; 25 RT 3615.) This was not an ideal setting, but Light spent four to five hours with appellant and administered a number of tests. (24 RT 3553, 3556.)

The neuropsychological tests that Light administered are commonly used in hospital and clinical settings in order to determine how the brain is functioning. (24 RT 3544, 3551; 26 RT 3683.) Light looked at language measures, memory measures, visual motor integration tests, intellectual function tests, and executive function tests. (24 RT 3549-3550.) He tested appellant for malingering and found that appellant was making a good effort during the assessment. (24 RT 3538-3539.)

Light also considered certain pathognomonic signs, which are behavioral observations that suggest brain injury or matters that are not limited to test scores. Several of these signs were apparent when he examined appellant. One sign was appellant's right visual field and attention problems, another was confabulation. Appellant put things into a

story that were not there. These signs indicated orbital frontal lobe dysfunction as well as medial temporal lobe dysfunction. (24 RT 3553.)

Appellant's intelligence quotient (IQ) scored at 74. Although Dr. Light did not make an assessment of mental retardation, the I.Q. score is in the range of someone with significant cognitive limitations. (24 RT 3589.)

Light concluded that appellant had deficits in several aspects of both neuropsychological functioning and cognitive intellectual functioning. Light found limitation in appellant's intellectual functioning, psychomotor speed, visual processing of information and some areas of cognition. (24 RT 3562.) Deficits at a cognitive level result in difficult functioning in school and a poor vocational history. People with this kind of profile can have problems in socialization and misread people. They do not see the right way to respond to a task, which can lead to poor decisions and actions. Such deficits affect a person's judgment and the ability to control rage and anger. (24 RT 3563.)

After conducting the 2003 examination, Light thought that the most logical explanation for appellant's deficits was traumatic brain injury. There were multiple events that could have led to this, including reports that appellant had been struck by a baseball when he was younger and hit with a flashlight in prison. Appellant also boxed and stated that he had been knocked out in training and fights, which can lead to traumatic damage to the brain. Even if these events could not be substantiated, Light would stand by his conclusion because the pattern of the testing was consistent with traumatic brain injury. (24 RT 3565-3566.)

Light again evaluated appellant on September 5, 2008. The conditions for this exam were far better than when the original assessment was conducted. Although Light used some overlapping measures to see if

there was consistency between the two assessments, he did not use the same exact tests because practice can affect the results. (24 RT 3568-3589.)

The tests administered by Light again showed that appellant was not malingering. (25 RT 3584.) The neuropsychological tests revealed that appellant had deteriorated in some areas of his functioning, particularly in aspects of memory and executive functioning. The tests confirmed that appellant had a brain deficit or dysfunction. (25 RT 3585.) Light believed that this analysis was consistent with traumatic head injury, environmental deprivation, malnutrition, and neglect. He also thought that seizure disorder, a long history of drug abuse, and hepatitis were important to consider.[5/] (25 RT 3587-3588)

Light concluded that appellant had a deficit in executive functioning that affected his ability to plan, organize, and analyze behavior. (24 RT 3461; 25 RT 3585.) Appellant was capable of some executive functioning. (25 RT 3636.) He acknowledged that some of appellant's criminal conduct involved goal-directed behavior, which is an aspect of executive functioning. (25 RT 3642.) However, intact executive functioning leads to good decisions involving planning, socialized rules, and awareness of consequences. Light believed that the crime in this case involved aspects that were very disoriented and impulsive. Although there was goal-directed behavior, the crime was not very well thought out or planned. Light

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[5/] Dr. Light noted that appellant had been prescribed Dilantin. This is an anticonvulsant and antiseizure medication, but it is not a drug that people tend to abuse. Many people refuse to take it because it clouds certain conditions and has unpleasant side effects. Light was not aware of anyone wanting to take that medication who did not need it. (25 RT 3593-3594.)

emphasized the difference between strategy, which does not necessarily mean high level executive functioning, and the ability to use intelligence and modulate behavior. (25 RT 3648-3651; 26 RT 3846-3847.)

Light testified that frontal lobe dysfunction is associated with uninhibited conduct, which can lead to criminal behavior. There are certain risk factors that increase the chances of criminal conduct, including malnutrition, child abuse, and abuse as an adult. Appellant was also diagnosed with psychosis and schizophrenia. Light opined that the combination of factors in appellant's case created a situation where "chances go quite high that the cards are stacked against you to grow up to be a productive member of the society and avoid doing criminal things." (25 RT 3590.)

2. Testimony of Dr. Robert Brook

The prosecution presented the rebuttal testimony of Dr. Robert Brook, a clinical psychologist with a subspecialty in neuropsychology. (28 RT 4020.) Brook stated that neuropsychological exams cannot determine how a person's brain was functioning in past years. Although he was not able to conduct a personal interview with appellant, tests are standardized and scored in an objective way. (28 RT 4052-4053.) Brook reviewed the data from Light's tests and looked at appellant's prison, medical, mental health, and employment history. (28 RT 4054, 4056.)

Brook testified that the records he reviewed did not indicate that there were any independent observation of seizures, psychosis, or hallucinations. There were no random acts of violence consistent with psychosis, rather a pattern of criminal behavior. (28 RT 4057.) Brook opined that appellant's acts had a purpose, and Brook did not see evidence of a substantially disordered reality or a pattern that was consistent with brain dysfunction.

(28 RT 4058.) He did not believe that the 2003 test data was consistent with brain dysfunction. (28 RT 4066.)

There were dramatic changes in some of the tests between the 2003 results and the 2008 exam. Brook thought it was very unusual to have such disparate scores. but he was not in a position to determine the reason for this and it was difficult for him to determine what might have caused such scores. (28 RT 4077-4078.)

Brook reviewed the memory tests that appellant had taken and found that there was no indication of an impairment. Appellant was stronger in visual memory and being able to understand the story, but limited in being able to recall specific words. (28 RT 4083.) This does not necessarily indicate brain dysfunction. (28 RT 4086.) Brook did not believe that a finding of brain dysfunction could be based on pathognomonic signs, which simply raise a suspicion that something might be present. (28 RT 4087.)

Brook believed that appellant had intact executive functioning, which involves planning, organizing, and carrying out a goal. Brook specifically noted that appellant planned certain acts, including a commercial burglary that involved tearing off credit card receipts in order to later obtain cash. (28 RT 4127.) Similarly, it appeared to Brook that when appellant instigated cell extractions after taking steps to defend or protect himself, it showed focus, memory, and organized behavior for a specific purpose. (28 RT 4131.)

Brook also found that if appellant formed a plan and convinced Maria to meet him, that it would show executive functioning, a strategy and a consciousness of guilt in not wanting to be caught. (28 RT 4133-4134.) He opined that if appellant took Maria's body to where he used to live, it showed higher order executive functioning because appellant knew the

neighborhood and how to leave quickly. (29 RT 4182.) Brook believed that appellant's history was consistent with antisocial personality disorder rather than brain dysfunction. (28 RT 4122.) Executive functioning does not mean smart decisions. (29 RT 4231.)

Brook recalled two mental health evaluations that found that appellant had suffered from a psychotic disorder. (28 RT 4164, 4166.) He still believed, however, that based upon the tests, appellant did not have a brain dysfunction that interfered with his behavior. (28 RT 4167.)

3. Rebuttal by Dr. Light

In rebuttal, Dr. Light testified that appellant showed deficits in multiple measures of memory, attentional, and intellectual functioning. At the highest, he scored in the lower end of the average range, but the majority of the test results were deficient or borderline deficient. Light reviewed all the data together and the testing was most consistent with organic brain dysfunction. (29 RT 4244-4246.)

Light selected tests based the pattern that emerged and the information obtained. (29 RT 4248.) Executive functioning is only a small part of the neuropsychological exam and is not critical in assessing traumatic brain injury. Nothing in Brook's testimony caused Light to change his conclusions in any way. (29 RT 4254.)

F. Appellant's Statement at Sentencing

At sentencing, appellant stated that he had no words to express how he felt to Maria's family, but he believed that the district attorney and investigating officer shared some responsibility because they charged him with a rape that he did not commit. Appellant acknowledged that he argued with Maria, slapped her, and that he had no excuse. He accepted

responsibility for her murder but did not take responsibility for a rape that did not occur. (31 RT 4477.)

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ARGUMENT

I.

THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHS DISPLAYING APPELLANT'S TATTOOS

The trial court admitted photographs showing appellant's upper body, including a large tattoo depicting the "Venice Jokers" on appellant's back. There was another large tattoo referring to Venice on appellant's front body and various images on both sides, including jokers, three men who could be seen as menacing, and a woman in a sexually submissive pose. (Peo. Exh. 37, photographs A, C, & D; Peo. Exh. 38, photograph B.) Appellant objected that these photographs were extremely graphic and prejudicial. The trial court's ruling constituted an abuse of discretion under Evidence Code section 352 and violated appellant's state and federal rights to due process and a reliable verdict in a capital trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.)

A. Relevant Facts

Appellant first objected to upper-body photographs being used as part of a power point presentation in the prosecutor's opening statement. (10 RT 1413.) Appellant argued that close-up photographs showed the scratches on his body, so it was not necessary to use the full pictures identified above, which were extraordinarily graphic and prejudicial under Evidence Code section 352.[6/] (10 RT 1414-1415.) The trial court noted that the tattoos were "somewhat overpowering" in that they showed the

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[6/] The photographs showing scratches on appellant's body, without the full tattoos, were admitted in People's Exhibit 37, photographs B and D, and People's Exhibit 38, photographs A, C, D, E, and F.

Venice 13 Jokers and included some "interesting perhaps frightening" images. However, it allowed the photographs to be used during the opening statement because the tattoos could have affected the victim's state of mind, including her reluctance to report that she had been raped and her compliance with demands that appellant made upon her. The trial court reasoned that it was better to show the tattoos through pictures than to have appellant disrobe. It found that there was "no prejudice involved at all" in the use of the photographs. (10 RT 1416.)

The prosecutor's opening statement identified appellant as being a member of a "dangerous gang," the Jokers clique within the Venice 13. (10 RT 1428.) The power point presentation showing the tattoos followed as the prosecutor discussed photographs that were taken after appellant was arrested. (10 RT 1447-1448.)

At trial, the prosecutor established that the photographs were taken in order to show the injuries on appellant's body at the time of his arrest. (15 RT 2245.) Detective Oppelt and the arresting officer stated that the photographs showed the injuries that they saw at that time. (13 RT 1983-1984; 15 RT 2277.) The coroner testified that the scratches shown in the photographs were consistent with having been made by Maria's fingernails, but specifically identified one of the close-ups (Peo. Exh. 37, photograph B), rather than focus on a full-body picture. (21 RT 2188-2190.) Detective Oppelt also linked the tattoos to the Venice 13 gang and the Jokers. He

described the prominent tattoo in People's Exhibit 37 as being the "largest one I've ever seen with a V 13 gang member."[7/] (15 RT 2264.)

At the close of the guilt trial, the prosecutor offered the photographs into evidence. Appellant again objected that the upper-body photographs showing the tattoos were "excessive with respect to the issues of the wounds that he incurred." (16 RT 2519.) The trial court overruled appellant and admitted the exhibits. It found that the photographs showed the wounds that appellant sustained and that the tattoos were relevant to the intimidation of the victim. It also stated that "to some extent, the caricatures" on appellant's body were "significant." In particular, the court identified a tattoo of a woman in a sexual posture on appellant's lower back (Peo. Exh. 37, photograph C) that was "suggestive of his attitude towards women." The court found that this image was consistent with the testimony of Sandra Baca, who testified for the prosecution about intimate partner violence. (16 RT 2519.)

During the penalty phase, the photographs in People's Exhibit 37 were used to illustrate testimony that the Jokers were a clique within the Venice 13 gang. (20 RT 3053.) The prosecutor argued to the jurors during her closing argument that appellant permanently marked his body with tattoos showing his gang affiliation in order to emphasize the importance of the gang to appellant. (30 RT 4334-4335.)

B. The Evidence was More Prejudicial than Probative

Appellant objected that under Evidence Code section 352, the photographs were graphic and prejudicial. This section allows a trial court

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[7/] This description of appellant's tattoos was part of testimony that improperly established that appellant flashed a gang sign during a pretrial proceeding. (See Argument II, *infra*.)

to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) A trial court's decision to admit evidence under this section is reviewed for abuse of discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) The discretion is not unlimited, but is subject to reversal upon appeal where no reasonable basis for the action is shown. (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.)

Under Evidence Code section 352, the probative value of evidence is determined by its materiality and necessity. (*People v. Stanley* (1967) 67 Cal.2d 812, 818.) Materiality depends on "'the strength of the relationship between the evidence and . . . the issue upon which the evidence is offered, and whether such evidence tends to prove a main issue or a collateral matter.'" (*Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, 576, quoting 1 Jefferson, *Cal. Evidence Benchbook* (2d ed. 1982), § 22.1, p. 589.) If the evidence is necessary to prove an essential element of a case, it has greater probative value than if it is cumulative to other matters. (*Burke v. Almaden Vineyards, Inc.* (1978) 86 Cal.App.3d 768, 774.)

The prejudice under Evidence Code section 352 applies to matters that uniquely tend to evoke an emotional bias against defendant as an individual and that have very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) Evidence should be excluded under this section if it "is of such nature as to inflame the emotions of the jury, motivating them to use the information . . . to reward or punish one side." (*People v. Scott* (2011) 52 Cal.4th 452, 491.)

Gang evidence requires special scrutiny under this section. It is recognized as being extraordinarily prejudicial and inflammatory. (See,

e.g., *People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-194.) As one reviewing court has observed: "It is fair to say that when the word 'gang' is used in Los Angeles County, one does not have visions of the characters from 'Our Little Gang' series. . . . [T]he word 'gang' takes on a sinister meaning when it is associated with activities." (*People v. Perez* (1981) 114 Cal.App.3d 470, 479.) The unique danger that arises from gang evidence is that it causes the jury to prejudge a defendant on the basis of his gang membership. (See *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 240 [strong public outrage over street gangs].) Accordingly, this Court has "condemned the introduction of evidence of gang membership if only tangentially relevant." (*People v. Cox* (1991) 53 Cal.3d 618, 660.) Evidence of gang membership "should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

Here, the trial court stated that the pictures "obviously show the wounds that [appellant] did sustain at some point." (16 RT 2519.) At trial, the evidence was used primarily for this purpose. The photographs were introduced to show scratches on appellant's shoulder and neck (13 RT 1983-1984; 15 RT 2188-2190; 15 RT 2277), yet the pictures that showed appellant's upper body (Peo. Exh. 37, photographs A, C, & D; Peo. Exh. 38, photograph B) focused more on the tattoos than the scratches. Indeed, it is difficult to see any wounds in photograph C of People's Exhibit 37. The scratches are more apparent in the close-up pictures, which do not show the panorama of gang-related imagery that the upper-body photographs revealed. The coroner specifically identified one of the close-ups, rather than focus on a full-body picture, to establish that scratches on appellant were consistent with having been made by Maria. (15 RT 2188.)

Accordingly, the disputed pictures were not necessary to establish any issue at trial and were cumulative to other photographs that showed appellant's wounds in far greater detail. The probative value of the photographs was minimal at best. (See *People v. Avitia* (2005) 127 Cal.App.4th 185, 192 [gang evidence improper if cumulative].)

The trial court also found that the photographs were relevant to show "the intimidation of those tattoos." (16 RT 2519.) The trial court erred. The probative value of evidence depends on the use for which it is offered. (*Mendez v. Superior Court, supra*, 206 Cal.App.3d at p. 576.) The photographs were not used by the prosecution to show that Maria was intimidated by the tattoos. Moreover, there was no evidence that Maria was intimidated by them. She could not help but have been aware of appellant's tattoos throughout the course of their relationship and had a tattoo of her own. (10 RT 1551.) She did not state that appellant's tattoos made her apprehensive to press charges in the rape case. Under these circumstances, there was not a sufficient link between the evidence and the trial court's rationale to make the photographs probative. (See *People v. Avitia* (2005) 127 Cal.App.4th 185, 193 [relevance requires link between the evidence and the purpose for which it is being introduced].)

The trial court's finding was simply another way of stating that the tattoos were intimidating, in and of themselves, to all who saw them. If the trial court believed that Maria would have been frightened by them, even in the absence of specific evidence, it is an implied acknowledgment that the photographs had an emotional and prejudicial effect; that the very nature of the tattoos would make appellant seem particularly dangerous or sinister. (See *People v. Perez, supra*, 114 Cal.App.3d at p. 479 [gang membership and tattoos equated with sinister activities]; *People v. Champion* (1995)

9 Cal.4th 879, 922 [evidence of gang membership may not be used to show disposition].)

Finally, the trial court stated that the tattoo on appellant's lower back depicting a woman in a sexually submissive posture was suggestive of his attitude towards women, consistent with Sandra Baca's testimony about intimate partner violence. (16 RT 2519.) Baca did not use the photograph during her testimony. Rather than provide a reason to support admission of the photograph, the trial court's rationale shows the prejudice that resulted from its use at trial. Like the trial court, jurors would have speculated that the tattoo was representative of a certain disposition. Appellant's attitude toward women was not at issue and the use of sexually-charged tattoos to show disposition was improper. (See *Wilde v. State* (Wyo. 2003) 74 P.3d 699, 710 [evidence of sexual tattoos and body piercing found to be prejudicial in sexual assault case].)

The reasons given by the trial court that went beyond the use of the exhibits at trial demonstrates that the photographs would have confused jurors. Given that the trial court speculated that the tattoos may have intimidated the victim or represented appellant's attitudes at the time of the crime, the jurors likely did the same. Evidence that encourages speculation confuses jurors and justifies exclusion under Evidence Code section 352. (*People v. Bush* (1978) 84 Cal.App.3d 294, 307.)

Ultimately, the graphic nature of the tattoos rendered them extremely prejudicial. Although the "Venice Jokers" formed the largest section on appellant's back, there were also images showing various figures who may have been gang members, jokers, and a woman in a sexual posture. The trial court described the tattoos as being "somewhat overpowering" with "interesting perhaps frightening" images. (10 RT 1416.) Given this

description of the tattoos, the court's conclusion that there was no prejudicial effect to the photographs is inexplicable. If an experienced jurist found the tattoos to be somewhat overpowering or frightening, the effect on a juror would be even more pronounced. The nature of the gang display and the images evoked an emotional bias against appellant while having very little effect on the issues. (*People v. Coddington*, *supra*, 23 Cal.4th at p. 588.)

