SUPREME COURT, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. NATHAN VERDUGO, Defendant/Appellant.	No. S083904 APPELLANT'S OPENING BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
LOS ANGELES COUNTY
SUPERIOR COURT CASE NO. BA105622-01

THE HONORABLE CURTIS B. RAPPE, JUDGE

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGE NO.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CASES — PAGE NO.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CASES — PAGE NO.

TABLE OF AUTHORITIES

STATUTES — PAGE NO.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATUTES PAGE NO.

OTHER

TABLE OF AUTHORITIES

OTHER — PAGE NO.

TABLE OF AUTHORITIES

OTHER — PAGE NO.

TABLE OF AUTHORITIES

I. STATEMENT OF APPEALABILITY

The instant appeal is automatic because a judgment of death was rendered. (Penal Code sec.1239 subd.(b).)

II. INTRODUCTION

Twenty-two-year-old Nathan Verdugo's trial was exceedingly unfair. This overwhelming unfairness commenced with the denial of second counsel despite the fact the court had ample evidence before it -- including counsel's own statement -- that counsel was not competent to handle this, his first capital trial, on his own.[1] The prejudice in forcing appellant to trial with an inexperienced, incompetent attorney was immeasurable.

The unfairness carried over into the guilt phase. Appellant testified that he did not shoot Yolanda Navarro and Richard Rodriguez. The prosecution attacked appellant's credibility with evidence that his family may have fabricated evidence in an effort to conceal the crime. When appellant sought to introduce evidence establishing the true, non-inculpatory reason the evidence was manufactured, the trial court excluded the evidence of those reasons. The trial court similarly deprived appellant of his ability to present a defense by precluding appellant from attacking the credibility of a key

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[1] On several occasions throughout the proceedings, defense counsel was reprimanded and/or sanctioned for being late and as a result of improper conduct. (CT 402, 2333, 2335, 2533, 2534A-2534K, 2536, 2644; RT 1377-1379, 1925, 1983-1984, 2470-2474, 3489-3493, 3932-3935, 3980-3981, 5018-5025.)

prosecution witness through questions about her psychiatric problems.

The guilt phase was also infected with severely prejudicial instructional error. The jury was never given the option of finding appellant guilty of the lesser included offense of voluntary manslaughter as to Richard Rodriguez, despite ample evidence to warrant such an instruction. The trial court similarly erred in failing to instruct the jury on voluntary intoxication, where the evidence showed appellant had been drinking. Other prejudicial instructional error occurred as well.

The penalty phase of appellant's trial was also inherently unfair. The jury, during deliberations, wanted to know if life without possibility of parole really meant appellant would never be paroled. Rather than directly answering the question with the correct answer, i.e., that with such a sentence appellant would never be released on parole, the trial court gave a misleading response which left the jury groping for guidance. Extensive inflammatory, unnecessary, and prejudicial heartrending victim impact evidence resulted in a penalty decision based on emotion, not reason or facts. Prejudicial conduct by the prosecutor contributed to and exacerbated the unfairness of the penalty phase.

The unfairness of appellant's trial was capped off by the denial of his motion for new trial. The motion presented new evidence seriously undercutting the credibility of a pivotal prosecution witness, yet the trial court denied the motion.

The capital conviction and death sentence of appellant Nathan Verdugo were the product of numerous prejudicial errors which combined to deprive appellant of his fundamental constitutional rights to due process, a fair trial, trial by an impartial jury, a

reliable determination of guilt and penalty, protection from cruel and unusual punishment, equal protection, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I, sections 1, 7, 15, 16, 17, and 28 of the California Constitution. Appellant's conviction and sentence are the direct result of constitutionally deficient proceedings. Reversal is therefore required.