In *People v. Perez*, *supra*, 114 Cal.App.3d at p. 476, a gang expert testified that a particular gang used the symbol "CV3" and that it was common for members of the gang to tattoo themselves on their hands with this symbol. The defendants were required to walk by the jurors and show their tattoos. The reviewing court found that the probative value of the evidence was minimal since membership in an organization was not relevant to proving a person's conduct. (*Id.* at p. 477.) In contrast, the evidence had a significant prejudicial effect and served to make the defendants look particularly sinister. (*Id.* at p. 479.) It found that the trial court prejudicially erred when it allowed the gang evidence and tattoos to be used against the defendants. (*Ibid.*)

The trial court in this case similarly erred. Rather than consider the inflammatory nature of gang evidence and its own belief that the tattoo images might be frightening, it mistakenly found that there was no possible prejudice. Given the minimal probative value of the tattoo photographs and the substantial risk of prejudice, this Court should find that the trial court abused its discretion in allowing the photographs showing appellant's tattoos to be used against him.

C. The Error was Prejudicial

The photographs at issue went beyond showing the scratches on appellant's body at the time of his arrest. The prosecution used the tattoos to introduce a powerful graphic portrayal of appellant's gang involvement. The size of the Venice Jokers tattoo – which Detective Oppelt described as the largest one he had seen (15 RT 2264) – and the accompanying images, some of which were undoubtedly frightening to the jurors, brought significant emotional and inflammatory elements into appellant's trial. (See *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345 [erroneous admission of gang evidence often found to be prejudicial because of its inflammatory nature]; *People v. Gurule* (2002) 28 Cal.4th 557, 653 [gang evidence highly inflammatory].)

Significantly, the photographs were first shown to the jurors as part of a power point presentation that was used during the prosecutor's opening statement. The prosecutor initially described the Venice 13 as a dangerous gang. (10 RT 1428.) The images of the tattoos that followed went beyond mere words, showing appellant covered with gang names, symbols, and other disturbing images. This Court has recognized the significance of the opening statement, which prepares jurors "to follow the evidence and more readily discern its materiality, force, and meaning." (*People v. Gurule*, *supra*, 28 Cal.4th at p. 611.) In this case, the photographs gave the prosecutor's case a force and meaning that went beyond any proper purpose.

The importance of images in trials has long been recognized. "One does not need a law degree to understand that a picture is worth a thousand words." (*Oziel v. Superior Court* (1990) 223 Cal.App.3d 1284, 1291, fn. 4.) A picture can make it more likely for jurors to accept other evidence

relating to a prosecutor's case. (Miller & Mauet, *The Psychology of Jury Persuasion* (1999) 22 Am. J. Trial Advoc. 549, 563.) A graphical presentation, such as used in the prosecutor's opening statement, can have a significant impact on a trial. (See Atkinson & Lanier, *Tap into the Power of A Powerpoint Storyboard* (April 2006) 42 Trial 18, 19 [citing studies that graphic presentations add psychological and emotional power to cases].)

It is also well established that what is seen first will have a strong and permanent impact. (See Lakamp, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?* (1998) 45 UCLA L.Rev. 845, 866, fn. 82 [explaining primacy effect and its impact on jurors]; Kassin & Wrightsman, *The American Jury on Trial: Psychological Perspectives* (1988) pp. 132-135; Lund, *The Psychology of Belief IV, The Law of Primacy in Persuasion* (1925) 20 J. Abnormal and Soc. Psychol. 183-191.) Thus, from the very beginning of the trial, the jurors defined their impressions of appellant with the graphic images shown in the photographs. This association became a filter through which all the other evidence was viewed in both the guilt and penalty phases of the trial.

In the guilt phase, an important issue before the jurors was appellant's intent at the time of the crime – whether the killing was a spontaneous act of violence or if appellant lured the victim to meet with him in order to kill her with premeditation and deliberation. The prosecutor alleged that the murder occurred while lying in wait (Pen. Code, § 190.2, subd. (a)(15)), making appellant's intent very much at issue. From the very beginning of the trial, jurors would have viewed appellant as being particularly sinister. Jurors would be more likely to accept the prosecutor's case because appellant was so visibly tied to gang activity and other criminal acts. Both standing alone, and in conjunction with other improper

gang evidence (Arguments II, III), the photographs influenced the jurors' view of both appellant and the case against him. (See Eisen, Dotson, & Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?* (2014) 62 UCLA L.Rev. Discourse 2, 11-15 [gang evidence gives rise to confirmation bias and makes jurors more likely to find a defendant is guilty].)

The error also carried on to the penalty phase. Evidence that is introduced at the guilt phase affects the penalty decision. (See *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [error may be harmless at guilt phase but prejudicial at penalty phase].) This is particularly true because the jurors were instructed to consider all the evidence brought forth during the guilt phase in making their normative decision about whether to impose death or life without parole. (9 CT 2426 [CALJIC No. 8.84.1].)

Appellant's tattoos presented a powerful first impression that remained with the jurors. By introducing them at the start of the guilt phase, the prosecutor made appellant's gang involvement a significant part of her case and effectively linked the tattoos to the crime itself. Moreover, during the penalty phase, the prosecutor used the photographs of the gang tattoos in People's Exhibit 37 to illustrate testimony that the Jokers were part of the Venice 13 gang. (20 RT 3053.) The prosecutor's closing argument reminded the jurors that appellant was a gang member (30 RT 4291) and emphasized his tattoos – that "he permanently marks his body with his gang affiliation" – to show how important the gang was to appellant. (30 RT 4334-4335.) The effect of this upon the penalty decision is apparent since it linked appellant to past and future criminality. (See, e.g., *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1230 [it is "reasonable to infer" prior criminality from gang membership]; *People v. Thompson*

(1980) 27 Cal.3d 303, 317 [prior criminality breeds tendency to condemn because defendant has previously escaped punishment]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 624 [gang involvement suggests future criminality].[8/]

Under state law, this Court should find that the error prejudicially affected the guilt judgment, including the lying-in-wait special circumstance finding. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Admission of the photographs was also significant error requiring penalty reversal. (*People v. Robertson* (1982) 33 Cal.3d 21, 54-55.)

Under federal standards, the introduction of prejudicial gang evidence may render the trial fundamentally unfair in violation of due process. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223-232; see *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [due process requires fundamental fairness].) Indeed, the United States Supreme Court has determined that the submission of gang affiliation evidence in a criminal proceeding may be constitutional error when such evidence is irrelevant to the issues at hand. (See *Dawson v. Delaware* (1992) 503 U.S. 159, 165 [defendant's First Amendment rights were violated by the admission of

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[8/] Towards the end of the prosecutor's penalty phase, two other photographs of appellant's tattoos were introduced to show that appellant had been validated as a gang member within the state prison system. (21 RT 3215; Peo. Exhs. 90, 91.) Although appellant did not object to these photographs, appellant's prison classification was not relevant to any of the statutory factors under Penal Code section 190.3. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1202 [defendant's background, character, or conduct must be probative to sentencing factors].) The photographs at issue set the stage for the additional pictures. That the jury might have otherwise seen photographs in a context unrelated to their sentencing decision does not lessen the prejudice in using the photographs in People's Exhibit 37 during the penalty phase.

gang evidence in sentencing proceedings where the evidence proved nothing more than his abstract beliefs].) Here, the use of frightening and graphic photographs of appellant's tattoos, beginning with the prosecutor's opening statement, fundamentally affected his trial. Moreover, in the penalty phase, it heightened the danger that appellant was sentenced on the basis of emotion rather than reason (*Gardner v. Florida* (1977) 430 U.S. 349, 358) and left the judgment unreliable under Eighth Amendment standards (see *Johnson v. Mississippi* (1988) 486 U.S. 578, 584, 589). This Court should find that the state has not met its burden of showing harmlessness beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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II.

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY THAT A HAND SIGN THAT APPELLANT FLASHED DURING A PRETRIAL HEARING WAS A GANG SYMBOL

During a pretrial hearing, appellant flashed a hand sign to a potential witness who did not testify at trial. Over appellant's objection under Evidence Code section 352, the trial court allowed a detective to identify this sign as one used by the Venice 13 street gang and to testify about how the gang operated. The trial court abused its discretion. The prejudicial nature of gang evidence far outweighed any relevance. The trial court's ruling violated appellant's statutory rights under Evidence Code section 352 and his constitutional rights to due process and a reliable capital trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17 .)

A. Factual Background

Detective Michael Oppelt testified that during an August, 2004, pretrial conference, he saw appellant "throw a V" to Rosa Marquez with his right hand.[9/] Oppelt stated that "throw[ing] a V is demonstrating a hand sign" and began to give the basis for his opinion. Appellant objected that this testimony was more prejudicial than probative. The trial court "sustained" the objection as to foundation. (15 RT 2258.)

After the prosecutor began to establish Oppelt's expertise with gangs, appellant objected to testimony about how "gang experts gain

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[9/] During the preliminary hearing, Marquez testified that appellant had lived in her home and that she had observed certain things in regard to appellant and his relationship to the victim, as well as the events surrounding the time of her death. (5 CT 1171-1179.) Marquez did not testify at trial.

criminal street experience." Appellant asked for "a ruling with respect to the relevance and the probative value" of the prosecutor's line of questions as they pertained to the charges in this case. The trial court stated that the only basis for its ruling was on foundational grounds and overruled the objection. (15 RT 2259.) Appellant made a continuing objection to the prejudicial nature of Oppelt's testimony about his work with gangs. (15 RT 2260.) The trial court erroneously stated that appellant had objected to lack of foundation: "You asked for the foundation, you're getting the foundation. If you don't like it, don't ask for it . . . . You wanted to know the basis for his conclusion about the V sign. That is what you are getting." (15 RT 2260-2261.) Appellant reminded the court that the objection was that the testimony was more prejudicial than probative. The trial court stated, "You can't keep it out when you ask for it and object when it's brought out anyway." (15 RT 2261.)

Detective Oppelt testified that he had spoken to gang members about how they communicate. (15 RT 2260.) He stated that the primary purpose of the gang unit where he worked was to gain intelligence about their criminal activities. (15 RT 2261.) Oppelt talked to gang members about their involvement with graffiti, guns, and drugs. According to Oppelt, gang members were reluctant to talk about drugs because that was their business. (15 RT 2261.) Oppelt went on to identify the sign that appellant made as one that was used by the Venice 13 gang. He also stated that appellant's "Venice 13" tattoo was the largest that he had seen. (15 RT 2263-2264.)

After the testimony, the trial court addressed the issue outside the jury's presence. The court stated that it did not understand the objection to the testimony about the meaning of the V sign: "Given the fact that you're letting him testify about throwing a V, we can't just leave that in the air.

The explanation for it is necessary or we shouldn't have let that come in in the first place." (15 RT 2265-2266.) The trial court found nothing prejudicial about explaining what the sign means. (15 RT 2266.)

In the trial court's view, the testimony was relevant because it suggested that appellant and Rosa were "still hooked up in some manner, even at the time of the court proceedings, and that she recognizes the gang sign and is somehow affiliated with the gang, either as an associate or an actual member." (15 RT 2266.) The trial court reasoned that since the hand sign was admitted, "we've got to know what it means and what the significance is, and the basis for that is what I upheld." (15 RT 2266.)

Appellant stated that he was not arguing the relevance or probative value of the foundational testimony, but that it distorted the jury's view of the case. (15 RT 2266.) Appellant argued that the history of the gang, its criminal activities, and Oppelt's expertise with gang matters were prejudicial. (15 RT 2267.) Appellant stated that there was no gang allegation at issue and the evidence was "too probative with respect to certain areas" and unnecessary to a fair determination of the case. (15 RT 2268.)

The trial court found the testimony to be highly probative since appellant flashed a gang sign to someone in the courtroom, at a time when he would be expected to be on his best behavior, "to show an association with somebody in the courtroom." (15 RT 2269.) It stated that evidence about gang activity was part of the trial, not only through appellant's tattoos, but when appellant wrote to his brother and signed a photograph

with the initials "J K S."[10/] The trial court stated that gang activity was "very significant as to [appellant's] attitude about the victim in this case." The court saw no prejudice. (15 RT 2269.)

The trial court acknowledged that appellant had not sought a foundation for the detective's testimony, but the court had believed that lack of a foundation was the only basis for an objection. By sustaining the objection on that ground, it was overruling the objection that the evidence was more prejudicial than probative. (15 RT 2270.)

Detective Oppelt further testified that the V sign represented the Venice 13 and showed appellant's allegiance to that gang. Oppelt described Venice 13 as a long standing criminal street gang, extending through generations. (16 RT 2331.)

B. The Testimony about Gangs and the Gang Sign Was More Prejudicial than Probative

Evidence Code section 352 provides that a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." As discussed above (Argument I), evidence should be excluded under this section if it "is of such nature as to inflame the emotions of the jury, motivating them to use the information . . . to reward or punish one side." (*People v. Scott* (2011) 52 Cal.4th 452, 491.) At bottom, evidence is substantially more prejudicial than probative if it poses an intolerable "risk to the fairness of the

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[10/] A photograph in an envelope addressed to appellant's brother depicted appellant and Maria, with the words, "This is the bitch, Ruben, J K S." The picture was introduced as People's Exhibit 61 and used during Oppelt's testimony without objection. (15 RT 2256.)

proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14). The trial court abused its discretion under Evidence Code section 352 because it allowed inflammatory testimony that had no bearing on any substantive issue in this case.

This Court has long recognized the prejudicial danger that gang evidence presents. (*People v. Cox* (1991) 53 Cal.3d 618, 660 ["we have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact"].) Due to the nature of gang evidence, a trial court should scrutinize it with special care before allowing it to be admitted. (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Albarran* (2007) 149 Cal.App.4th 214, 224.)

The trial court first found that the testimony identifying the V sign with the gang was necessary to explain appellant's actions. The court believed that the testimony about the V sign could not be left "hanging." As it stated: "The explanation for it is necessary, otherwise we shouldn't have let that come in in the first place." (15 RT 2266.) The trial court may have been right to the extent that the original testimony about the V sign should not have been admitted, but appellant objected before Oppelt offered any explanation about what it meant. (15 RT 2258.) On its own, flashing a V sign meant very little. Rosa Marquez was not a witness at trial and the sign was not relevant to any trial issue. That the prosecutor introduced a small piece of tangential evidence does not open the door to expand the testimony into a prejudicial line of questioning in order to explain the sign's meaning. (See *People v. Robinson* (1997) 53 Cal.App.4th 270, 285 [failure to object to irrelevant evidence does not op; en the door for further testimony about it]; *Fortner v. Bruhn* (1963) 217 Cal.App.2d 184, 190 [failure to object to improper testimony does not open the door to further irrelevant testimony].)

The trial court found that identifying the gang sign was relevant because it showed that appellant and Marquez were "still hooked up in some manner" and that she recognized the sign either as an associate or an actual member of the gang. (15 RT 2266.) Even if this was true, it does not make the testimony probative. Marquez did not testify, no statement of hers was admitted, and her conduct was not otherwise at issue. Marquez's relationship to either the gang or appellant did not prove a disputed fact that was of consequence to any issue at trial. (See *People v. Hines* (1997) 15 Cal.4th 997, 1034, fn. 4 [evidence of conduct of third person irrelevant when that person's conduct is not at issue].) Accordingly, this reason does not weigh in favor of admission under Evidence Code section 352.

The trial court also stated that it was "highly probative" that appellant flashed a gang sign to somebody in the courtroom at a time when you would expect him to be on his best behavior. The court believed that appellant wanted "to show an association with somebody in the courtroom." (15 RT 2268-2269.) That appellant conducted himself poorly in court, at a hearing that was not held during the jury trial, did not transform this incident into relevant evidence of appellant's guilt or require further explanation of appellant's gang activity.

The trial court also erred in believing that evidence of continuing gang activity had a significant bearing on appellant's attitude toward the victim in this case. (15 RT 2269.) There was no allegation that the crime was committed as a result of gang activity. There was no evidence that appellant killed Maria because he was a gang member or had any attitude toward her that was based upon gang membership. Flashing a gang sign, long after the crime had been committed, in circumstances unrelated to the victim, had no bearing upon this case. It would be relevant only if jurors

believed appellant had a propensity to murder because he belonged to a gang. Rather than being admissible evidence, it shows the inherent prejudicial effect that the gang testimony had in this case. (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345 [gang membership improperly equated with criminal disposition].)

The prejudicial nature of the gang testimony was emphasized in the foundational testimony that Oppelt presented over appellant's continuing objection. Oppelt testified that the most important part of his work as a member of the gang unit was to gain intelligence about criminal street gangs. Gang members told him what graffiti meant; the type of crimes that were committed against the gang; and, activities the gang engaged in, such as dealing guns or drugs." (15 RT 2261-2262.) Oppelt specifically identified Venice 13 as being a long-established criminal street gang that went back at least two generations. (16 RT 2331.)

As early as 1981, a reviewing court aptly observed that "the word 'gang' takes on a sinister meaning when it is associated with activities." (*People v. Perez* (1981) 114 Cal.App.3d 470, 479.) This association between violent criminal behavior and gangs has only increased in the intervening years. By emphasizing appellant's association with the Jokers and Venice 13, the jurors would believe that appellant was particularly brazen and sinister when he flashed the gang sign in court. This certainly affected them on a deep emotional level.

In *People v. Hill* (2011) 191 Cal.App.4th 1104, the reviewing court emphasized that "[t]he primary danger flowing from admission of these other gang-related crimes evidence is its tendency to persuade the jury that the defendant 'had committed other crimes, would commit other crimes in the future, and posed a danger to the police and society in general and thus

he should be punished.'" (*Id.* at p. 1140, quoting *People v. Albarran*, *supra*, 149 Cal.App.4th at p. 230.) The court concluded, "[s]uch evidence may, therefore, create an emotional bias against the defendant that impacts the jury's determination of all of the charges . . . ." (*Id.* at p. 1140.) These same considerations apply here.

The testimony about the gang sign and the kind of activities associated with gangs went beyond mere membership. The prosecution effectively invited the jurors to speculate that appellant had committed all the acts identified by Oppelt and more. It created an emotional bias that distorted the jurors' view of the evidence. Given the tangential nature of the gang sign, this Court should find that the trial court abused its discretion in allowing it to be presented. In so doing it violated both appellant's statutory and constitutional rights. (Evid. Code, § 352; *Payne v. Tennessee* (1991) 501 U.S. 808, 824-825 [unduly prejudicial evidence violates due process if it renders the trial fundamentally unfair]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385 [admission of irrelevant and emotionally charged "other acts" evidence violated due process].)