III. STATEMENT OF THE CASE

On June 24, 1997, after a preliminary examination (CT1: 39-200), [2] an amended information was filed charging appellant Nathan James Verdugo with two violations of Penal Code section 187, subdivision (a), first degree murder. Count 1 involved Yolanda J. Navarro. Count 2 involved Richard Rodriguez. Pursuant to Penal Code section 190.2, subdivision (a)(3), the special circumstance of multiple murder was alleged. As to each count, pursuant to Penal Code section 12022.5, subdivision (a)(1), it was alleged that appellant personally used a firearm, a shotgun. (CT1: 238-239; CT9 2418.)

On March 29, 1996, appellant filed motions seeking discovery regarding law enforcement officers (CT1: 248-258), discovery in general (CT1: 262-270), disclosure of impeachment information (CT1: 271-279), and for appointment of an investigator. (CT2: 280-284.)

On July 26, 1996, appellant filed a confidential ex parte application for appointment of a second counsel. (CT12: 3062-3077.) On July 29, 1996 and August 1,

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[2] "CT" refers to the Clerk's Transcript. "RT" refers to the Reporter's Transcript.

1996, the application was denied. (CT12: 3029-3032, 3060.)[3]

On August 15, 1996, the trial court ordered defense counsel to submit to a physical and mental examination by a doctor appointed by the trial court. (CT2: 296; RT 331-358.) On August 19, 1996, the Court of Appeal temporarily stayed the order (CT2: 302-303) and the order was withdrawn on August 20, 1996. (CT2: 304, 305; RT2: 359-366.)

On August 15, 1996, appellant's oral Code of Civil Procedure section 170.6 challenge against Judge Rappe was denied as untimely. (CT2: 296; RT2: 344 .)

On August 22, 1996, appellant filed a motion to suppress statements obtained in violation of *Miranda* (CT2: 306-309) and to suppress the identification made by witness Donald Jones. (CT2: 310-316.) After an evidentiary hearing, the motion as to Jones's identification was denied. (CT2: 325, 440; RT3: 480.) The motion to suppress statements taken in violation of *Miranda* was granted; however, the trial court reserved the issue of "...credibility use when the matter goes to trial." (CT2: 440; RT14: 2477.) The trial court subsequently ruled the statement was admissible for impeachment. (RT14: 2477-2494.)

On August 26, 1996, trial started. Appellant's Code of Civil Procedure section 170.1 challenge to disqualify Judge Rappe was denied. (CT2: 395; RT3: 491.) Jury selection commenced. (CT2: 395; RT 499.)

On August 27, 1996, the trial court learned that appellant's counsel, George

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[3] The documents pertaining to appellant's application for second counsel are included in Volume 12 of the Clerk's Transcript entitled, "Confidential - Under Seal."

Hernandez, had been arrested.[4] The case was continued. Attorney Yamamoto was appointed to advise appellant. Defense counsel agreed to, presumably, a mental examination, and a doctor was appointed. The doctor recommended that defense counsel undergo a physical examination. Counsel agreed. A mistrial was declared. Appellant stated he wanted present counsel, Mr. Hernandez, to continue representing him. Mr. Hernandez was subsequently found to be competent to represent appellant. (CT2: 396-405; RT3: 553-652 .)

On November 25, 1996, appellant filed a motion seeking to introduce evidence of third-party culpability. (CT2: 416-423.) Supplements were also filed. (CT2: 458-464.) The prosecution filed opposition. (CT2: 430-438.) On May 9, 1997, the motion was denied without prejudice. (CT2: 456; RT3: 762-763.)

On November 25, 1996, a motion to quash search warrant pertaining to appellant's father's house and to suppress evidence was filed by appellant. (CT2: 424-427.) On January 10, 1997, the motion was denied. (CT2: 440 .)