C. The Errors Were Prejudicial

"Erroneous admission of gang-related evidence, particularly regarding criminal activities, has frequently been found to be reversible error, because of its inflammatory nature and tendency to imply criminal disposition, or actual culpability." (*People v. Bojorquez*, *supra*, 104 Cal.App.4th at p. 345.)

Here, the sign that appellant flashed was at best a tangential issue. Identifying the sign as being gang-related raised it to another level. Even assuming that appellant committed a homicide, an important issue before the jurors was appellant's intent at the time of the crime. The lying-in-wait

special circumstance alleged in this case required jurors to determine if the crime occurred after appellant intentionally lured the victim in order to kill her. Appellant based his defense on the killing being a spontaneous act of rage. (See 17 RT 2623 [closing argument of counsel].) Evidence showing ongoing gang affiliation would weigh heavily in this determination, making it appear that appellant had a disposition to commit violent crimes with premeditation and deliberation in order to meet his ends.

The danger with predisposition evidence is that it may prove too much in ways that should have no bearing on the issues before the jurors. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 915 [propensity evidence "deemed objectionable, not because it has no appreciable probative value, but because it has too much"].) Thus, apart from limited exceptions, disposition evidence is not permitted. (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1384 [inferences based on propensity are "impermissible under an historically grounded rule of Anglo-American jurisprudence"].)
The evidence about gang signs and gang activity was prejudicial because it proved too much about appellant's disposition. (See 15 RT 2268 [argument of counsel that evidence was "too probative" in certain respects]; Eisen, Dotson, & Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?* (2014) 62 UCLA L.Rev. Discourse 2, 11-15 [gang evidence prejudicially affects jurors' view of defendants].)

This Court should therefore find that the error had a significant impact upon appellant's trial in general, and the lying-in-wait special circumstance in particular, that requires reversal under state law. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of prejudice under state law].) It rendered the trial fundamentally unfair in violation of due process and federal constitutional standards for a fair and reliable

judgment. (See *People v. Albarran, supra*, 149 Cal.App.4th at pp. 223-232.) The error cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The effect of the error carried into the penalty determination. As discussed above (Argument I), at the penalty phase of a capital trial jurors must make a normative decision based on all the evidence that is before them. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) Here, appellant's jurors were so instructed. (9 CT 2426 [CALJIC No. 8.84.1].)

Although jurors in the penalty phase would have been aware that appellant was involved with a gang as a juvenile or young adult, the testimony about the gang sign showed appellant's continuing association. Jurors were informed that appellant flaunted his gang association even in a recent court proceeding. At a minimum, jurors likely believed – as did the trial judge – that appellant was disrespectful towards the entire judicial process at a time when he would have been expected to be on his best behavior. They could have also believed that he was trying to subvert justice or affect future proceedings. None of this was relevant to any legitimate issue before the jurors, but it was extremely inflammatory. The testimony would have held considerable emotional sway and helped convince jurors that appellant would continue to pose a special danger. (See *People v. Hill, supra*, 191 Cal.App.4th at p. 1140 [gang evidence linked to future dangerousness].)

It has been recognized that evidence about future dangerousness can have a particularly powerful impact during penalty deliberations. (Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports* (2008) 35 Am. J. Crim. L. 145, 170.) Empirical

studies have found "that concerns regarding the defendant's dangerousness may weigh heavily in jury decision making and consume a majority of the sentencing deliberation time across a variety of capital sentencing frameworks," even when no expert testimony is admitted and even when future dangerousness is not a statutory aggravating circumstance. (Claussen-Schulz et al., *Dangerousness, Risk Assessment, and Capital Sentencing* (2004) 10 Psychol. Pub. Policy & L. 471, 481-482 [reviewing literature].) "This suggests that jurors may be especially primed to give inappropriate weight to evidence concerning the defendant's dangerousness." (*Ibid.*)

The impact of this testimony heightened the likelihood that appellant would be sentenced on the basis of emotion rather than reason. (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) This Court should therefore find that the evidence violated due process and Eighth Amendment standards for reliability in a capital case. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584, 589 [reliability of death sentence undermined by jury's consideration of inaccurate and prejudicial aggravating evidence].)

Under state law, the error in admitting the evidence, both standing alone and in conjunction with other errors (Arguments I, III, & IV) had a substantial effect upon the penalty verdict. (*People v. Robertson* (1982) 33 Cal.3d 21, 54-55.) Under federal constitutional standards, the error cannot be shown to be harmless beyond a doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Reversal is required.

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III.

THE TRIAL COURT IMPROPERLY ADMITTED GANG EVIDENCE FOUND IN THE VICTIM'S ADDRESS BOOK

The trial court abused its discretion by admitting various entries found in the victim's address book relating to gangs and gang nicknames. This evidence was introduced simply to link appellant to the Venice 13 Jokers and criminal street gangs. It served no proper purpose in this trial and should not have been introduced. The writing in the book was improper hearsay and brought further inflammatory testimony about gangs into this case in violation of appellant's statutory and constitutional rights. (Evid. Code, §§ 352, 1200; U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.)

A. Relevant Facts

During the search of appellant's bedroom, officers found an address book that belonged to Maria. (Peo. Exh. 4; 12 RT 1711, 1734; 13 RT 2015.) Although most of the writing in the book was Maria's, some of it was not. (10 RT 1542; 12 RT 1734, 1739.) Over appellant's hearsay objection, Detective Oppelt testified that the book contained written items "consistent with the Venice Jokers or criminal street gangs." He identified pink writing that stated "Venice J K S," as standing for the Jokers clique of the Venice gang. (16 RT 2332.) Oppelt testified that numerous gang monikers or nicknames were found in the book as well as another reference to "J K S." (16 RT 2332-2334.)

Appellant objected that the line of questions about the writings was more prejudicial than probative under Evidence Code section 352. The trial court overruled the objection on that basis, but stated that it was concerned

about relevance. The prosecutor replied that she was "just pointing out various thing, given some of the evidence in this case." Without any further ruling from the trial court, Oppelt identified one more name, "Chita" Marquez, which was listed with the address of where appellant was staying. (16 RT 2334.) The trial court admitted the address book into evidence. (16 RT 2522.)

B. The Testimony Was Hearsay

Hearsay encompasses any out of court statement, including writing, that is admitted for the truth of the matter. (Evid. Code, § 1200.) Hearsay is inadmissible unless it comes within an exception to the general rule. (*People v. Alvarez* (1996) 14 Cal.4th 155, 185.) The trial court did not identify an exception to the hearsay rule under which the writing in the book could be admitted, but the only potential basis was as an admission against appellant.[11/] (Evid. Code, § 1220.)

In order for the writing to qualify as an admission, there must be some proof that it was appellant's. (See Evid. Code, § 1401 [writing must be authenticated before it is admitted]; *Lewis v. Western Truck Line* (1941) 44 Cal.App.2d 455, 465 [writing introduced as admission requires proof of authorship]; *People v. Price* (1991) 1 Cal.4th 324, 413 [typewritten letter properly excluded when authorship was not authenticated].) Here, all that is known is that the book was found in appellant's bedroom and that some of the writing in it was not Maria's.

[11/] The trial court overruled appellant's objection without argument. The prosecutor did not contend that the writing met any exception to the hearsay rule or was not being admitted for the truth of the statements. (16 RT 2332.)

There was no evidence to establish who wrote the entries referring to gangs; when appellant obtained the book; under what circumstances he had it; or if appellant was the only one who could have written in it. Although the prosecution obtained a handwriting exemplar from appellant before trial (see 4 RT 498 [over appellant's objection, court grants prosecution motion to obtain exemplar]), it was not introduced to prove that he wrote the passages at issue. Under these circumstances, this Court should find that the writing was inadmissible hearsay and erroneously admitted into evidence.

C. The Evidence Was Irrelevant and More Prejudicial than Probative

Appellant objected that the extensive questioning about the book was more prejudicial than probative under Evidence Code section 352. The trial court overruled the objection on that basis, but was concerned about the relevance of the testimony. (12 RT 2334.)

As discussed above (Arguments I, II), Evidence Code section 352 requires a trial court to weigh the relevance of the evidence against its potential for prejudice. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1162.) The trial court here had every reason to be concerned about the relevancy of the testimony. Even assuming that this Court finds that appellant wrote the entries, there was no evidence to establish when he wrote them; whether Maria saw the book or was present in a way that would affect her state of mind; or, why the entries were made. All that was established was that "J K S" was written in the book at least twice and that various nicknames (including Spanky, Risto, Squid, Sneeks, and Gumby) were gang identifications. (16 RT 2332-2334.) This improperly invited the jurors to speculate about what this association may have meant, the extent of appellant's gang affiliation, and why the entries were made in the book.

(*People v. Kraft* (2000) 23 Cal.4th 978, 1035 [speculative inferences are irrelevant].)

The prosecutor's justification, that she was just pointing out various things given the evidence in this case, did nothing to clarify the potential relevance or establish any proper purpose. (16 RT 2334.) It did not matter whether certain people who had no relation to this case had gang monikers, or that "J K S" was doodled. It did not matter that appellant's affiliation with the gang was important to him. This was not a case involving gang enhancements and the crime was not gang-related. Accordingly, the probative value of the evidence was minimal at best.

The prejudicial nature of gang evidence must be weighed against this. As discussed in Arguments I and II, gang evidence is likely to conjure up deeply emotional and inflammatory associations in a juror's mind. (*People v. Perez* (1981) 114 Cal.App.3d 470, 479.) Therefore, a trial court must be particularly careful before such evidence is admitted. (*People v. Williams* (1997) 16 Cal.4th 153, 193.) Evidence of gang membership "should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

Here, the trial court overruled appellant's objection even though the testimony lacked probative value. This Court should find that the trial court erred in allowing writing and drawings pertaining to the Venice Jokers and gang monikers.

D. The Evidence was Prejudicial

The prosecutor introduced the notations in the address book by first establishing that the Jokers were a clique within Venice 13, a long-standing criminal street gang. (16 RT 2332.) Even if one were to assume that appellant wrote the entries, whether considered alone or in conjunction with

improper gang evidence (Arguments I, II), the book revealed appellant's gang association in a case that was not premised upon his gang involvement. Jurors could only believe that appellant had a criminal disposition, that he was likely to have committed other crimes associated with criminal street gangs, and that he should be punished as a continuing danger to society. (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1140.)

By alleging that appellant developed a plan to lure Maria to meet him, and laid in wait in order to kill her, the prosecution made appellant's intent an important part of the guilt phase. Jurors could conclude that because appellant was actively involved in a criminal gang, he was far more likely to have developed a plan that would have concealed a murderous purpose than simply to have acted in rage.

Moreover, appellant's gang membership became the lens through which jurors viewed all the evidence in this case. This affected the entire trial as described in Arguments I and II. (See Eisen, Dotson, & Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?* (2014) 62 UCLA L.Rev. Discourse 2, 11-15 [gang evidence gives rise to confirmation bias and makes jurors more likely to find a defendant is guilty].) Under state law, at a minimum, the special circumstance of lying in wait must be set aside because it is reasonably probable that the gang evidence affected the verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) This evidence would have also had a substantial effect upon the penalty phase, making it likely that appellant was seen as being particularly sinister and deserving of death. Reversal is required. (*People v. Robertson* (1982) 33 Cal.3d 21, 54-55.)

Introducing the gang evidence at issue also violated appellant's federal constitutional rights to due process and a reliable verdict. (See

People v. Albarran (2007) 149 Cal.App.4th 214, 223-232 [finding federal due process error in admitting gang-related evidence].) Under federal constitutional standards, the error cannot be shown to be harmless beyond a reasonable doubt either at guilt or as part of the penalty judgment. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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IV.

THE TRIAL COURT IMPROPERLY ADMITTED STATEMENTS BY APPELLANT CLAIMING TO BE A HIT MAN FOR THE MEXICAN MAFIA

During the course of a conversation, before the alleged rape occurred, appellant told one of Maria's coworkers that he had been a hit man for the Mexican Mafia. The trial court found that the statement was relevant to Maria's state of mind because she heard the conversation. Although the court recognized that the prejudicial effect of the statement was at issue, it erroneously ruled that the statement was admissible in violation of appellant's statutory rights under Evidence Code section 352 and his constitutional rights to due process and a reliable capital verdict. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.)

A. Relevant Facts

Before any guilt phase testimony was presented to the jurors, the prosecutor stated that she would be introducing testimony from one of the victim's coworkers, including that appellant "gloated about the fact that he was a hit man for the Mexican Mafia and had always gotten away with it and knew how to come out clean." (10 RT 1468.)

Appellant objected that the statements were irrelevant because the victim's state of mind was not at issue. (10 RT 1469.) The trial court reasoned that appellant's opening statement addressed whether Maria was raped. It found that her delay in reporting the incident made her state of mind relevant: "[I]f there was a real rape and she's terrified of a possible Mexican Mafia hit man, she's going to keep her mouth shut and figure, well, it was bad enough, I'm not going to make it worse." (10 RT 1469.)

The court found that it did not matter whether the statements were true, since the effect on Maria made them admissible. (10 RT 1469, 1471.)

The trial court stated that the statements were "clearly relevant" so that the "only issue would be whether it is so prejudicial" to justify exclusion. (10 RT 1469.) The Court recognized that "one of the problems would be that its being a braggart" but that it still had "the effect of terrifying the victim, so whether it's true or not, its admissible." (10 RT 1469.) Appellant submitted the issue to the trial court (10 RT 1470) but maintained that there was no evidence that appellant was a Mexican Mafia hit man and that the statement was simply braggadocio. (10 RT 1471.)

Chris Eck testified that in 1999, before the alleged rape took place, Maria was present when appellant spoke to him about his life in prison and criminal activity. Appellant mentioned that he had served time as a juvenile for homicide and later as an adult for a double attempted murder. Appellant claimed to be a hit man with the Mexican Mafia. He stated that he had killed people in the past and got away with it. Eck knew that the Mexican Mafia was a violent prison gang. (11 RT 1612-1613.) These statements occurred during a casual conversation. Eck did not think that appellant was trying to intimidate him or scare him, but it made a deep impression on him. (11 RT 1630-1632.)

B. Appellant's Claims of Being a Mexican Mafia Hit Man Was More Prejudicial than Probative

The trial court found that appellant's claim to be a hit man for the Mexican Mafia who had committed several uncharged murders was relevant to Maria's state of mind, so that "the only issue would be whether

[the statement was] so prejudicial" to warrant exclusion.[12/] (10 RT 1469.) Under Evidence Code section 352, a statement should be excluded if its probative value is substantially outweighed by its prejudicial effect. This section applies to evidence that tends to invoke an emotional or other bias against the defendant so that there is a danger that the jurors will consider it for improper purposes or "in some manner unrelated to the issue on which it was admissible." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1016.) Here, the trial court abused its discretion because the probative value of the statement was minimal compared to the substantial prejudice that the claim involving the Mexican Mafia engendered.

At the time of the objection, the trial court was aware that Juan Arevalo had testified that appellant had directly threatened Maria and her family if she reported that she had been raped to the police. (5 RT 645-647 [hearing on admitting prior statements made by Maria].) Appellant had abused and threatened to kill Maria. (5 RT 638, 679.) There was no doubt that appellant's threats made Maria fearful. (5 RT 649, 678.) There was no evidence, however, that Maria felt threatened by appellant's brag or that it

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[12/] Although appellant objected to the relevance of Maria's state of mind rather than under Evidence Code section 352, the purpose of requiring an objection is to alert the trial court to the issues before it and enable it to make an informed ruling. (*People v. Partida* (2005) 37 Cal.4th 428, 435.) Here the trial court itself recognized that the primary issue before it was the potential for prejudice. In effect, the court ruled on its own motion and appellant accordingly submitted the issue. (10 RT 1470.) This Court has reached the merits of a claim when a trial court is aware of an issue and rules on that basis. (See *People v. Lewis* (2008) 43 Cal.4th 415, 497, fn. 21.) This Court should therefore determine whether the trial court abused its discretion in admitting evidence that was more prejudicial than probative. (Evid. Code, § 352.)

affected her in any way. Accordingly, testimony that appellant gloated about being in the Mexican Mafia added little to show Maria's state of mind and was of minimal probative value. (Cf. *People v. Guerra* (2006) 37 Cal.4th 1067, 1141 [victim hearing that defendant had committed murders was relevant because it expressly made her afraid to report the matter].)

In contrast, the potential for prejudice was enormous. Gang evidence is likely to have a "highly inflammatory impact" upon jurors. (*People v. Cox* (1991) 53 Cal.3d 618, 660.) Testimony about uncharged crimes is similarly prejudicial. (*People v. Thompson* (1980) 27 Cal.3d 303, 314, 317; *People v. Smallwood* (1986) 42 Cal.3d 415, 428.) Accordingly, even if evidence about gangs is relevant, it must be carefully scrutinized because of its potential for prejudice. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224.)

Here, the claim about being a hit man for the Mexican Mafia went beyond simple membership in a street gang. The Mexican Mafia is a particularly notorious prison gang. (See *People v. Hisquierdo* (1975) 45 Cal.App.3d 397, 405.) Even if a juror might be unfamiliar with the organization, the "mafia" reference would conjure images of murders and hit men. Accordingly, some trial courts have excluded references to the gang's name even when a witness's fear is otherwise at issue. (See *People v. Ayala* (2000) 23 Cal.4th 225, 276-277 [noting with approval efforts of trial court to exclude references to the "Mexican Mafia" to explain why a witness may be fearful].)

In *People v. Albarron, supra*, 149 Cal.App.4th at p. 227, the reviewing court found that evidence of gang involvement was relevant to motive. Certain gang evidence, however, went beyond what was necessary to show this. Reference to gang conduct and the Mexican Mafia "had little

or no bearing on any other material issue relating to [the defendant's] guilt on the charged crimes and approached being classified as overkill." (*Id.* at p. 228.) This evidence was irrelevant, cumulative, and presented a substantial risk of undue prejudice. (*Ibid.*)

As in *Albarron*, the references to uncharged murders committed as a hit man for the Mexican Mafia was not necessary to show the effect upon Maria's state of mind. It had little or no bearing on that issue and was cumulative to the other evidence that offered direct testimony about why Maria was reluctant to report her allegation to the police. Given the substantial risk of prejudice that reference to the Mexican Mafia entailed, this Court should find that the trial court erred in allowing it to be used against appellant.