On May 12, 1997, trial commenced. (CT9: 2323; RT4: 781.) Prior to opening statements, appellant objected to the prosecution's introduction of a shotgun which was not the murder weapon. The objection was overruled. (CT9: 2332.) Also, defense counsel, for the first time, produced some eyeglasses (Def. Ex. B) which he claimed were

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[4] The charges, which were eventually dismissed, involved the claim that counsel attempted to smuggle drugs to an inmate/client. Counsel had been given an envelope to give to the inmate. Counsel was unaware that it contained contraband. (RT3: 586-587.) The trial court claimed, counsel was "...an innocent dupe." (RT22: 4102.)

the glasses appellant had been wearing the night of the incident. Because the glasses had just been given to counsel, the trial court ordered that the glasses be given to the prosecution for investigation. (RT7: 1199-1210.)

On May 28, 1997, appellant's motion for mistrial based on prosecutorial misconduct was made and denied. (CT9: 2337; RT10: 1785-1789.)

On May 30, 1997, the prosecution filed a motion to introduce crime scene and autopsy photographs. (CT9: 2339-2352.) Appellant objected and the trial court excluded four proffered photographs. (CT9: 2367; RT12: 2044-2061.)

On June 5, 1997, appellant and his counsel were ordered not to make any mention of a Los Angeles Police Department internal affairs investigation regarding Detectives Teague and Markel, the lead investigators in the instant case. (CT9: 2372-2373.)

On June 5, 1997, an *in-camera* hearing, from which the defense was excluded, was held regarding the prosecution's ongoing investigation regarding Defense Exhibit B, the eyeglasses defense counsel produced on May 21, 1997 prior to opening statements. The trial court ruled that the defense was not yet entitled to discovery as to the eyeglasses. (CT9: 2374; RT14: 2699-2705.)

On June 6, 1997, appellant's mistrial motion on the ground of prosecutorial misconduct was made and denied. (CT9: 2375.)

On June 10, 1997, appellant's mistrial motion on the ground of a discovery violation was made and denied. The trial court stated it would grant a continuance, if necessary. (CT9: 2381; RT17: 3149-3150.) On June 11, 1997, appellant filed a motion

for a continuance. (CT9: 2383-2387.)

On June 16, 1997, appellant's mistrial and continuance motions on the ground of discovery violations were denied. The prosecutor was ordered to turn over discovery forthwith. (CT9: 2411; RT21: 3983-3989.)

On June 30, 1997, at 10:14 a.m., jury deliberations began. (CT9: 2421; RT29: 5643.) The jury deliberated all day on July 1. On July 2, 1997, at 3:50 p.m., the jury returned its verdict, finding appellant guilty as charged. (CT9, 10: 2423, 2515-2517, 2526-2529A; RT30: 5666-5669.)

On July 3, 1997, prior to the start of the penalty phase, appellant made a motion for a mistrial on the ground of juror misconduct. The motion was denied, but the parties stipulated that Juror No. 2 would be removed and replaced by Alternate Juror No. 3. A further hearing regarding Juror No. 2 was scheduled. Again, the mistrial motion was denied. (CT10: 2530, 2533; RT31: 5700-5778.)

The penalty phase commenced on July 3, 1997. (CT10: 2530; RT 5791.)

On July 8, 1997, the parties stipulated that Juror No. 10 could be excused because his wife just had a baby. Juror No. 10 was replaced with Alternate Juror No. 2. (CT10: 2532; RT32: 5858-5860 .)

On Friday, July 11, 1997, the jury began deliberations regarding penalty. (CT10: 2535; RT35: 6336.) On Monday, July 14, 1997, during deliberations, the jury asked, "In the event the defendant is given life in prison without the possibility of parole, is he still given parole hearing and a chance of being released?" (CT10: 2537; RT35: 6338.) The

trial court, after consultation with counsel, and over appellant's objection, replied:

> "You were instructed on the applicable law and should not consider or speculate about matters of law on which you were not instructed in arriving at a verdict of death or life in prison without the possibility of parole." (RT 6341-6342.)

On July 14, 1997, the jury returned its verdict finding that death was the appropriate penalty. (CT10: 2620, 2621, 2623; RT35: 6343-6345.)

In letters to the trial court dated September 7, 1997 and November 8, 1998, appellant personally complained about the quality of his counsel's representation. (CT10, 11: 2645, 2784.)

On September 11, 1998, appellant's "declaration of disqualification" was filed as to Judge Rappe. (CT10: 2774-2775.) It was stricken by the trial court. (CT10: 2776; RT36: 6577-6584.)

After numerous continuances (CT10: 2631-2727), appellant filed a motion for new trial on August 13, 1998. (CT10: 2728-2739.) On September 3, 1998, the prosecution filed opposition. (CT10: 2753-2766.) Several evidentiary hearings were held. (CT10, 11: 2773, 2776, 2822, 2822B, 2851A-2851B; RT35-38: 6450, 6533, 6545, 6586, 6615, 6636, 6670, 6704, 6874, 6928, 6955, 6991, 7000, 7043 .) Supplemental pleadings were filed in conjunction with the motion for new trial. (CT11: 2785-2793, 2829D-2837, 2840-2851, 2852-2867, 2868-2879, 2880-2895, 2897-2902.) On June 18, 1999, the motion for new trial was denied. (CT11: 2904; RT39: 7181-7243.)

On December 2, 1998, appellant's counsel filed a motion for leave to withdraw as

appellant's attorney. (CT11: 2794C-2799.) The prosecution filed opposition. (CT11: 2800C-2821.) After a hearing, the motion was denied on December 4, 1998. (CT11: 2800-2800B; RT36: 6738-6768, 6773-6838.)

On August 16, 1999, defense counsel filed a motion for a continuance for the purpose of retaining a psychiatrist to conduct an evaluation of appellant. The motion was granted. (CT11: 2905-2909; RT39: 7244-7248.) However, appellant refused to be examined. Defense counsel's request to have appellant examined pursuant to Penal Code section 1368 to determine whether appellant was competent to refuse was denied. (CT11: 2911, 2965; RT39: 7249-7264, 7271-7276.)

On November 17, 1999, appellant filed a statement in mitigation. (CT11: 2951-2955.)

On November 20, 1998, appellant filed a "motion to reduce offense for lack of proportionality." (CT11: 2794-2794A.) The trial court and counsel considered this to be a statement in mitigation of penalty. (RT39: 7277.) On November 19, 1999, the motion was denied. (CT11: 2965-2978; RT39: 7277-7303.)

On March 18, 1999, a letter from appellant personally to the trial court was filed. In the letter, appellant proclaimed his innocence. CT11: 2838A-2839.)

On March 12, 1999, pursuant to Penal Code section 190.4, subdivision (e), appellant filed a motion to reduce death penalty. (CT11: 2829-2829C.) On November 18, 1999, the prosecution filed opposition. (CT11: 2956-2964.)

On November 19, 1999, appellant's motions to modify the verdict and to reduce

the penalty of death were denied. (RT39: 7303-7339.) The trial court denied the automatic motion to reduce the death penalty and sentenced appellant to death. Two upper term consecutive sentences of five years were imposed for the gun use enhancements. (CT11: 2965-2978; RT39: 7352-7356.)

On November 19, 1999, the judgment of death was filed. (CT11: 2979-2988.)

IV. STATEMENT OF THE FACTS: GUILT PHASE

A. THE PROSECUTION'S CASE

1. The party

On October 22, 1994, Hector Casas hosted a party at his home at 3516 Parrish Avenue in Los Angeles. Fliers were printed and handed out to friends and family members. (RT7: 1250-1252.) Mario Olmos was a co-host of the party. (RT7: 1275-1276.) Yolanda ("Yoli") Navarro, Lisa Revalcaba, and Adrianna Castellano drove to the party with Richard Rodriguez in his car, a maroon Honda Civic. (RT8: 1315-1324, 1478-1479.) Jennifer was at the party. Frances Rodriguez went to the party with Kevin Estrada, who was dressed in a Michael Meyers costume. (Michael Meyers is a character from the movie "Halloween.") (RT8: 1315-1324, 1381-1385.) Esteban Garcia went to the party with Christina, Julie, and Pete. (RT8: 1326, 1430-1434.) Paul Escoto, referred to at times in the testimony as "Big Boy," went to the party with his girlfriend, Monica Tello. (RT9: 1541-1543, 1581-1584.) Mike Arevalo, who was wearing a Rolling Stones T-shirt and was referred to at times in the testimony as "Rolling Stone," arrived at the party with Ray Muro. Muro was dressed in Marine fatigues. (RT9, 10: 1633-1635, 1890-