C. Reversal is Required

Admission of appellant's claim of having been a hit man for the Mexican Mafia undoubtedly had a profound impact upon the jurors. During the guilt phase, one of the important considerations before the jurors was whether appellant lured Maria in order to kill her or if the homicide was a spontaneous violent act. Testimony that appellant acted as a hit man likely served to convince jurors that appellant had a cold disposition, with the propensity to murder in order to accomplish certain goals. It would help convince jurors that appellant was likely to have killed Maria with premeditation and deliberation, through lying in wait, rather than her death being the result of a spontaneous rage. (See 17 RT 2623 [closing argument of counsel setting forth defense theory of case].)

Even if jurors discounted the truth of the statement, that appellant was willing to make such a claim to Eck would have been used against him. The brag about being a Mexican Mafia hit man who had committed

uncharged murders likely led jurors to believe that appellant was so immersed in a culture of violence that this kind of claim was second nature to him. Appellant appeared to be outside the bounds of societal norms even in the most informal type of discussion. That he made the claim in the course of a casual conversation, in a way that was not designed to intimidate or manipulate Eck, undoubtedly alarmed the jurors. The statement likely made a deep impression upon them, just as it did upon Eck when he heard appellant's claim. (11 RT 1630-1632.)

Under state law, there is a reasonable probability that the error affected the verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Under federal due process standards, the prejudicial effect of the evidence outweighed its necessity and rendered the trial fundamentally unfair in violation of due process. (*Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 972.) Accordingly, the state has not shown the error to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Moreover, the testimony affected the penalty deliberations. In the penalty phase of a capital trial, the jury is called to make a normative decision about whether a defendant should live or die. (*People v. Brown* (1985) 40 Cal.3d 512, 541.) In making this decision, very few things would be as compelling as the belief that a defendant had been a hit man for a notorious prison gang and murdered in the past without suffering any consequences.

This evidence was squarely before the jurors, who were instructed to consider all the evidence received during the trial. (9 CT 2426 [CALJIC No. 8.84.1].) If the jurors believed appellant, they could have used his claim of being a hit man as an aggravating factor. (9 CT 2433 [modified

CALJIC No. 8.87 listing murder and conspiracy to murder as an aggravating factor]; see Argument XI, *infra*.) Even if jurors only considered it to be a brag, it would have horrified jurors that he was willing to make such a claim to one of Maria's coworkers. It amounted to disposition evidence that went beyond the enumerated aggravating circumstances as defined in Penal Code section 190.3.

Under these circumstances, appellant's claims to have been a hit man and to have been unpunished for multiple murders had great weight and rendered the verdict unreliable in violation of due process and Eighth Amendment standards. Both standing alone and in conjunction with Arguments I, II, and III, this error had a substantial effect upon the verdict requiring penalty reversal under state law. (See *People v. Robertson* (1982) 33 Cal.3d 21, 54.) It cannot shown to be harmless beyond a reasonable doubt under federal constitutional standards. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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V.

THE TRIAL COURT ERRONEOUSLY ALLOWED TESTIMONY THAT APPELLANT WAS ABLE TO MANIPULATE THE LEGAL SYSTEM AS SUBSTANTIVE EVIDENCE OF GUILT

Maria was afraid to report the alleged rape to the police because appellant had threatened her. Appellant also told her that he could get away with crimes by acting crazy. Appellant asked the trial court to limit the latter statement to Maria's state of mind. The trial court erroneously admitted it as spontaneous statement (Evid. Code, § 1240), without limiting its use in any way. The error violated appellant's statutory rights as well as his constitutional rights to due process and a reliable verdict. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.)

A. Relevant Facts

Maria Eugenia Herrera testified that she met Maria Arevalo at the police station after the alleged rape on August 8, 1999. Maria, the victim, was bruised and shaking. She said that appellant had hit her, choked her, and threatened to kill her if she went to the police. (12 RT 1705-1707.) Maria stated that appellant knew how the legal system worked: "He could make believe that he was crazy and that way get away with it." (12 RT 1708.)

Appellant moved that the statement be limited to Maria's state of mind.[13/] (12 RT 1708-1709.) Appellant acknowledged that the threats that appellant had made would have contributed to her fear in reporting her

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[13/] Evidence Code section 1250 allows a statement to be admitted when "offered to prove the declarant's state of mind, emotion, or physical sensation" when that is an issue in a case, or when offered to prove or explains acts or conduct of the declarant.

allegations, but "with respect to anything else, . . . it's simply double hearsay and unreliable." (12 RT 1709.) The prosecutor responded that Maria's statement was admissible under Evidence Code section 1240 as a spontaneous statement. The trial court agreed and overruled appellant's objection. (12 RT 1709.)

B. The Trial Court Improperly Admitted Maria's Statement Without Limitation

The trial court overruled appellant's request to limit Maria's reason for being afraid to report the rape to her state of mind because it found that it was admissible as a spontaneous statement. Evidence Code section 1240 allows a hearsay statement to be admitted if it narrates, describes, or explains "an act, condition or event perceived by the declarant" and if the statement was made spontaneously "while the declarant was under the stress of excitement caused by such perception." This Court has explained that for a statement to be admitted under this section there must be some occurrence startling enough to render the utterance spontaneous and "the utterance must relate to the circumstance immediately proceeding it." (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) It is admissible only if it relates "to an event the declarant perceived personally." (*People v. Phillips* (2000) 22 Cal.4th 226, 235.)

In *People v. Miron* (1989) 210 Cal.App.3d 580, a declarant's statement was admitted that described a shooting. The trial court excluded a portion of it that gave the declarant's opinion that the shooter was trying to kill the victims. (*Id.* at p. 583.) The reviewing court upheld the decision to exclude the opinion testimony. It found that the opinion portion of the statement would not have been admissible if given as part of the declarant's testimony and was not made any more admissible because it was part of a

spontaneous statement. The reviewing court cautioned that "the spontaneous statement exception to the hearsay rule cannot be used to bootstrap admissibility." (*Id.* at p. 584.)

Even assuming that Maria was under the stress of the alleged rape when she spoke about her fear and the threats, testimony about whether appellant pretended to be crazy in order to get away with something did not purport to narrate or describe what she had experienced. It was not relevant to the circumstance that produced the stress or excitement, but simply related her state of mind about whether she wanted to report the incident to the police. The trial court erroneously used Evidence Code section 1240 to bootstrap evidence and allowed it to be used without limiting it to Maria's state of mind.

C. The Testimony Was Prejudicial

The trial court erroneously allowed the statement to be used for its truth. As such, jurors would believe that appellant had committed other wrongful acts for which he escaped punishment by pretending to be crazy. This likely inflamed jurors against appellant and allowed them to conclude that appellant willfully committed crimes even if he appeared to be acting in a crazed manner. The testimony affected their view of the evidence – whether appellant was raging out of control when he began to beat Maria or if he was acting according to a deliberate plan. Under state law standards, it is reasonably probable that the error affected the lying-in wait special circumstance. (*People v. Watson* (1956) 46 Cal.2d 818, 836) Under federal constitutional standards, the error cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Even assuming that the error was harmless in relation to other issues during the guilt phase, the penalty decision is distinct from the guilt verdict

because it is a normative judgment. (*People v. Lewis* (2006) 39 Cal.4th 970, 1060.) As discussed above, error that is harmless at guilt may affect the penalty phase. (*In re Marquez* (1992) 1 Cal.4th 584, 605, 609.) Since appellant's jurors were instructed at penalty to consider all the evidence introduced during the guilt phase, the error carried over to the penalty judgment. (9 CT 2426 [CALJIC No. 8.84.1].)

During the penalty phase, the jurors likely used this statement to believe that appellant had gotten away with other crimes without being punished. It could also have been used to discount the testimony of Dr. Roger Light and the neuropsychological evidence that was introduced by appellant. (24 RT 3500, et seq.) If appellant feigned mental illness to escape punishment for other crimes he committed, then jurors would have concluded that the evidence of a brain deficit was simply an example of trying to avoid the death penalty. Indeed, the statement could have been taken as a warning from the victim that appellant might try to "get away" with a life sentence based upon his mental state – and a plea from her not to let this happen. Under these circumstances, jurors likely resolved not to let appellant's mental deficits serve as a reason to avoid the ultimate punishment. In short, the erroneous statement went to the heart of appellant's penalty phase defense.

Under state law, this Court should find that admitting the statement for its truth was substantial error that prejudicially affected the penalty verdict. (*People v. Robertson* (1982) 33 Cal.3d 21, 54-55.) Under federal law, the error in allowing the statement to be considered for its truth violated due process by rendering appellant's penalty trial unfair. (*Duncan v. Henry* (1995) 513 U.S. 364, 366 (per curiam).) It left the verdict unreliable under the Eighth Amendment. (*Beck v. Alabama* (1980) 447

U.S. 625, 638, fn. 13.) The error cannot be shown to be harmless beyond a doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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VI.

THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

At the conclusion of the guilt phase of the trial, the trial court instructed the jury on first degree premeditated murder (17 RT 2690-2691; 9 CT 2333 [CALJIC No. 8.20] and on felony murder (17 RT 2692; 9 CT 2333 [CALJIC No. 8.21].) The jury found appellant guilty of murder in the first degree. (9 CT 2367; 17 RT 2735.) The instructions on first degree murder were erroneous, and the resulting convictions of first degree murder must be reversed. The information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder; thus he could not be convicted of first degree murder. Appellant acknowledges that this Court has rejected similar claims (see, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368), but asks this Court to reconsider its previous opinions.

Count 7 of the information alleged that appellant "did willfully, unlawfully and with malice aforethought murder" in violation of Penal Code section 187, subdivision (a). (5 CT 1358.) Both the statutory reference ("section 187(a) of the Penal Code") and the description of the crime ("murder") establish that appellant was charged exclusively with second degree malice murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.

Penal Code section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.)[14/] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[15/]

Because the information charged only second degree malice murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) that charges that specific offense. (*People v. Granice* (1875) 50 Cal. 447, 448-449

[14/] Subdivision (a) of Penal Code section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[15/] At the time of the alleged murder in appellant's case, section 189 read as follows: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnaping, train wrecking, or any act punishable under section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree."

[defendant could not be tried for murder after grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of Penal Code section 187. (See, e.g., *People v. Hughes*, *supra*, 27 Cal.4th at pp. 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

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

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

> murder in the second degree.[16/] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

The rationale of *People v. Witt*, however, and all similar cases, was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that section 187 was *not* "the statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe *section 189* as a statutory enactment of the first degree

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[16/] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in section 189. On the contrary, "[s]econd degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344), at least when the first degree murder does not rest on the felony murder rule. A crime cannot both include another crime and be included within it.

felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, italics added.)

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997)15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord, *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute defining that offense must be Penal Code section 189. No other statute purports to define premeditated murder or murder during the commission of a felony, and *Dillon* expressly held that the first degree felony-murder rule was codified in section 189. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472.) Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, this Court's conclusion that "[f]elony murder and premeditated murder are not distinct crimes" is not dispositive. (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice murder clearly *are* distinct crimes. (See *People v. Hart* (1999) 20 Cal.4th 546, 608-609 [discussing the differing elements of those crimes]; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1344

[holding that second degree murder is a lesser offense included within first degree murder].)[17/]

The greatest difference among species of murder is between second degree malice murder and first degree felony murder. By the express terms of Penal Code section 187, second degree malice murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder. (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the high court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189, and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense." (*Id.* at p. 194, fn. 14.)

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, the United States Supreme Court declared that, under

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[17/] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements* for conviction. This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.), original emphasis.)

the notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, italics added, citation omitted.)[18/]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. Therefore, those facts should have been charged in the information. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *Ex parte Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict appellant of murder without finding malice, which was an essential element of the crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423;

[18/] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

People v. Henderson (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1034-1035.) Therefore, appellant's convictions for first degree murder must be reversed.

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VII.

THE INSTRUCTIONS IN THIS CASE IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

The trial court instructed the jury at the guilt phase with CALJIC Nos. 2.01, 2.21.1, 2.21.2, 2.22, 2.27, 2.51, 8.20, and 8.83. (9 CT 2326-2328, 2333, 2335.) These instructions violated appellant's right not to be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (*In re Winship* (1970) 397 U.S. 358, 364), and thereby deprived him of his constitutional rights to due process and trial by jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 16; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The instructions also violated the fundamental requirement of reliability in a capital case, by relieving the prosecution of its burden to present the full measure of proof. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Because these instructions violated the federal Constitution in a manner that can never be "harmless," the judgment must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-281.)

Appellant recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here for this Court to reconsider those decisions and in order to preserve the claims for federal review should that be necessary.

A. The Instructions on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt

The trial court instructed the jurors with CALJIC No. 2.90 that the defendant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving [him] guilty beyond a reasonable doubt." (17 RT 2678; 9 CT 2329.) The instruction defined reasonable doubt as follows:

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

(17 RT 2678; 9 CT 2329.)

The jury was also given two instructions that supplemented and expanded upon the concept of reasonable doubt, and its relationship to circumstantial evidence: CALJIC No. 2.01, addressing the relationship between the reasonable doubt requirement and circumstantial evidence (17 RT 2666-2667; 9 CT 2326), and CALJIC No. 8.83, addressing the use of circumstantial evidence to prove special circumstances (17 RT 2699-2700; 9 CT 2335).

These instructions, addressing different evidentiary issues in nearly identical terms, advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you *must* accept the reasonable interpretation and reject the unreasonable." (17 RT 2667, 2701, italics added.) This admonition informed the jurors that if appellant reasonably appeared to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to

guilt. The instructions undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process, trial by jury, and a reliable capital trial. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California*, *supra*, 491 U.S. at p. 265; *Beck v. Alabama*, *supra*, 447 U.S. at pp. 642-643.)[19/]

First, the instruction compelled the jury to find appellant guilty and the special circumstances true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship* (1970) 397 U.S. 358, 364.) The instructions directed the jury to convict appellant based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (27 RT 3670.) An interpretation that appears reasonable, however, is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instruction improperly required conviction on a degree of proof less than that constitutionally mandated.

Second, the circumstantial evidence instructions required the jury to draw an incriminatory inference when it appeared "reasonable." The instructions thus created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the

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[19/] Although defense counsel did not object to these instructions, the errors are cognizable on appeal because they affect appellant's substantial rights. (Pen. Code, § 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even if explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of a crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

In *People v. Roder* (1983) 33 Cal.3d 491, 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to its existence. Accordingly, this Court should invalidate the suite of instructions given here, which required the jury to presume all elements of the crimes supported by a "reasonable interpretation" of the circumstantial evidence unless appellant produced a competing reasonable interpretation of that evidence pointing to his innocence.

The instruction particularly affected the key evidence in dispute in this case, that appellant planned the crime and lured the victim to meeting her while he lay in wait. This allegation was based entirely upon circumstantial evidence. The jury may have found appellant's defense unreasonable but still have harbored serious questions about the sufficiency of the prosecution's case. Nevertheless, under the erroneous instruction, the jury was required to convict appellant of murder if he "reasonably appeared" guilty of murder, even if the jurors still entertained a reasonable doubt of his guilt. The instruction thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution's case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1214-1215.)

The prosecutor's closing argument explicitly conflated the reasonable doubt standard with choosing a "reasonable" interpretation of the evidence in just the manner discussed above. As part of her final remarks to the jury, the prosecutor used the language of CALJIC No. 2.01 and stressed that jurors must accept the reasonable interpretation and reject the unreasonable. (17 RT 2655.) The prosecutor equated the reasonable doubt standard with a common sense approach. (17 RT 2652.) Given the circumstances of the case and the argument of the prosecutor, the circumstantial evidence instructions wrongfully and prejudicially shifted the burden of proof to appellant.

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find appellant guilty on a standard less than what is constitutionally required.

B. CALJIC Nos. 2.21.1, 2.21.2, 2.22, 2.27, and 8.20 Also Vitiated the Reasonable Doubt Standard

The trial court gave five other standard instructions that magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC Nos. 2.21.1 (discrepancies in testimony); 2.21.2 (witness wilfully false – discrepancies in testimony), 2.22 (weighing conflicting testimony); 2.27 (sufficiency of testimony of one witness); and 8.20 (deliberate and premeditated murder). (17 CT 2669-2672, 2690-2692; 9 CT 2327-2328, 2333.) All of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, and violated the constitutional

prohibition against convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.21.2 lessened the prosecution's burden of proof by authorizing the jurors to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (17 RT 2671.) The instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22,[20] regarding the weighing of conflicting testimony (17 RT 2672), specifically directed the jury to

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[20] "You are not required to decide any issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which you find more convincing. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses. The final test is not in the number of witnesses, *but in the convincing force of the evidence*." (9 CT 2328, italics added.)

determine each factual issue in the case by deciding which version of the facts was more credible or more convincing, replacing the constitutionally-mandated standard of proof beyond a reasonable doubt with one indistinguishable from the lesser preponderance of the evidence standard.

CALJIC No. 2.27,[21] regarding the sufficiency of the testimony of a single witness to prove a fact (17 CT 2672), erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case, and cannot be required to establish or prove any "fact." (*People v. Serrato* (1973) 9 Cal.3d 753, 765.)

Finally, CALJIC No. 8.20, which defines premeditation and deliberation, misled the jury regarding the prosecution's burden of proof. The instruction told the jury that the requisite deliberation and premeditation "must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation. . . ." (17 RT 2691.) In that context, the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, as opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean absolutely prevent].)

Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard

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[21] "You should give the testimony of a single witness whatever weight you think it deserves. Testimony concerning any fact by one witness, which you believe, *is sufficient for the proof of that fact.* You should carefully review all of the evidence upon which the proof of the fact depends." (9 CT 2328, italics added.)

under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." The theory of premeditation and deliberation and the lying-in-wait special circumstance were built on circumstantial evidence. No evidence established what appellant told Maria before they met or even if he was the one who suggested that they meet. In the face of so many instructions permitting conviction on a lesser showing, no reasonable juror could have been expected to understand that he or she could not find appellant guilty unless every element of the offenses or special circumstances was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellant's constitutional rights to due process, trial by jury, and a reliable capital trial. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.)

C. The Motive Instruction Also Undermined the Burden of Proof Beyond a Reasonable Doubt

The trial court instructed the jury pursuant to CALJIC No. 2.51, as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant's guilt. Absence of motive may tend to establish the defendant is not guilty.

(17 RT 2672-2673; 9 CT 2328.)