1893.) Irma Casas, Arevalo's aunt, was at the party. (RT10: 1812-1813.) Victor Casas, Arevalo's uncle, went to the party with his wife, Carmel. (RT7, 10: 1265, 1860-1862, 1873-1874.) Yolanda and Lisa are about the same height, have a similar build, have the same color hair, and are both Mexican-American. (RT8: 1319-1320.) Richard Rodriguez was not wearing glasses at the party. (RT8: 1324.) For "most of the night," Richard was outside talking on his cell phone. (RT8: 1355.)

Ray Muro is a male Hispanic, 5'6" to 5' 7", 140 pounds. Paul Escoto is a male Hispanic, about 6', 200-220 pounds. Mike Arevalo is a male Hispanic about 6', 180-190 pounds. RT7: 1248-1249.) Escoto was dressed in white shorts at the party. (RT9: 1563-1564.) He does not wear glasses. (RT9: 1578.)

Appellant was at the party. He was wearing a blue shirt and white shorts. (RT7-9: 1253,1259, 1280-1281, 1287-1288, 1393-1394, 1485, 1517, 1531, 1549.) Frances Rodriguez testified that three people were "hanging out" in the kitchen: "One had a light blue shirt and glasses, the other one had a Rolling Stones shirt and some other man had a camouflage Army suit." (RT8: 1327.) She identified appellant as the one wearing glasses. (RT8: 1327-1328, 1354-1356.)[5] Jason Borens videotaped portions of the party and gave the videotape to the police. (RT7: 1293-1294, 1303, 1257-1258; People's Ex. 13.)

Things did not go smoothly at the party. First, Kevin Estrada turned off the light

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[5] The other two were Muro and Arevalo.

in the kitchen in an effort to scare a woman. Esteban Garcia was walking through the kitchen when the light went off. "Big Boy, " i.e., Paul Escoto, grabbed Garcia by the neck area of his shirt and put him up against the wall. Kevin and "Rolling Stone," i.e., Mike Arevalo, interceded and calmed down the situation. Although Escoto apologized and gave Garcia a hug, he subsequently gave Estrada "hard looks" and "dogged" Garcia. (RT8: 1416, 1446, 1455-1456.) Appellant was not involved in this incident. (RT8: 1420-1422.)

Second, during the party, some people got "rowdy" around the pool table. (RT 1295-1296.)

Third, at some point during the party, Adriana and Frances went outside to look for their friend Jennifer, along with Yolanda, and possibly Kevin, Steve and Lisa. They walked up the hill toward Jennifer's boyfriend's car. As they did so, Paul Escoto, driving his older model Toyota Celica with his girlfriend Monica Tello in the passenger seat, pulled out and hit Adriana as he was driving up the hill. (RT8, 9: 1330-1332, 1486-1488, 1503-1507.) Escoto maintained that he did not realize he had hit anyone until the next day. Monica claimed she heard a "thud," but thought someone had "kind of smacked the car with their hand." (RT8, 9: 1396-1397, 1438-1441, 1447-1451, 1553-1555, 1582-1587, 1597-1598.) Escoto's Toyota is tan, with black on the bottom, tinted windows, and a loud muffler. Although Escoto testified it never had louvers on the back window, Esbeban Garcia testified the car looked like as if it had louvers on the back window. (RT8, 9: 1451-1459, 1503, 1547-1548, ; People's Ex. 43A, 43B.) Kevin Estrada, who

was outside, heard someone yell that Adriana had been hit. Estrada threw a beer can at the car and hit it. (RT8: 1397-1400.)

After Adriana had been hit by the car, she and Yolanda started walking down the hill. Richard Rodriguez (or possibly Kevin) came and carried Adriana back to the party. Frances then carried Adriana downstairs. Yolanda stayed with Adriana for about an hour. Richard would come and go. (RT8: 1332-1334, 1488-1490.) Although Adriana was hysterical, she did not appear to be injured. She was walking around. (RT7: 1282-1283.) Irma Casas called the ambulance. (RT10: 1817-1822.)

Esteban Garcia had seen Escoto's car hit Adriana. (RT8: 1438-1441.) Garcia went back into the house, grabbed Arevalo by the shoulder, turned him around, and said, "...your friend hit my friend with his car as he was taking off." Immediately thereafter Lisa came over Garcia's back and hit Arevalo twice on the forehead with a beer bottle. As she did so, she screamed, "You fucking asshole. Your friend hit my friend with the car. He ran over them." (RT7, 8, 10: 1279, 1441-1443, 1875-1877.) Garcia took Lisa outside, to the front of the house. (RT8: 1443.) Lisa admitted to Frances that she had hit Arevalo with the bottle. (RT8: 1369.)

After being hit, Arevalo "...was screaming...touching his face, trying to climb over the crowd that was holding him back." He was angry and cussing, saying,"fucking bitch." (RT8: 1401, 1410-1412, 1875.) Someone said, "Shoot the bitch." (RT8: 1426-1427.) Mario Olmos told the police that someone with blood on him -- not appellant -- was trying to get at Lisa and had to be restrained. (RT7: 1288-1292.)

Meanwhile, after being at the top of the hill for about 45 minutes, Escoto and Tellis drove down after hearing sirens. They stopped at the party and saw Arevalo, who had "blood all over his face." Arevalo blamed Escoto for his injury. (RT9: 1555-1557, 1566-1572, 1577, 1587-1588, 1592, 1596.)

Arevalo was bleeding profusely. He was taken to the bathroom, where people were trying to help him. He wanted to know who had hit him. (RT7, 10: 1255-1257, 1266, 1281-1282, 1823, 1866, 1876-1877.) Carmel Casas went out to get her car to take Arevalo to the hospital. She pulled in front of the house to wait for Victor to come out with Arevalo. The police or an ambulance arrived and Carmel knew she would not be able to drive down the hill. Appellant, who had a Honda, pulled behind her in a small black car. She asked appellant to move his car. Appellant was wearing glasses. Appellant backed up, got out, and leaned against the car. (RT9: 1567-1568, 1877-1887.) Carmel Casas, Paul Escoto, Monica Tello, and others were there. Victor Casas eventually took Arevalo to the hospital. (RT9, 10: 1556, 1862-1865, 1868-1871, 1883-1884.)

Officer Vincent and her partner, Officer Block, arrived at the party at about 1:00 a.m. They were directed into the house where Adriana was laying on a bed, crying and complaining of pain to her left buttock. The paramedics arrived. Adriana was not seriously hurt. The police were there for only 30 minutes. (RT9: 1607-1612.)

Meanwhile, Frances left Adriana and came upstairs. However, somebody was guarding the door. An argument was occurring. Frances stayed outside for about 10-15 minutes before leaving with Kevin and others. Yolanda and Adriana were still in the

house. (RT8: 1335-1340, 1403-1404, 1416-1420.)

Richard Rodriguez told Adriana and Yolanda that he wanted to leave because of trouble in the kitchen. They came outside, where an argument was taking place. Irma Casas, who was drunk, was arguing with some girls, including Lisa, who was also drunk. (RT10: 1843-1849.) People were holding back Lisa and Irma. Irma said she was glad Adriana had been hit by the car. (RT7, 8, 9, 10: 1255, 1258-1259, 1267-1269, 1402-1404, 1443-1444, 1490-1492, 1513-1515, 1520-1521, 1526-1530, 1825-1827, 1875.) Appellant, Ray Muro, and others were outside. (RT10: 1828, 1844-1845 , 1849.)