This instruction improperly allowed the jury to determine guilt and the lying-in-wait special circumstance based upon the presence of a motive – to kill Maria because she was pressing charges against him – and shifted the burden of proof to appellant to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. Due

process, however, requires substantial evidence of guilt. (*Jackson v. Virginia, supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

Because CALJIC No. 2.51 is aberrant, it undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning could mislead reasonable juror as to scope of instruction].)

This Court has recognized that differing standards in instructions create erroneous implications. (*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [if a generally applicable instruction is expressly applied to one aspect of a charge but not another, the inconsistency may be prejudicial error].) Here, the jury would have understood that motive alone could establish guilt, effectively placing the burden on appellant to negate or show an alternative to the motive advanced by the prosecutor.

Moreover, the instruction was misleading as to the probative value of the evidence of motive to the primary issue in this case. In this case, the instruction told the jury to consider motive as a circumstance tending to establish the defendant is guilty. Yet, the same evidence that established that Maria was killed because she pressed the rape charge against appellant,

could establish a mental state consistent with someone who was told that charges had not been dropped and who erupted in a rage of anger and violence. By equating motive with the prosecutor's theory of guilt, the instruction lightened the prosecutor's burden.

CALJIC No. 2.51 failed to state the applicable law impartially, invited the jury to draw inferences favorable to the prosecution, and lessened the prosecution's burden of proof, depriving appellant of due process, a fair trial, equal protection and a reliable determination of guilt and penalty.

D. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

Although each challenged instruction violated appellant's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland*, *supra*, 32 Cal.4th at pp. 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false testimony and circumstantial evidence instructions]; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.02, 2.27)].) While recognizing the shortcomings of some of the instructions, this Court has consistently concluded the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) In this era where CALJIC instructions are being replaced by

instructions written in plain English because the CALJIC instructions are "simply impenetrable to the ordinary juror" (Blue Ribbon Commission on Jury System Improvement, Final Report (May 1996) p. 93), this Court's old evaluations of the validity of those instructions must be re-examined.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions actually say. (See *People v. Jennings* (1991) 53 Cal.3d 334, 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the federal Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions are "saved" by the language of CALJIC No. 2.90 – requires reconsideration. An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin* (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"].) Nothing in the challenged instructions explicitly informed the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to the evaluation or sufficiency of particular evidence.

E. Reversal is Required

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was structural error, which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) Minimally, because the instructions violated appellant's federal constitutional rights, reversal is required unless the prosecution can show the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) The prosecution cannot make that showing here. Because these instructions distorted the jury's consideration and use of circumstantial evidence, lessened the prosecution's burden and diluted the reasonable doubt requirement, the reliability of the jury's findings is undermined. The dilution of the reasonable doubt requirement by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, appellant's judgment must be reversed in its entirety.

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VIII.

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE JURORS' FINDING OF THE SPECIAL CIRCUMSTANCE ALLEGATION OF LYING IN WAIT

The prosecutor's theory of lying in wait was based upon speculation that appellant planned to murder Maria when he called her on the morning of the crime. (17 RT 2590-2592 [closing statement].) The call was not unusual and there was no evidence that appellant asked to meet with Maria or whether Maria suggested that they meet. It is not known if Maria had told him that she refused to drop the rape charges against appellant during the call or before they spoke that morning, or if appellant learned of her decision only when they met. All that is established is that when they met, appellant erupted in rage, beating Maria severely until he forced her into her car and drove away. At some point after that, Maria was killed through ligature strangulation and a stabbing wound.

At the close of the prosecutor's case, appellant moved to dismiss the special circumstance of lying in wait that had been alleged under Penal Code section 190.2, subdivision (a)(15). (16 RT 2523.) The trial court denied the motion and the jurors eventually found that the special circumstance was true. (17 RT 2737; 9 CT 2367-2369.) This Court should find that these decisions were not supported by substantial evidence and violated due process under the federal and state Constitutions. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15.)

A. Standard of Review

A special circumstances finding must be supported by substantial evidence under the same standards that apply to a judgment of guilt. (*People v. Valencia* (2008) 43 Cal.4th 268, 290.) The state Constitution

requires this Court to "determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the [allegations] beyond a reasonable doubt." (*People v. Ochoa* (1998) 19 Cal.4th 353, 413-414, internal quotes and citation omitted.) Reviewed in the light most favorable to the judgment, "the record must contain reasonable and credible evidence of solid value," such that a reasonable trier of fact could find the special circumstance to be true. (*People v. Stevens* (2007) 41 Cal.4th 182, 201.) Similarly, under the federal Constitution, courts must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, italics omitted.)

While all reasonable inferences must be drawn in support of the judgment, substantial evidence requires more than speculation:

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

(*People v. Rowland* (1982) 134 Cal.App.3d 1, 8; see also *People v. Felix* (2001) 92 Cal.App.4th 905, 912 ["the prosecution may not fill an evidentiary gap with speculation"]; *People v. Moore* (2011) 51 Cal.4th 386, 406 [narrative theories in a capital crime must not be based upon speculation].)

B. The Evidence Was Legally Insufficient to Support the Lying-In-Wait Special Circumstance

The question of whether a lying-in-wait special circumstance has occurred "is often a difficult one which must be made on a case-by-case

basis, scrutinizing all of the surrounding circumstances." (*People v. Morales* (1989) 48 Cal.3d 527, 557-558.) Lying in wait requires "an intentional murder, committed under circumstances which include: (1) concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*Id.* at p. 557.) Under the law in effect at the time of the crime, the murder must have occurred "during the period of concealment and watchful waiting."[22/] (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1149.)

1. There was no evidence of a concealed purpose

The concealed purpose to murder the victim is a hallmark of lying in wait. (*People v. Hardy* (1992) 2 Cal.4th 86, 164.) This purpose is equated with a specific intent to kill. (See, e.g., *People v. Stevens*, *supra*, 41 Cal.4th at p. 203 [sufficient evidence to establish that defendant "concealed his deadly purpose"]; *People v. Jurado* (2006) 38 Cal.4th 72, 119 [sufficient evidence that defendant concealed from victim his "purpose to kill her"].) The lying-in-wait special circumstance in this case rests upon speculation that appellant concealed a murderous purpose.

There is no evidence that appellant concealed any kind of intent before he met with Maria. He called her early in the morning, as he did

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[22/] At the time of the crime, the special circumstance applied to murders committed "while" lying in wait. Proposition 18 became effective on March 8, 2000, and changed the language to delete the word "while" and substitute "by means of" lying in wait. (Stats.1998, ch. 629, § 2; *People v. Michaels* (2002) 28 Cal.4th 486, 516.) Because the crime occurred before the revisions went into effect, this Court must analyze the issue under the "more stringent requirement of the former law." (*People v. Hajek* (2014) 58 Cal.4th 1144, 1184.)

each day. (12 RT 1733, 1761.) It is not known how long the call lasted, what appellant said to her, or who suggested the meeting, but there did not seem to be anything remarkable about the phone call that morning. Maria's demeanor did not change as a result of the call. (12 RT 1763.) She made her lunch and left the house. (12 RT 1749.) She only seemed to be in a hurry when she stopped at a store to buy cigarettes for appellant and water for herself. (12 RT 1770, 1779.)

Significantly, there is nothing to show that Maria had told appellant that she had not dropped the rape charges after she met with the district attorney. Maria was afraid of what appellant might do if she continued to press the charges. (11 RT 1617; 12 RT 1718.) When Maria received a phone call during her meeting with Peggy Beckstrand, the prosecutor who was handling the rape case, her demeanor visibly changed and she was anxious or afraid. (10 RT 1494.) Given the threats against her, Maria certainly would have been apprehensive if she met with appellant after telling him that she had not dropped the charges against him. Yet, there was nothing out of the ordinary that morning.

Appellant would not have formed a murderous intent unless he knew that Maria had not dropped the charges. Appellant had a long-standing relationship with her. Maria visited with appellant even after she alleged that he had raped her. (See e.g., 16 RT 2366-2368, 2375-2376, 2378 [visiting at the Marquez residence].) If the rape allegations had not been pursued, appellant would have had no reason to kill Maria. The intense, focused anger and violence that consumed appellant before Maria was killed indicates that he learned of her intention just before the attack upon her. (See 12 RT 1817, 1848-1849 [describing appellant's consuming rage when he beat Maria in front of the Gonzalez family].)

Moreover, if appellant had intended to lure Maria to her death, it is unlikely that he would have met her at her car on a neighborhood street, in front of a family residence, to beat her before driving off to commit the crime. As the prosecutor argued, appellant had to get the ligature after driving away. (17 RT 2586.) If appellant planned the crime, he would have had the weapons at hand. (See 12 RT 1826 [appellant did not use murder weapons during initial attack]; 15 RT 2251-2252 [murder likely occurred elsewhere].) Accordingly, the crime had the earmarks of a violent reaction rather than a systematic plan. It is most likely that appellant had no murderous purpose until appellant learned that Maria was proceeding with the case against him. Once he was told that, his purpose was not concealed.

In some cases, the circumstances of the crime have allowed this Court to infer that there was a concealed murderous purpose. (See *People v. Jurado*, *supra*, 38 Cal.4th at p. 120 [attack from back seat of car established lying in wait]; *People v. Webster* (1991) 54 Cal.3d 411, 449 [defendant maneuvered himself behind the victim and then attacked without warning]; *People v. Nakahara* (2003) 30 Cal.4th 705, 721 [lying in wait found when the victim had been shot three times in the back].) In this case, however, this Court does not know how the victim was first attacked. There is no evidence that she was taken by surprise once appellant confronted her. Certainly, she would have been aware of her grave danger from the moment she told appellant that she was continuing to press the rape charges. She was very aware of her danger when he beat her and put her into the car before taking her to where the murder was committed. Accordingly, lying in wait was not established. (See *People v. Lewis* (2008) 43 Cal.4th 415, 515 [insufficient evidence of lying in wait when victims were aware of their grave danger before murders].)

2. The victim was not killed during a period of lying in wait

Even assuming that appellant had a concealed purpose, at the time of the crime the lying-in-wait special circumstance required that the killing be either contemporaneous with or "follow directly on the heels of the watchful waiting." (*People v. Morales*, *supra*, 48 Cal.3d at p. 558.) In other words, the murder must have occurred without any "cognizable interruption" in the period of lying in wait. (*Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1011; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1149.)

After the crime in this case was committed, Proposition 18 changed the word "while" in the lying-in-wait special circumstance to "by means of," so that it would conform with the lying-in-wait language defining first degree murder, thus eliminating the immediacy requirement of this special circumstance. (See Legis. Analyst's analysis of Prop. 18, Mar. 7, 2000 Ballot Pamphlet; Chief Counsel, Rep. On Sen. Bill 1878 to Assem. Comm. On Public Safety, June 23, 1998 hearing, pp. 10-11.) The Legislative Analyst concluded that as a result of the change, lying in wait could be established in circumstances remarkably similar to the present case: "This change would permit the finding of a special circumstance . . . in a case in which the murderer waited for the victim, captured the victim, transported the victim to another location, and then committed the murder." (Analysis of Prop.18, *supra*, at pp. 10-11.) This perceived need to change the law underscores that the immediacy requirement was not met here.

In *Domino v. Superior Court*, *supra*, 129 Cal.App 3d at p. 1004, the defendants entered a house and shot one of the victims, who died shortly thereafter. Fifteen minutes after that, another victim was handcuffed and

savagely beaten. The second victim was kidnaped and driven to another location where he was murdered. Although the victim was captured during the period of lying in wait, he was killed at least an hour later. The reviewing court found that the lying-in-wait special circumstance could not be sustained because the murder did not take place during the period of lying in wait. (*Id.* at p. 1011.)

This Court recently reached a similar result in *People v. Hajek*, *supra*, 58 Cal.4th 1144, where the defendants entered the victim's house through a ruse, displayed a gun, bound and blindfolded the victim in an upstairs room, and then killed her several hours later. This Court found that the murder was not committed "during a period of watchful waiting." Even though the murder was "inevitable" and "unsurprising," the evidence did not establish that the victim was killed while the defendants were lying in wait. (*Id.* at p. 1185; see also *People v. Lewis*, *supra*, 43 Cal.4th at p. 515 [victims kidnaped and later murdered after the period of lying in wait had ended].)

In contrast, this Court has found lying in wait when there has been affirmative evidence to show the defendant's intent during a continuous event. In *People v. Carpenter* (1997) 15 Cal.4th 312, for example, this Court found that the defendant intended to rape and kill the victims from the moment that he lay in wait for an opportune time to commit the crime. The defendant passed a man and woman who were hiking on a trail. He met the couple again as they returned down the trail, took out a gun, and stated that he wanted to rape the woman. He shot one of the victims almost immediately, and murdered the woman soon after that. (*Id.* at p. 346.) A surprise attack was consistent with the brief interval of time before the defendant shot the first victim and there was no lapse in his culpable state

of mind. (*Id.* at p. 389.) This Court found that if a person lies in wait, and immediately proceeds to carry out an intent to rape and kill, "the elements of the lying-in-wait special circumstance are met." (*Ibid.*)

In this case, the homicide did not occur during a period of watchful waiting. Maria was beaten and taken to another location where she was killed. It is not known where Maria was killed, how long there was between the kidnaping and the homicide, or whether appellant decided to kill Maria only after he initially beat her. The prosecutor argued that after driving away, appellant had to get the ligature and make a conscious decision to kill (17 RT 2586), which suggests that appellant's ultimate decision came after the period of lying in wait had ended. All that can be established, however, is that Maria's car was seen in the apartment parking area anywhere from one to three hours after she was kidnaped. (13 RT 1874, 1921.) Even if Maria's death was inevitable, as were the murders in *Hajek*, *Lewis*, and *Domino*, the evidence does not establish that the killing occurred during a period of lying in wait or that Maria was surprised at the time of her death. Under these circumstances, this Court should find that the lying-in-wait special circumstance was not supported by substantial evidence.

C. The Lying-in-Wait Special Circumstance Cannot Be Applied to the Facts of This Case Without Making It Unconstitutionally Vague and Overbroad

As argued below, the lying-in-wait special circumstance is unconstitutional because it fails to provide the narrowing function required by the Eighth Amendment to ensure that there is a meaningful basis for distinguishing those cases in which the death penalty is imposed from those which it is not. (See Argument IX, *infra*.) In addition to appellant's

challenge to the constitutionality of this special circumstance as written, appellant also contends that it cannot apply to the facts of this case consistent with these principles.

In order for this Court to find that there is sufficient evidence in this case to sustain the lying-in-wait special circumstance, it would have to find that the required element of concealment of purpose does not have to be specifically proved and need not be contemporaneous with watchful waiting; that the watchful waiting does not have to be for an opportune time to attack the victim; and that there does not have to be a surprise attack immediately after the period of watching and waiting. Sustaining the application of the special circumstance in this case would leave the prosecution free to speculate about such matters without meeting the burden of proof. There would be nothing to distinguish this type of killing from any other murder.

Such a construction of the lying-in-wait special circumstance would fail to "genuinely narrow the class of persons eligible for the death penalty" or "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 876.) This Court should accordingly find that the lying-in-wait special circumstance is invalid as applied in this case.

D. This Court Should Strike the Special Circumstance and Reverse Appellant's Death Judgement

This court must reverse the lying-in-wait special circumstance finding because the evidence supporting it was insufficient. (See *People v. Lewis*, *supra*, 43 Cal.4th at p. 509.) In addition, the finding of the lying-in-wait special circumstance allowed the prosecutor to build a narrative based on speculation and improperly exaggerated appellant's

culpability. This affected the penalty phase in ways that require that this Court reverse the judgment of death.

The lying-in-wait allegation was crucial to the juror's view of the crime. Although appellant was found guilty of two other special circumstances, murder in the commission of a kidnaping and the killing of a witness, these acts followed the initial attack upon Maria. The allegation that appellant laid in wait therefore defined the nature of Maria's death.

This Court has noted that "murder committed by lying in wait has been 'anciently regarded . . . as a particularly heinous and repugnant crime. (*People v. Stanley* (1995) 10 Cal.4th 764, 795, quoting *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) There is a significant difference in moral culpability between appellant murdering the victim while lying in wait and spontaneously erupting in anger when confronted with Maria's resolve to pursue the rape charges. The special circumstance would have certainly weighed heavily in the juror's penalty deliberations.

This Court has found that penalty reversal is not required if other sentencing factors enable the jurors to give aggravating weight to the same facts and circumstances. (*People v. Hajek, supra*, 58 Cal.4th at p. 1186, citing *Brown v. Sanders* (2006) 546 U.S. 212, 220.) Here, the allegation that appellant lured the victim to her death as he lay in wait is far different than the facts otherwise show. Appellant's telephone call to the victim would not have been aggravating except for the way that the prosecutor was able to use it to speculate that the crime was particularly calculated, planned, and premeditated because it was committed through lying in wait. (See 30 RT 4268 [closing argument of prosecutor].) A narrative based on speculation is improper. (*People v. Moore, supra*, 51 Cal.4th at p. 406.) Accordingly, apart from the trial court's error in denying appellant's motion

to dismiss the allegation, the facts at issue would not have been used to aggravate the sentence against appellant.

Under state law, this Court should find that the special circumstance had a substantial effect upon the penalty verdict, requiring reversal. (*People v. Robertson* (1982) 33 Cal.3d 21, 54-55.) Under federal constitutional law, it cannot be shown beyond a reasonable doubt that the improperly found special circumstance did not influence the juror's decision to sentence appellant to death. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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IX.

THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PERFORM THE NARROWING FUNCTION REQUIRED BY THE EIGHTH AMENDMENT AND FAILS TO ENSURE THAT THERE IS A MEANINGFUL BASIS FOR DISTINGUISHING THOSE CASES IN WHICH THE DEATH PENALTY IS IMPOSED FROM THOSE WHICH IT IS NOT

"To avoid th[e] constitutional flaw [of arbitrary and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 876.) Under California law, the special circumstances enumerated in Penal Code section 190.2 "perform the same constitutionally required 'narrowing function' as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 468; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 975.) The lying-in-wait special circumstance, as interpreted by this Court, violates the Eighth Amendment by failing to narrow the class of persons eligible for the death penalty, and by failing to provide a "'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).)