Richard Rodriguez pulled up in front of the house in his Honda Civic. Adriana noticed that her sister, Luz Maria, had arrived in her Jeep. Luz wanted to talk to Irma Casas. An argument ensued. Richard escorted Adriana and Luz to the Jeep and Richard and Yolanda got into his car and drove away. As Richard drove away, Adriana saw a small, dark Honda-sized car "...pull out behind them and follow them." The small dark car cut in front of the Jeep. Adriana and her sister went home. Appellant was present while the argument was occurring; he could have overheard the argument. (RT7, 8, 9, 10: 1285-1286, 1492-1499, 1509-1510, 1515-1516, 1518-1520, 1536, 1828-1829, 1887-1840.

Adriana never saw appellant bothering Richard or Yolanda at the party and never saw appellant at Richard's car. (RT9: 1524-1525.) She agreed that appellant was "pretty noticeable...because he's so tall." (RT9: 1533.)

After Arevalo was hit with the bottle, the party broke up and most of the attendees left. (RT8, 9: 1403-1404, 1445, 1490.) Irma Casas had asked appellant to take her to the

hospital to see Arevalo. Appellant said he would drive her and Ray Muro to the hospital. Irma went back into the house. When she came out 15 to 20 minutes later, appellant was gone. Irma's sister and Ray Muro were there. Muro walked Irma down the hill to her sister's house. They stayed for about one half-hour and then walked back to the party. Eventually, Arevalo returned. Everyone left. (RT10: 1829-1837, 1896-1847, 1849-1851, 1865.)

Sometime after 2:00 a.m., Hector Casas received a telephone call from Frances, asking if he had seen Yolanda Navarro and Richard Rodriguez. Casas had not seen them. (RT7, 8: 1260, 1341-1342.) At some point after leaving the party, Richard paged Lisa. She called back, but no contact was made. (RT8: 1342-1343.) When Frances got home at about 4:00 a.m., she paged Yolanda. Yolanda did not return the page. (RT8: 1343-1345.)

Julissa Segura testified that, earlier that evening, Richard Rodriquez, driving his red or burgundy-colored Honda Civic, dropped her off at her uncle's house. She later spoke with Richard by phone at 7:00 p.m., 9:00 p.m., 10:30 p.m., and 12:30 a.m. During the 12:30 a.m. call, Richard said, "...he was going to leave already because...everyone was coming out." Although Richard said he would page her when he got home "...he never did." (RT9: 1473-1478.)

At about 5:00 a.m., on the morning of October 23, 1994, Yolanda's sister, Tina, picked up Frances. They went to Huntington Drive and Monterey Road but did not see anything except yellow tape. Frances spoke with Detective Teague at the scene and also

gave a statement at the police station, which was consistent with her trial testimony. (RT8: 1346-1349.) He also interviewed her at a later date and showed her the video of the party. She told him the individual in the kitchen with the glasses and blue shirt was wearing white shorts. (RT8: 1364-1366.)

2. At the hospital

After leaving the party, Escoto and Tellis went to the hospital to see Arevalo, arriving there half an hour to 45 minutes after leaving the party. Friends and family of Arevalo were there including Victor Casas, Carmel Casas, Arevalo's mother, his father and his father's girlfriend, and Ray Muro. Escoto was at the hospital for two or three hours. When Arevalo was released, Escoto and Tello went home. Tello testified they arrived home at about 5:30 a.m. Escoto had not seen appellant at the hospital. (RT9: 1557-1560, 1572-1573, 1588-1591.)