A. The Lying-in-Wait Special Circumstance Does Not Narrow the Class of Death-Eligible Defendants

Murder "perpetrated by means of . . . lying in wait . . . is murder of the first degree." (Pen. Code, § 189.) A defendant convicted of first degree

murder in California is rendered death eligible if a special circumstance allegation is found true. (See Pen. Code, § 190.2.) At the time of appellant's crime, a special circumstance could be applied if the defendant "intentionally killed the victim while lying in wait." (Former Pen. Code, § 190.2, subd. (a)(15).) This Court has described the overlap between the two types of lying-in-wait murders to be "substantial" and found that they are only "slightly different." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1140, fn. 2.)

1. There Is No Distinction Between the "Lying-in-Wait" Special Circumstance and Premeditated and Deliberate Murder

The special circumstance of lying in wait requires an intentional murder that occurs during a period "which includes (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*People v. Morales* (1989) 48 Cal.3d 527, 557.)

Although the second element of the lying-in-wait special circumstance – a substantial period of watching and waiting – theoretically could differentiate murder under the lying-in-wait special circumstance from simple premeditated murder, this Court's construction of this prong has precluded such a narrowing function. This Court has established that the necessary duration of the watching and waiting requirement is only that "such as to show a state of mind equivalent to premeditation or deliberation." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1021.) As the Court has explained, "the lying-in-wait special circumstance requires no fixed, quantitative minimum time, but the lying in wait must continue for long enough to premeditate and deliberate, conceal one's purpose, and wait

and watch for an opportune moment to attack." (*People v. Bonilla* (2007) 41 Cal.4th 313, 333.)

The victim need not be the object of the "watching" in order for this special circumstance to apply, as a period of "watchful waiting" for the arrival of the victim will satisfy this requirement. (*People v. Sims* (1993) 5 Cal.4th 405, 433.) And, this "watchful waiting" may occur in the knowing presence of the victim (see, e.g., *People v. Morales*, *supra*, 48 Cal.3d at p. 558), or where the defendant reveals his presence to the victim (see, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 388-389).

This Court's conception of lying in wait "threatens to become so expansive as to eliminate any meaningful distinction between defendants rendered eligible for the death penalty by the special circumstance and those who have 'merely' committed first degree premeditated murder." (*People v. Stevens* (2007) 41 Cal.4th 182, 213 (conc. opn. of Werdegar, J.).) Indeed, it has crossed that line. By not requiring anything more than the time required for premeditation and deliberation, undercutting the requirement that the period of watchful waiting be "substantial," the special circumstance is indistinguishable from premeditated and deliberate first degree murder. (See *id.* at p. 219 (conc. and dis. opn. of Moreno, J.) and pp. 214-216 (conc. and dis. opn. of Kennard, J.).)

In light of this broad interpretation of the second element of the lying-in-wait special circumstance, only the first and third elements are left to differentiate a first degree murder under the lying-in-wait special circumstance from other premeditated murders. The Court has, however, also adopted an expansive construction of the first prong of the lying-in-wait special circumstance (concealment of purpose), and its case law has construed the meaning of lying in wait to include not only killing in

ambush, but also murder in which the killer's purpose was concealed. (*People v. Morales*, *supra*, 48 Cal.3d at p. 555.) By requiring only a concealment of purpose, rather than physical concealment, the first prong fails to narrow the class of death-eligible premeditated murderers in any significant manner. (See, e.g., *id.* at p. 557 [noting concealment of purpose is characteristic of many "routine" murders].)

The Court has described a concealment of purpose and a strike from a position of advantage as being the "hallmark of a murder by lying in wait." (*People v. Hardy* (1992) 2 Cal.4th 86, 164.) Yet, it is hard to imagine many premeditated murders preceded by fair warning and carried out from a position disadvantageous to the murderer. Justice Mosk noted:

> [The lying-in-wait special circumstance] is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim.

(*People v. Morales*, *supra*, 48 Cal.3d at p. 575 (conc. and dis. opn. of Mosk, J.).)[23/]

Indeed, it is clear that a defendant need not do anything to bring about a "position of advantage." If a defendant finds himself behind an

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[23/] See also Osterman & Heidenreich, *Lying-in-Wait: A General Circumstance* (1996) 30 U.S.F. L.Rev. 1249, 1274: "Most of the time a victim is attacked when vulnerable, is unaware of the killer's intention, and is taken by surprise. How is this substantially different from other types of intentional killings? This question is particularly difficult to answer when one recalls that the actual period of "lying-in-wait" need not include 'watching,' the killing need not occur simultaneously with the "lying-in-wait" phase, and it will not matter if the defendant converses or argues with the victim, or even if there were warnings just prior to the attack."

intended victim and strikes from that position, the special circumstance of lying in wait is sustainable. (See, e.g., *People v. Jurado* (2006) 38 Cal.4th 72, 119-120 [lying in wait found when victim was struck from behind in car although defendant did not arrange for the seating positions].) Thus, to qualify as a lying-in-wait murder, the victim need not be lured, and the killer need neither watch nor wait nor conceal his presence. To become eligible for society's ultimate penalty, a killer need only take the victim by surprise, a circumstance present in most first degree murders.

In light of the broad interpretation that the Court has given to the lying-in-wait special circumstance, the class of first degree murders to which this special circumstance applies is enormous. (See, e.g., Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1320 [the lying-in-wait special circumstance makes most premeditated murders potential death penalty cases].) This special circumstance thereby creates the very risk of "wanton" and "freakish" death sentencing found unconstitutional in *Furman v. Georgia*, *supra*, 408 U.S. at p. 310 (conc. opn. of Stewart, J.).)

2. There Is No Difference Between Lying-in-Wait Murder and Lying-in-Wait Special Circumstance

Appellant is aware that this Court has repeatedly rejected the contention that the special circumstance of " lying in wait" is unconstitutional because there is no significant distinction between the theory of first degree murder by "lying in wait" and the special circumstance of "lying in wait," and that the special circumstance therefore fails to meaningfully narrow death eligibility as required by the Eighth Amendment. (See, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148.)

Appellant requests that this Court revisit the issue in light of the facts and circumstances of this case.

In *People v. Moon* (2005) 37 Cal.4th 1, 22, this Court relied on its earlier decision in *People v. Carpenter, supra*, 15 Cal.4th 312, and noted the "slightly different" requirements of lying-in-wait first degree murder and the lying-in-wait special circumstance. In discussing the difference between the two, the Court has stated that there are two factors that are supposed to differentiate them: (1) the special circumstance requires an intent to kill; and (2) the murder must be done while lying in wait rather than by means of lying in wait. (See *People v. Gutierrez, supra*, 28 Cal.4th at pp. 1148-1149.)

This Court has held that what distinguishes lying-in-wait murder from the special circumstance is that "[m]urder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death" while the special circumstance requires "'an intentional murder'" that "'take[s] place during the period of concealment and watchful waiting.'" (*People v. Gutierrez, supra*, 28 Cal.4th at pp. 1148-1149.) California juries are not, however, instructed that murder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death. Moreover, adding intent to kill as an element of the special circumstance is an illusory distinction. If the other factors for lying in wait are met, including watchful waiting and concealment of a murderous purpose, it is hard to imagine how the killing can occur without the defendant having an intent to kill.

According to this Court, lying in wait as a theory of murder is "the functional equivalent of proof of premeditation, deliberation and intent to kill." (*People v. Ruiz* (1988) 44 Cal.3d 589, 614.) Therefore, "a showing

of lying in wait obviates the necessity of separately proving premeditation and deliberation. . . ." (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1149, fn. 10.) However, as pointed out by the dissent in *People v. Superior Court* (*Bradway*) (2003) 105 Cal.App.4th 297, 313 (dis. opn. of McDonald, J.):

> If by definition lying in wait as a theory of murder is the equivalent of an intent to kill, and lying in wait is defined in the identical manner in the lying-in-wait special circumstance, then both must include the intent to kill and there is no meaningful distinction between them. The statement that lying-in-wait murder requires only implied malice appears incorrect because the concept of lying in wait is the functional equivalent of the intent to kill.

In addition, California juries are instructed that lying-in-wait murder must be "immediately preceded by lying in wait" (CALJIC No. 8.25; see also CALCRIM No. 521 [murder while lying in wait or "immediately thereafter"]), indicating, as does the special circumstance, that there can be no "clear interruption separating the period of lying in wait from the period during which the killing takes place." (CALJIC No. 8.81.15 [Pre March 8, 2000].) Thus, while this Court may interpret the special circumstance differently than lying-in-wait murder, California juries, and particularly appellant's jury, have not been provided adequate guidance from which they can distinguish the class of death-eligible defendants. (See *Wade v. Calderon* (1994) 29 F.3d 1312, 1321-1322 [failure to adequately guide the jury's discretion regarding the circumstances under which it could find a defendant eligible for death violates the Eighth Amendment]; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1444 [death penalty statutes are constitutionally defective where "they create the potential for impermissibly disparate and irrational sentencing [by] encompass[ing] a broad class of

death-eligible defendants without providing guidance to the sentencing jury as to how to distinguish among them"].)

Moreover, the element of immediacy of the killing, the purported distinguishing feature of the special circumstance, has been weakened by cases which have held that the murder need not occur while lying in wait as long as there is a continuous flow of events after the concealment and watchful waiting end. (See, e.g., *People v. Morales*, 48 Cal.3d at p. 558.)

Although most states now have capital punishment statutes, only three states other than California use lying in wait as a basis for a capital defendant's death eligibility: Colorado, Indiana and Montana. (See Osterman & Heidenreich, *supra*, 30 U.S.F. L.Rev. at p. 1276.) Notably, the construction of the Indiana provision is considerably narrower than the construction of the California statute, as it requires watching, waiting and concealment, then ambush upon the arrival of the intended victim. (*Thacker v. State* (Ind. 1990) 556 N.E.2d 1315, 1325.) Colorado similarly limits its "lying-in-wait or ambush" aggravating factor to situations where a defendant "conceals himself and waits for an opportune moment to act, such that he takes his victim by surprise." (*People v. Dunlap* (Colo. 1999) 975 P.2d 723, 751.) While there are few cases interpreting the Montana aggravating factor, its scope is necessarily limited by the state law requirement of proportionality review, which prevents imposition of death sentences on less culpable defendants. (See Mont. Code Ann., § 46-18-310.)

Accordingly, the lying-in-wait special circumstance is not narrower than lying-in-wait murder, and can apply to virtually any intentional first

degree murder. This special circumstance therefore violates the Eighth Amendment's narrowing requirement.[24/]

B. The Lying-in-Wait Special Circumstance Fails To Meaningfully Distinguish Death-Eligible Defendants from Those Not Death-Eligible

The Eighth Amendment demands more than mere narrowing of the class of death-eligible murderers. The death-eligibility criteria must provide a meaningful basis for distinguishing between those who receive death and those who do not. For example, a death penalty statute could attempt to achieve the Eighth Amendment narrowing requirement by restricting death eligibility to only those murderers whose victims were between the ages of 20 and 22. However, such an eligibility requirement would be unconstitutional in that it fails to meaningfully distinguish, on the basis of comparative culpability, between those who can be sentenced to death and those who cannot. "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so." (*Arave v. Creech* (1993) 507 U.S. 463, 474; see also *United States v. Cheely*, *supra*, 36 F.3d at p. 1445 ["Narrowing is not an end in itself, and not just any narrowing will suffice"].)

The lying-in-wait special circumstance fails to provide the requisite meaningful distinction between murderers. In *People v. Webster* (1991) 54

[24/] It is not surprising that the lying-in-wait special circumstance fails to narrow since it is not clear that it was ever meant to. It became a special circumstance as part of the Briggs Initiative which, according to the ballot proposition arguments, was intended to make the death penalty applicable to all murderers. (See Shatz & Rivkind, *supra*, 72 N.Y.U. L.Rev. at p. 1307.)

Cal.3d 411, for instance, two defendants met the victim who accompanied them down a trail. One defendant was in front of the victim and one behind him on the trail. Both defendants had planned to kill the victim, and both attacked simultaneously with knives and killed the victim. Only as to Webster, however, who had followed behind the victim, was the special circumstance of lying in wait found true. (*Id.* at p. 427, fn. 3.) The defendants were differentiated only because Webster was behind, rather than in front of the victim when the attack took place – apart from that, their crimes happened at the same time and were identical. In such cases, the special circumstance does nothing to distinguish between the culpability of defendants.

There is simply no reason to believe that murders committed by lying in wait are more deserving of the extreme sanction of death than other premeditated killings. Indeed, members of this Court have recognized the fundamental flaw of the lying-in-wait special circumstance. (See, e.g., *People v. Stevens*, *supra*, 41 Cal.4th at p. 213 (conc. opn. of Werdegar, J.); *id.* at pp. 224-225 (conc. and dis. opn. of Moreno, J. ["the lying in wait special circumstance . . . does not provide a principled basis for dividing first degree murderers eligible for the death penalty from those who are not, and is therefore not consistent with the Eighth Amendment"].)

It is particularly revealing that, as stated above, almost no other state has included lying-in-wait murder as the type of heinous killing deserving of eligibility for the ultimate sanction of death, a clear indication of the lack of "societal consensus that a murder while lying in wait is more heinous than an ordinary murder, and thus more deserving of the death penalty." (*People v. Webster*, *supra*, 54 Cal.3d at p. 467 (conc. and dis. opn. of

Broussard, J.).) The Eighth Amendment accordingly demands that the lying-in-wait special circumstance be struck.

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X.

THE TRIAL COURT ERRONEOUSLY ALLOWED INADMISSIBLE OPINION AND HEARSAY TESTIMONY DURING THE PENALTY PHASE

Deputy Sheriff David Florence was a percipient witness to events in the Los Angeles County Jail that were introduced to show criminal conduct involving force or violence or the threat of force or violence. (Pen. Code, § 190.3, factor (b) (hereafter "factor (b)").) In particular, Florence testified that appellant had been found with razor blades "keestered," or hidden, in his buttocks. (19 RT 2979.) Beyond that, Florence testified over appellant's objections that appellant was in the top group of prisoners who were able to manipulate any situation (19 RT 2983); that Florence was aware that appellant commonly challenged deputies to take his waist chain off so that they could fight (19 RT 2984); that appellant presented a special risk to deputies, staff, and inmates in the county jail (19 RT 2986); and that Florence believed that appellant often acted to gain respect of other prisoners and to show that he was not afraid of them. (19 RT 2987.)

Florence's opinions were reinforced by those of Deputy Sheriff Mike Davis, who found razors while searching appellant. Although appellant had recently been attacked with razors by another inmate, Davis did not believe that appellant was afraid for his safety, but possessed razors in order to attack other inmates even as he had been attacked. (20 RT 3144.) The trial court erroneously overruled appellant's objection that this was an improper opinion. The trial court's errors violated appellant's statutory and constitutional rights, requiring that the penalty verdict be reversed.

A. Florence's Testimony That Appellant Was a Leading Expert at Manipulating Any Given Situation Was an Improper Opinion

Deputy Florence testified that he rated appellant in the top five people who are able to "manipulate any given situation however he wants the outcome to come for him." (19 RT 2983.) The trial court erroneously overruled appellant's objection that the testimony was an improper opinion or conclusion. (19 RT 2982-2983.)

Florence testified as a percipient witness. An opinion by a lay witness is admissible only if it is rationally based on the perception of the witness and helpful to a clear understanding of the given testimony. (Evid. Code, § 800.) It is permitted only in situations where it might aid the trier of fact in arriving at the ultimate decision. (*People v. Perry* (1976) 60 Cal.App.3d 608, 614.) A witness may give an opinion only in a situation where the concrete observations on which the opinion is based cannot otherwise be conveyed. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 130.) Lay opinion is not necessary when the testimony is otherwise "perfectly understandable to the trier of fact." (*People v. Thornton* (2007) 41 Cal.4th 391, 453.)

Florence's testimony that appellant was in the top group of people who were able to manipulate any situation (19 RT 2983) was nothing more than his opinion. The opinion extended Florence's testimony beyond any specific conduct at issue under factor (b). It did not relate to any particular incident offered in aggravation and therefore was not necessary for his testimony. Under these circumstances, it did not assist the jurors in reaching their ultimate decision under the statutory framework and therefore was an improper opinion. (See *People v. Pinholster* (1992) 1 Cal.4th 865,

961-962 [testimony of officer that defendant was one of the two or three most dangerous inmates "arguably inadmissible" as being outside of factor (b)].)

B. The Trial Court Improperly Admitted Hearsay Alleging that Appellant Commonly Committed Misconduct

Deputy Florence testified that he was aware that appellant commonly told deputies to take his waist chain off so that they could "go one on one." (19 RT 2984.) The trial court erroneously overruled appellant's hearsay objection.

Hearsay encompasses any out-of-court statement that is admitted for the truth of the matter. (Evid. Code, § 1200.) Statements attributed to another must be based on the personal knowledge of the witness, rather than what he or she has been told by others. (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1779; *People v. Valencia* (2006) 146 Cal.App.4th 92, 104.) Once a hearsay objection is made, the burden shifts to the proponent to establish that there is a valid exception and to lay a proper foundation. (*People v. Livaditis* (1992) 2 Cal.4th 759, 778.)

Here, Florence testified only that he was *aware* that appellant told officers that he would fight them if they took off his cuffs. This was not tied to any particular incident and did not establish that appellant made the statements to Florence or were within his direct hearing. As a senior interviewing officer (19 RT 2983), Florence was aware of many things that were outside of his personal experience. Indeed, the statement implies that Florence heard about such things from other officers rather than personally witnessing it. The prosecutor did not establish otherwise. The testimony was hearsay and should have been excluded. (*People v. Williams*, *supra*,

46 Cal.App.4th at p. 1779 [trial court properly excluded hearsay when statement was based on what the declarant had been told by others].)

C. The Trial Court Erroneously Allowed Florence to Opine to the Jurors that Appellant Presented a Special Danger in the Jail

Deputy Florence testified that he believed that appellant presented a danger to officers working in the unit where he was housed. The trial court overruled appellant's objection that this was improper opinion testimony. (19 RT 2986.) The prosecutor continued the same line of questions to establish that Florence was of the opinion that appellant presented a danger to other staff and inmates in the jail.[25/] (19 RT 2986.)

Florence's opinion that appellant was a danger to deputies, other inmates, and jail staff did not relate to any specific incident alleged under factor (b). At most, it would show only that appellant had a general disposition to act with force or violence while in jail. Accordingly, it was inadmissible to prove any specific conduct. (Evid. Code, § 1101, subd. (a); *People v. Thompson* (1980) 27 Cal.3d 303, 317 [evidence of a criminal disposition inadmissible to prove charged offense].)

Moreover, even assuming that Florence's opinion was based on the penalty phase evidence, it was up to the jurors rather than the Florence to draw inferences from the evidence presented at trial. (*People v. Melton*

[25/] Appellant objected to the first question regarding the danger to deputies, but did not object to the follow-up questions asking about other prisoners or staff. Because the trial court overruled the first objection, subsequent objections on the same grounds would have been futile and are not required to preserve the issue for appeal. (*People v. Hill* (1998) 17 Cal.4th 800, 820 [futility excuses need for timely objection]; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 237 [futile to make further objections after trial court improperly overruled initial objection].)

(1988) 44 Cal.3d 713, 744.) The opinion did not explain Florence's testimony and was not helpful to the jurors' understanding of the events that Florence witnessed. Accordingly, the trial court erred in overruling appellant's objection. (Evid. Code, § 800; *People v. DeHoyos*, *supra*, 57 Cal.4th at p. 130.)

D. Florence Improperly Speculated That Appellant Committed Misconduct in Order to Gain Respect from Other Inmates

Deputy Florence testified that appellant was housed in a unit with the more dangerous prisoners, including members of the Mexican Mafia. (19 RT 2886.) The prosecutor asked Florence if he was of the opinion that appellant acted like he was afraid of other inmates. Appellant objected that this called for a conclusion. The trial court overruled the objection and allowed Florence to testify that he believed that appellant often acted to show other inmates that he was not afraid. Florence opined that an inmate who acted violently and aggressively towards deputies would gain respect from other prisoners. The trial court again overruled appellant's objection that the testimony called for speculation. (19 RT 2887.)

Conclusory and speculative statements fall within the general restrictions on lay opinions. (See 1 Witkin, *Cal. Evidence* (5th ed. 2012), Opinion, § 4, p. 611 [opinion includes "all opinions, inferences, conclusions, and other subjective statements made by a witness"].) Here, Florence offered subjective opinions that appellant often acted to show other inmates that he was not afraid or to gain respect from other prisoners. This testimony was not tied to any specific incident admitted under factor (b). Moreover, it was speculative since fear itself may motivate a prisoner to avoid being perceived as weak. (See *People v. Ayala* (2000) 23 Cal.4th

225, 294 [testimony that violent acts in certain prison units were necessary to avoid being perceived as weak and subject to predation].) Accordingly, it did not contribute to the understanding of incidents properly before the jurors and should have been excluded.

E. Deputy Davis Improperly Opined That He Did Not Believe That Appellant Was Afraid for His Own Safety

Deputy Davis testified about various incidents, including one where appellant had "keestered" razors after being attacked with a razor by another inmate. (20 RT 3135, 3142.) Davis opined that he did not think that appellant had the razors because he was afraid for his safety: "I think there were some people maybe he wasn't getting along with, and I think he was more than a willing participant to do to them what they did to him, and I think that's why he was bringing the razors in for that reason, too." (20 RT 3143-3144.)

As discussed above, a lay witness generally may not give an opinion about another person's state of mind, but only can testify about objective behavior and describe behavior as being consistent with a state of mind. (*People v. DeHoyos*, *supra*, 57 Cal.4th at p. 130.) Here, there was no basis for Davis to testify about appellant's subjective intent apart from any specific conduct that might have led to his conclusion. Davis simply asserted that appellant had a particular state of mind and speculated that he was not afraid for his safety. The trial court erred when it allowed the opinion to be introduced against appellant.

F. The Errors Were Prejudicial

Florence and Davis offered opinions and hearsay evidence that were not limited to any specific aggravating incident introduced under factor (b).

Accordingly, the opinions allowed the prosecutor to present evidence about appellant's general conduct that did not fall within the statutory framework. The jurors heard that appellant was an expert manipulator who challenged officers to fights; that rather than being afraid for his safety, appellant acted aggressively in order to enhance his standing among other prisoners; and, that appellant posed a special danger to both inmates and staff in the county jail. The erroneously admitted testimony allowed jurors to believe that appellant's disposition made him more likely to have committed any of the aggravating acts brought forth in the penalty phase, as well as other acts that were not otherwise identified as part of his common behavior.

The errors discussed above were particularly prejudicial since part of appellant's penalty defense was that he had been a model prisoner from 2005 until the time of trial. (31 RT 4383-4384.) Florence's testimony that appellant posed a special danger raised the potential that he might be a danger in the future and would have weighed heavily in the jurors' deliberations. (See Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports* (2008) 35 Am. J. Crim. L. 145, 170 ["future dangerousness invites jurors to fear responsibility for the defendant's violent future acts, and this fear has the ability to render the defendant's culpability entirely irrelevant"].) Indeed, empirical studies have found that future dangerousness is very important to the sentencing determination. (Claussen-Schulz et al., *Dangerousness, Risk Assessment, and Capital Sentencing* (2004) 10 Psychol. Pub. Policy & L. 471, 481-482 [reviewing literature].)

Davis's testimony was closely linked to that of Florence and his opinion about appellant's subjective intent discounted that appellant had

been attacked before Davis found the razors in a search. During the trial, deputies acknowledged that prisoners in the county jail will sometimes arm themselves with weapons in order to protect themselves, particularly if they had been attacked by others. (19 RT 2900, 2972.) Rather than present concrete evidence that appellant did not act afraid, the prosecution substituted opinion unrelated to any particular incident for fact. In so doing, appellant was presented as a willing participant in violence rather than a victim. This effectively turned potential mitigation into further aggravation. Given the extent of the hearsay and opinions that were introduced against appellant, this Court should find that there is a reasonable possibility that a juror would have rendered a different verdict absent the errors. (*People v. Brown* (1988) 46 Cal.3d 432, 466.)

Moreover, the errors violated federal constitutional standards. Appellant was entitled to a penalty phase trial free of irrelevant and inflammatory evidence untethered to appropriate sentencing factors. The introduction of irrelevant opinions denied appellant his rights to due process, and to a reliable and individualized penalty determination under the Eighth and Fourteenth Amendments. (*Gregg v. Georgia* (1976) 428 U.S. 153, 192 [evidence in aggravation must be "particularly relevant to the sentencing decision"]; see *Johnson v. Mississippi* (1988) 486 U.S. 578, 584, 589 [reliability of death sentence undermined by jury's consideration of improper aggravating evidence].) This court should find that the errors cannot shown to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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XI.

THE TRIAL COURT ERRED BY PROVIDING THE JURORS WITH AN INSTRUCTION THAT BOTH IMPROPERLY DIRECTED THEM TO FIND THAT CERTAIN ACTS WERE COMMITTED WITH FORCE AND VIOLENCE AND PERMITTED THEM TO CONSIDER ACTS THAT WERE NOT COMMITTED WITH FORCE AND VIOLENCE AS AGGRAVATING CIRCUMSTANCES UNDER FACTOR (B)

Penal Code section 190.3, factor (b), allows a jury to consider as an aggravating factor any criminal act that involves "the use or attempted use of force or violence or the express or implied threat to use force or violence." The trial court in this case instructed appellant's jurors that evidence had been introduced to show that appellant had committed "criminal acts and activity" that involved the express or implied use of force or violence or the threat of such force. This instruction focused on broad categories of conduct, such as obstruction of justice, that included misconduct that did not fall into the statutory framework. (31 RT 4442; 9 CT 2433 [CALJIC No. 8.87].[26/]) It offered no guidance on how to

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[26/] In pertinent part, the trial court's instruction read:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: Murder, Conspiracy to Commit Murder, Attempted Murder, Assault, Battery, Battery by Gassing of a Custodial or Peace Officer, Attempted Battery by Gassing of a Custodial or Peace Officer, Assault with Force Likely to Cause Great Bodily Injury, Possession or Manufacture of a Weapon while confined in a Penal Institution or County Jail, and Obstructing or Resisting a Peace Officer, which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any criminal acts

(continued...)

distinguish nonstatutory conduct from evidence properly received in aggravation, instead defining all conduct within its range as involving force or violence. The instruction violated appellant's federal and state constitutional rights to a trial by jury, due process, and the requirements for a reliable penalty verdict. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.)

A. The Instruction Allowed the Jurors to Consider Misconduct That Fell Outside the Statutory Framework

In the penalty phase, a juror may consider aggravating evidence under Penal Code section 190.3, factor (b) (hereafter "factor (b)"), only if the prosecution has proven beyond a reasonable doubt that a defendant is guilty of an actual crime involving the required force or violence. (*People v. Phillips* (1985) 41 Cal.3d 29, 72.) This factor "rests in large part on a determination whether certain events occurred." (*Tuilaepa v. California* (1994) 512 U.S. 967, 976.) The question, though, is what events were properly at issue under factor (b)?

Factor (b) is limited so that jurors will not consider nonviolent offenses and "incidental incidents of misconduct and ill temper." (*People v. Boyd* (1985) 38 Cal.3d 762, 774.) This Court has cautioned that "to avoid potential confusion over which other crimes – if any – the prosecution is relying on as aggravating circumstances in a given case, the prosecution should request an instruction enumerating the particular other crimes which

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[26] (...continued)
activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal act.

(31 RT 4442.)

the jury may consider as aggravating circumstances in determining penalty." (*People v. Robertson* (1982) 33 Cal.3d 21, 55, fn. 19.) Here, the trial court asked the prosecutor to "fill in the blanks" that identified the crimes at issue. (27 RT 4015.) The resulting instruction given by the court focused on broad categories of criminal offenses without identifying the specific aggravating acts at issue. This left the jurors free to consider evidence introduced during the penalty phase that did not rise to the level of a factor (b) offense. As a result, the instruction implicated the kind of confusion identified by this Court in *Robertson*.

Appellant acknowledges that this Court has found that it is not necessary to "describe or otherwise identify" any of the acts that might be applied under factor (b). (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 591.) The trial court, however, undertook to instruct the jury about the acts that could be considered. The court thus had a duty to ensure that the instructions were accurate and not vague or confusing. (See *Bollenbach v. United States* (1946) 326 U.S. 607, 614 [instructions must not be misleading]; *Penry v. Johnson* (2001) 532 U.S. 782, 798 [confusing instructions]; *People v. Moore* (2011) 51 Cal.4th 386, 411 [noting potential for confusion in instructions].)

In particular, the jurors heard penalty phase evidence of general misconduct that did not necessarily involve criminal acts committed with force and violence, yet could have been considered under the instruction's broad mandate to include any act that obstructed a peace officer. (9 CT 2443.) Acts or words that delayed an officer, diverted an officer's attention from his or her duties, or otherwise forced an officer to deal with appellant rather than focus on other duties would have been enough for the jurors to find that appellant obstructed an officer. (See Pen. Code, § 148, subd. (a)

[misdemeanor to resist, delay, or obstruct a peace officer]; *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1330 [nonviolently ignoring officer's orders constitutes obstruction].) Jurors received no guidance about how to apply this type of misconduct to the statutory framework. Indeed, under the terms of the instruction, they could assume that any act that obstructed an officer was a crime that implicitly involved force or violence. The instruction therefore invited the jurors to consider a wide range of nonstatutory aggravation:

- Appellant yelled, "Man down," that required officers to pay attention to him rather than perform other duties. (18 RT 1825.)
- Appellant threatened to yell "Man down" when he did not get medication, and did so after officers left the unit. (19 RT 2927-2928.)
- Appellant said he had a seizure disorder to get what he wanted. (19 RT 2959.)
- Appellant commonly did the opposite of what deputies asked. (19 RT 2960.)
- Appellant repeatedly caused problems for the deputies in the jail. (19 RT 2964.)
- Appellant often told deputies to take off his waist chain so that they could fight one on one. (19 RT 2984.)
- Appellant took a small incident and blew it up until it spilled over to other inmates and prevented the officers from doing their normal duties. (19 RT 2988.)
- A deputy believed that appellant faked mental illness so that if a request was not granted a nurse would have to document the report and transport him to another unit for evaluation. (20 RT 3129.)

• Appellant threatened to kill himself and had to be taken to another unit. (20 RT 3139.)

• Appellant wanted to get some shoe laces returned to him right away and told an officer to take his chains off so they could "go one on one." (21 RT 3127-3128.)

• A deputy believed that appellant was one of the more difficult prisoners in the county jail and faked seizures or acted crazy to avoid doing something in the unit. (21 RT 3228-3229.)

Moreover, the jurors were free to consider alleged threats that did not necessarily rise to the level of criminal conduct. A threat may be prosecuted only if it "reasonably appears to be a serious expression of intention to inflict bodily harm [citation] and its circumstances are such that there is a reasonable tendency to produce in the victim a fear the threat will be carried out [citation]." (*In re M.S.* (1995) 10 Cal.4th 698, 714.) Not every outburst conveys "a gravity of purpose and likelihood of execution" to constitute a true threat. (*United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1026.) The instruction gave the jurors no basis to distinguish criminal offenses from outbursts that did not constitute a true threat. Such incidents included:

• Appellant threatened to kill Lieutenant Rosson during a disciplinary hearing. (19 RT 2905.)

• Rosson was aware that on December 3, 2002, appellant had threatened to gas deputies if he did not receive a special diet. (19 RT 2906.)

In addition to the specific acts that were presented in aggravation, the prosecutor introduced hearsay alleging further criminal acts and propensity evidence that appellant generally committed violent acts. Because the instruction was not limited to particular incidents, this type of

testimony could have been considered in aggravation by convincing jurors that appellant had committed any number of acts that fell within the instruction's general wording. These allegations included:

• A sergeant in the county jail told Deputy Meyer that appellant wanted to be known as the "shit man" for gassing in the unit. (18 RT 2824.)

• Lieutenant Rosson stated that he was aware that appellant had assaulted or injured other inmates at the county jail. (19 RT 2905.)

• Rosson stated that appellant routinely threatened to gas officers. (19 RT 2906.)

• According to Deputy Florence, it was common for appellant to act aggressively towards deputies. (19 RT 2980, 2982, 2988.)

• Deputy Davis testified that appellant commonly acted in a violent or aggressive manner towards deputies. (20 RT 3138.)

• Davis also testified that appellant threatened to gas officers on a "pretty continual basis." (20 RT 3139.)

• Deputy Ellmore stated that appellant had a lengthy disciplinary record with a history of gassing officers. (21 RT 3277.)

Moreover, guilt phase evidence that was admitted to show the effect of certain statements on Maria's state of mind also fell within the scope of this instruction. Because there was no distinction between specific acts admitted as aggravating evidence and the broad categories listed in this instruction, jurors could have considered appellant's claims of being a hit man for the Mexican Mafia and having committed uncharged murders as further aggravation. (11 RT 1612-1613.)

The instruction left the "sentencer without sufficient guidance for determining the presence or absence of the factor." (*Espinosa v. Florida*

(1992) 505 U.S. 1079, 1081 (per curiam).) Indeed, one of the most fundamental principles of capital jurisprudence has been that states furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) Given the nature of the normative decision about whether a prisoner should be sentenced to death or life without parole, it is essential that the jurors be fully aware of the framework they must use in utilizing the evidence that was presented during the course of the trial. Since the instruction left the jury unfettered to consider a wide range of general misconduct against appellant, it failed to provide meaningful guidance and allowed arbitrary factors to enter into the sentencing process. (See *Tuilaepa v. California*, *supra*, 512 U.S. at p. 989 [factor (b) instruction allowed use of trivial incidents as aggravators] (dis. opn. of Blackmun, J.).) Accordingly, the instruction violated appellant's constitutional rights to due process and a reliable penalty judgment.

B. The Instruction Improperly Directed the Jury to Find that Misconduct Amounted to Criminal Acts Involving Force or Violence

The instruction given in this case stated that evidence was introduced to show that appellant committed various criminal acts that involved the express or implied use of force or violence or the threat of force or violence. (9 CT 2443.) This instruction improperly created a presumption that the wide range of aggravation introduced in the penalty phase were criminal acts that involved force or violence. These were matters for the jurors to determine. As a result, the instruction violated appellant's rights to a trial by jury, a reliable penalty verdict, and due process. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 16.)

Appellant acknowledges that this Court has upheld similar instructions. (See *People v. Nakahara* (2003) 30 Cal.4th 705, 720 [characterization of aggravating acts as incidents involving force or violence properly made by judge]; *People v. Ochoa* (2001) 26 Cal.4th 398, 453 [jurors need not determine whether acts involved force or violence].) This position should be reconsidered as a matter of law and under the facts of this case.

When evidence of uncharged crimes is introduced as aggravation, the defendant is in effect being tried for the prior crimes. (*People v. Robertson*, *supra*, 33 Cal.3d at pp. 53-54; see *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 952-955; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276, 280-281.) Although a trial court may make a preliminary determination of whether there is substantial evidence to support the allegations under factor (b), the issue of whether the act amounts to a crime that is proven beyond a reasonable doubt is for the jury to decide. (*People v. Phillips*, *supra*, 41 Cal.3d at p. 73, fn. 25; see also *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [Sixth Amendment right to have jurors decide factual questions that increase the range of penalties].)

This determination involves more than finding that a defendant committed an act. The jury must be able to determine if the act was, in fact, criminal. In *Phillips*, this Court found that had the jury been properly instructed about the reasonable doubt standard, the defendant could have argued that his actions did not constitute a crime under factor (b). (*People v. Phillips*, *supra*, 41 Cal.3d at p. 84.) Even if the jury could have found that the defendant was guilty of the crime, he "was at least entitled to have the issue properly presented to the jury." (*Ibid.*)

Similarly, this Court has found that the issue of whether "a particular instance of criminal activity involved the express or implied threat to use force or violence [citation] can only be determined by looking to the facts of the particular case." (*People v. Mason* (1991) 52 Cal.3d 909, 955.) Thus, a defendant may raise a defense under factor (b) that criminal activity does not involve force or violence. Such a defense creates "an ordinary evidentiary conflict for the trier of fact." (*Id.* at p. 957.)

If the reasonable doubt standard required by this Court is to have any true meaning, then the jury must be able to determine whether a particular action amounted to a crime involving force and violence. This is the type of decision that juries make every day in determining whether a defendant is guilty of a crime. (See *United States v. Johnson* (5th Cir. 1983) 718 F.2d 1317, 1321 (en banc) ["Juries are always judges of the law in the sense that juries must pass on the manner and the extent in which the law expounded by the judge fits the facts brought out in the evidence. This process requires juries to perform the legal function of interpretation and application"].) It is no less important in the context of factor (b).

In this case, the *only* question the jurors were told to decide was whether appellant "did in fact commit the criminal acts." (9 CT 2443.) Once the jury found that appellant had committed a certain act, they were to presume that it was criminal and that it involved force or violence. This created a mandatory presumption that improperly directed the jury to apply the evidence against appellant. (See *Francis v. Franklin* (1985) 471 U.S. 307, 314 ["mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts"]; *People v. Figueroa* (1986) 41 Cal.3d 714, 734 [trial court improperly removed issue from the jury and directed a finding].)

As discussed above, the jurors received evidence of a number of acts that fell within the general framework of the instruction, but not all of these acts were either criminal or involved force or violence. Moreover, there were incidents that could properly be seen as aggravation only if the jurors made specific findings of fact. For instance, Deputy Meyers testified that appellant hid a metal staple in his rectum that could have been used either as a weapon or to fashion handcuff keys. (18 RT 2820.) This act did not necessarily rise to the level of force or violence. (See *People v. Lancaster* (2007) 41 Cal.4th 50, 94 [possession of handcuff key did not fall within factor (b)].) Yet, under the terms of the instruction, jurors would have been required to view this as aggravating evidence under factor (b) without further findings.

The trial court's instruction lightened the prosecutor's burden of proving each allegation beyond a reasonable doubt in violation of appellant's due process rights under the Fourteenth Amendment. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 520-521.) Moreover, it deprived appellant of his Sixth Amendment right to have the jury decide all aggravating facts used to impose a sentence. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490; *Ring v. Arizona* (2002) 536 U.S. 584, 609.) Indeed, "[t]he constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly." (*United States v. Spock* (1st Cir. 1969) 416 F.2d 165, 182; see also *United States v. Voss* (8th Cir. 1986) 787 F.2d 393, 398 ["When the jury is not given an opportunity to decide a relevant factual question," the defendant is deprived of his right to a jury trial].) Accordingly, this Court should find that the trial court erred in instructing

the jury that the broad categories of evidence introduced in the penalty phase constituted criminal acts or activity involving force or violence.

C. The Errors Were Prejudicial

This Court has acknowledged the important role that proper instructions have in ensuring that uncharged conduct will not be used against a defendant unless it meets the requirements of factor (b). (See *People v. Yeoman* (2003) 31 Cal.4th 93, 132; *People v. Caro* (1988) 46 Cal.3d 1035, 1057.) Rather than reduce the risk associated with uncharged crimes, the instructions here heightened the likelihood that appellant's general misconduct would be used against him.

As discussed above, the instruction allowed jurors to consider, under factor (b), acts that might have been seen as obstructing officers; allowed jurors to use general threats that did not necessarily rise to the level of a criminal act; and let the jurors consider that appellant commonly committed acts that went beyond the specific incidents that were introduced at the penalty phase. The prosecutor took full advantage of this instruction by urging the jurors to consider all of appellant's conduct while he was waiting trial. (30 RT 4299-4302.) As the prosecutor argued, appellant had incentive to behave while waiting trial, but chose not to do so. (30 RT 4301.) Even incidents that might seem to be less important – such as yelling "man down" to divert the officers from other duties – would have convinced jurors that appellant would be a difficult prisoner if sentenced to life without parole.

The wide breadth of the evidence encompassed in the instruction created an insurmountable mountain. Jurors could consider everything from appellant's claims of being a Mexican Mafia hit man to the problems that officers encountered in the county jail, without any guidance to

distinguish incidents properly admitted under factor (b) from those that went beyond the statutory framework. Thus, the instruction added considerable weight to the prosecution's case that would not have otherwise been before the jury.

Under state law, any error that has a substantial effect upon the penalty phase requires reversal. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54.) Federal constitutional standards require reversal unless the prosecution can show that an error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Given the normative measure of the penalty decision, it cannot be said that the instructional error was not substantial or that it did not contribute to the verdict. Under either standard, reversal is required.

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XII.

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

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

murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty.

At the time of the offense charged against appellant, Penal Code section 190.2 contained 21 special circumstances. Since murder in the commission of 12 different felonies were included in these circumstances, the death penalty could be imposed in 33 different factual situations. Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3, Factor (a), Violated Appellant's Constitutional Rights

Penal Code section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 9 CT 2431.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts that cover the entire spectrum of circumstances inevitably present in every homicide: such as the age of the victim, the age of the defendant, the method of

killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the charged murder without some narrowing principle. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of Penal Code section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence.

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Cunningham v. California* (2007) 549 U.S. 270, 282, require that any fact used to support an increased sentence (other than a prior conviction) be submitted to the jurors and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jurors had to first make several factual findings: (1) that aggravating circumstances were present; (2) that the aggravating circumstances outweighed the mitigating circumstances; and (3) that the aggravating circumstances were so substantial as to make death an appropriate punishment. (9 CT 2434-2435 [CALJIC No. 8.88].) Because these additional findings were required before the jurors could impose the death sentence, each of these facts must have been established beyond a

reasonable doubt. The court failed to so instruct the jurors in this case and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground by *People v. Breverman* (1998) 19 Cal.4th 142, 149; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is aware this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 819-821). The Court has rejected the argument that *Apprendi* and *Ring* impose a reasonable doubt standard on California's penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant also contends due process and the prohibition against cruel and unusual punishment mandate that the jurors in a capital case be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected the claim that either the Fourteenth Amendment or the Eighth Amendment requires the jurors be instructed that to return a death sentence it must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances and that death is the appropriate penalty. (*People*

v. Blair, supra, 36 Cal.4th at p. 753.) Appellant requests the Court reconsider this holding.

2. Some burden of proof is required, or the jury should have been instructed that there was no burden of proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88 fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the

federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's death verdict was not premised on unanimous jury findings

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona* (2002) 536 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

As discussed above, appellant submits that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community."

(*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

Jury unanimity was particularly important in light of the extensive testimony of unadjudicated criminal activity in this case. The jurors were specially instructed that unanimity was not required. (9 CT 2433 [CALJIC No. 8.87].) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violated due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should

live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

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

4. The instructions caused the penalty determination to turn on an impermissibly vague and ambiguous standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (9 CT 2434 [CALJIC No. 8.88].) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

D. California's Death Penalty Statute and the CALJIC Instructions Given In This Case On Mitigating and Aggravating Circumstances Violated Appellant's Constitutional Rights

1. The instructions failed to inform the jury that the central determination is whether death is the appropriate punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. (3 CT 832.) These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

2. The instructions failed to inform the jurors that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a verdict of life without parole is required, tilts the balance of

forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

3. The instructions violated the Sixth, Eighth and Fourteenth Amendments by failing to inform the jury regarding the standard of proof and lack of need for unanimity as to mitigating circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 295-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) Such error occurred here because the jury was left with the impression that appellant bore some particular burden in proving facts in mitigation.

A similar error occurred when the trial court failed to instruct the jury that unanimity was not required as to mitigating facts. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A perceived requirement of unanimity improperly limited consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S.

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

4. The instructions improperly failed to inform the penalty jurors on the presumption of life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th

Amends.), and his right to the equal protection of the law (U.S. Const., 14th Amend.).

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction was constitutionally required.

E. Failing to Require the Jury to Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

F. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The use of restrictive adjectives in the list of potential mitigating factors prevented the jury from giving full effect to appellant's mitigating evidence

Appellant presented substantial evidence he had mental deficits that impaired his judgment and made it difficult for him to change the course of his conduct. (See, e.g., 24 RT 3562-3564.) The prosecutor argued that factor (d) required an extreme mental or emotional disturbance (30 RT 4267-4268) and that Dr. Light's testimony fell under factor (h), whether appellant had the capacity to conform his conduct to the law.[27/] (30 RT 4270-4282.)

The limitation on factor (d) to extreme mental or emotional disturbances (9 CT 2432 [CALJIC No. 8.85]) acted as a barrier to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration in this case because appellant's jurors would not have believed that mental deficits could be considered unless they were extreme.

The United States Supreme Court has consistently reaffirmed that "sentencing juries must be able to give meaningful consideration and effect

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[27/] Appellant did not contend that he lacked capacity to appreciate the criminality of his conduct. Dr. Light testified that appellant was not mentally retarded and knew the difference between right and wrong. (26 RT 3825-3826.)

to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 246.) Indeed, it has long been recognized:

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

(*Lockett v. Ohio* (1978) 438 U.S. 586, 605; see also *Penry v. Lynaugh* (1989) 492 U.S. 302, 323 [jury must be able to give a reasoned moral response to defendant's mitigating evidence].)

This Court has assumed that Penal Code section 190.3 and CALJIC No. 8.85 allow meaningful consideration of all mental states because jurors will somehow understand that factor (k) permits consideration of a defendant's less-than-extreme mental or emotional disturbance as mitigating evidence. (See, e.g., *People v. Wright* (1990) 52 Cal.3d 367, 443-444.) That assumption is not borne out in this case. The jurors would limit factor (d) to extreme disorders because in both law and logic there is a principle that the specific overrides the general. (See, e.g., *People v. Trimble* (1993) 16 Cal.App.4th 1255, 1259.) Related to this is the idea that the inclusion of a specific item will exclude its application in other general contexts: *inclusio unius est exclusio alterius*. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) ["Although the average layperson may not be familiar with the Latin phrase *inclusio unius est exclusio alterius*, the deductive concept is commonly understood . . . ."];

Alcaraz v. Block (9th Cir. 1984) 746 F.2d 593, 607 ["maxim *expressio unius* is a product of logic and common sense"].) Thus, appellant's jurors would have certainly have understood that the specific instruction on mental and emotional disturbances under Penal Code section 190.3, factor (d) would control over the general application under any other factor.

To conclude that factor (k) overrides factor (d) would be tantamount to declaring factor (d) extraneous. Just as another fundamental rule of logic and construction requires that "a construction that renders [even] a [single] word surplusage . . . be avoided" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799), so too one would expect a juror to have rejected an interpretation of the court's instructions that would have rendered all of factor (d) surplusage.

Finally, the language of factor (k) in no way compelled a juror to interpret it as overriding factor (d). To the contrary, the pertinent portion of factor (k) merely directed the jurors to consider "any sympathetic or other aspect of the defendant's character . . . that the defendant offers as a basis for a sentence less than death . . . ." (9 CT 2432.) There was no reason a juror would necessarily interpret appellant's mental or emotional impairment at the time of the killings – the subject of factor (d) – as an "aspect of his character." A juror more likely believed that factors (d) and (k) dealt with different subjects and limited its consideration of appellant's mental deficits to factor (d).

Appellant's mitigating evidence of brain deficits provided important information for the jurors to consider. Appellant's jurors could have found that the impairments made it difficult for him to control his behavior or stop his rage. Yet, because appellant was able to function in other areas of life,

jurors appear to have accepted the prosecutor's argument and concluded that any mental impairment was not applicable under factor (d).

In many ways, this case is similar to *Brewer v. Quarterman*, *supra*, 550 U.S. at p. 291, where the prosecutor's argument "deemphasized any mitigating effect that [domestic violence] evidence should have on the jury's determination." Our High Court found that the jury was likely to have accepted the prosecutor's reasoning, which required reversal even if the mitigating evidence in *Brewer* was not as strong as in other cases. (*Id.* at p. 293.) In so doing, the Court rejected the claim that there had to be evidence of a chronic or immutable mental illness before an error that foreclosed consideration of evidence was prejudicial.

> Nowhere in our *Penry* line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability. Rather, we have focused on whether such evidence has mitigating relevance to the special issues and the extent to which it may diminish a defendant's moral culpability for the crime.

(*Ibid.*) Thus, it found that the Texas courts had "failed to heed the warnings that have repeatedly issued from this Court regarding the extent to which the jury must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." (*Id.* at p. 296.)

Here, the instruction and the prosecutor's argument foreclosed consideration of appellant's mitigation under factor (d) if the jurors found the deficits to be less than extreme. The prosecutor argued that factor © required an extreme condition and factor (k) was merely a "catch all" that focused on sympathetic factors. (30 RT 4283-4284.) If appellant's

impairment was not applicable under factor (d), then the jury was left with a wilful and deliberate crime, including a mental state that was not mitigated. When jurors are unable to give meaningful effect or a reasoned moral response to a defendant's mitigating evidence, "the sentencing process is fatally flawed." (*Abdul-Kabir v. Quarterman, supra*, 550 U.S. at p. 264.)

Appellant therefore requests that the Court reconsider its previous opinions in light of *Brewer* and *Abdul-Kabir* and reverse the penalty judgment.

2. The failure to delete inapplicable sentencing factors diminished the weight of mitigation

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case, in particular factors (e) [the consent of the victim]; (f) [reasonable moral justification]; (g) [duress]; and (j) [accomplice]. The trial court failed to omit those factors from the jury instructions (3 CT 804-805), likely confusing the jurors and preventing them from making a reliable determination of the appropriate penalty, in violation of defendant's constitutional rights.

Even assuming that the juror did not apply inapplicable sentencing factors as aggravation (50 RT 9808 [argument of prosecutor explaining that inapplicable factors should not be considered]), jurors could not help but believe appellant's case in mitigation was weaker because there were a number of factors that did not apply. Appellant asks the Court to reconsider its decision in *People v. Cook* (2006) 39 Cal.4th 566, 618, and hold that the trial court erred in failing to delete all inapplicable sentencing factors from the instructions.

3. The failure to instruct that statutory mitigating factors were relevant solely as potential mitigators

In accordance with customary state court practice, the instructions did not identify which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (3 CT 804-805.) This Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) Appellant's jury, however, was free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors, thus precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

G. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1

Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the court to reconsider its failure to require inter-case proportionality review in capital cases.

H. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.420, (b) & (e).) In a capital case, there is no burden of proof at all; the jurors need not agree on what aggravating circumstances apply; and specific findings to justify the defendant's sentence are not required. Appellant acknowledges that this Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but asks the Court to reconsider.

I. California's Imposition Of the Death Penalty As a Regular Form Of Punishment Falls Short Of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty, violates international law, the Eighth and Fourteenth Amendments and evolving standards of decency. (See, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 127.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's use of international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions. It is clear that the movement away from using the death penalty, both nationally and internationally, should compel this Court to conclude that death violates the evolving standards that must be considered under our law. (*Trop v. Dulles* (1958) 356 U.S. 86, 101.)

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XIII.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINE THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Even if this Court were to conclude that no error in this case was sufficiently prejudicial, by itself, to require reversal of appellant's conviction or death sentence, the cumulative effect of the errors that occurred below nevertheless requires reversal of appellant's conviction and sentence. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may "so infect[] the trial with unfairness" as to violate due process and require reversal. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927-928 [principle that cumulative errors may violate due process is "clearly established" by Supreme Court precedent]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty judgments in capital case for cumulative prosecutorial misconduct].)

The death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244 [cumulative effect of penalty phase errors prejudicial under state or federal constitutional standards]; *People v. Brown* (1988) 46 Cal.3d 432, 463 [applying reasonable possibility standard for reversal based on cumulative error].)

In this case, at the very beginning of the prosecutor's case, the jurors were shown graphic photographs of appellant's tattoos that focused on gang membership, sexual images, and other depictions that made him appear to be frightening before the jurors. (See Argument I.) This depiction was reaffirmed through irrelevant and prejudicial evidence that emphasized how appellant was brazen enough to use a gang sign in court; that gang evidence was found in the victim's address book after it had been found in appellant's room and, that appellant claimed to be Mexican Mafia hit man who had murdered in the past. (See Arguments II, III, & IV.) Appellant was also alleged to be able to manipulate others by claiming to be crazy and get away with crimes. (Argument V.) These errors combined to create a firm image of appellant in the jurors' minds that would have had an especially profound effect in considering appellant's penalty phase evidence.

That appellant was erroneously alleged to have lured the victim and to have laid in wait in order to kill her also influenced the penalty decision. (Argument VIII.) The prosecutor used this verdict to argue that lying in wait contributed to the enormity of the crime. (See 30 RT 4272, 4336; 31 RT 4408.) As the prosecutor emphasized, it was one of three major reasons why death was appropriate. (30 RT 4321.)

The weight of the evidence against appellant increased through opinion evidence and hearsay that set appellant apart as one of the most dangerous people in the jail. (Argument IX.) The trial court's instruction allowed the jury to consider any evidence of general misconduct as being crimes involving force or violence under Penal Code section 190.3, factor (b). (Argument X.) In the end, this created an insurmountable burden that no defendant could overcome.

The errors at the guilt phase and the penalty phase – even if individually not found to be prejudicial – preclude the possibility that the jury reached an appropriate verdict in accordance with the state death penalty statute or the federal constitutional requirements of a fundamentally fair, reliable, non-arbitrary and individualized sentencing determination. The errors affected the guilt phase by portraying appellant's gang affiliation in the most frightening ways. Reversal of the death judgment is also mandated because it cannot be shown that the errors, individually, or collectively, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

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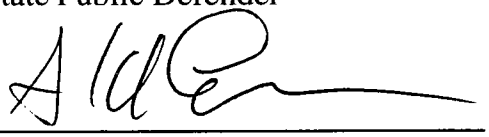
CONCLUSION

For all the reasons stated above, the judgment this case must be reversed.

DATED: October 3, 2014

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



ARNOLD ERICKSON
Senior Deputy State Public Defender

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, Rule 8.630(b)(2))

I, Arnold Erickson, am the Senior Deputy State Public Defender assigned to represent appellant Ruben Becerrada in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that the brief is 47,440 words in length.

Dated: October 3, 2014

ARNOLD ERICKSON
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Ruben Becerrada* Cal. Supreme Ct. No. S170957
(Los Angeles Co. Sup. Ct. No. LA033909)

I, Randy Pagaduan, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, Suite 1000, Oakland, California 94607. On this day, I served a copy of the following document(s):

APPELLANT'S OPENING BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;

/ X / **placing** the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **October 3, 2014**, as follows:

David Zarmi, Deputy Attorney General
Attorney General – Los Angeles Office
300 South Spring Street, 5th Floor
Los Angeles, CA 90013

Maria Arvizo-Knight
Death Penalty Coordinator
Los Angeles County Superior Court
210 West Temple St., Room M-3
Los Angeles, CA 90012

Mia Yamamoto, Esq.
800 Wilshire Blvd., #530
Los Angeles, CA 90017

Ruben Becerrada, #G-52922
CSP-SQ
2-EB-69
San Quentin, CA 94974

Robert A. Schwartz, Esq.
9100 Wilshire Blvd., Suite 333E
Beverly Hills, CA 90212

I declare under penalty of perjury that the foregoing is true and correct. Signed on **October 3, 2014**, at Oakland, California.

DECLARANT