Theresa Brooks, a nurse at Glendale Memorial Hospital, testified that Arevalo was seen at 1:17 a.m. on October 23, 1994 for lacerations to his face. The lacerations were sutured. Arevalo was given a tetanus shot and a toradol shot, a pain medication. Neither shot would make a person high or unable to remember, but, Brooks never saw what effect the drugs had on Arevalo. Arevalo smelled as if he had been drinking. He was discharged between 2:20 a.m. and 2:40 a.m. and was alert and oriented. (RT17: 3288-3301, 3304-3308.)

3. Mike Arevalo's testimony

Mike Arevalo has known appellant since they "were kids." They grew up around

the corner from each other. As they got older, they became good friends and spent a lot of time together. Arevalo would go to appellant's house on Hellman "maybe three times a week." Appellant may have told Arevalo that Arevalo was his best friend. Arevalo knew most of appellant's family. Appellant had been invited to Arevalo family gatherings. (RT9: 1614-1619, 1689, 1679-1680.)

Arevalo testified that, in October 1994, appellant drove two vehicles: an older Nissan truck and a 1988 or 1989 Honda CRX. The truck was "black primer" in color. When appellant purchased the CRX, it was yellow. Approximately two months after acquiring the CRX, appellant painted it primer black. The car's rims were also painted black primer. The CRX may have had front fender passenger side damage. (RT9: 1619-1626, 1761, 1766-1769.) Regarding the exhaust system on appellant's CRX, Arevalo claimed it "...had a lowered tone to it" different than a factory exhaust system. It sounded as if it had been modified. (RT9: 1627-1633.) Arevalo had driven the car. (RT9: 1686.)

The October 22, 1994 Halloween party was at the house of Arevalo's uncle, Hector Casas. Arevalo went to the party with Ray Muro and arrived at about 9:00 p.m. (RT9: 1633-1637, 1670-1671.) At the party, Arevalo drank four or five beers. (RT9: 1639.)

At one point during the party, in the kitchen, there was an incident when "somebody was messing with the lights." "[I]t was resolved." (RT9: 1640-1641, 1644.)

Later, Arevalo went out to the balcony and got a beer. A young woman "got in [his] face" and said he had run over her with his car. This was not true because Arevalo

had not left the party. Arevalo told the woman, "it wasn't me." A second woman came up and hit Arevalo with a bottle. The first woman also hit him, and he was hit a third time. He was hit on the forehead, nose, and lower lip. Arevalo was upset and bleeding. He tried to go after the women but was held back. (RT9, 10: 1644-1649, 1769-1772, 1802.)

Arevalo went into the bathroom where his uncle gave him a towel. Arevalo then went outside. When he heard sirens, he went down the hill to his aunt Stella's house. Arevalo's uncle, Victor Casas, arrived, along with others. Arevalo was taken to the hospital. (RT9: 1649-1654.) Arevalo did not see appellant at the hospital. (RT9: 1689.)

At the hospital, Arevalo received over 50 stitches. When he was released, his father, his mother, Carmel Casas, Paul Escoto, and others were in the waiting area. Arevalo did not see appellant at the hospital. Arevalo stopped back at the party and assured Hector Casas that he was all right. (RT9, 10: 1654-1657, 1689, 1776.)

Arevalo then went to his father's house with his father, his father's girlfriend, and Ray Muro, who "lived in the back." Appellant was there. Appellant may have hugged Arevalo. Arevalo did not remember any conversation. (RT9, 10: 1657-1664, 1694-1698, 1736-1738, 1757.) Arevalo stated it was possible appellant said he committed murder, but assumed he did not say so. (RT10: 1710-1711, 1715.)

The next morning, at about 10:00 a.m., Arevalo, Ray Muro, and appellant went to breakfast at "Bun and Burger." Arevalo did not remember whether appellant was wearing glasses, sunglasses, or contacts. Appellant looked the same. The men discussed

how Arevalo was feeling. (RT9, 10: 1675-1677, 1778, 1805-1806.)

During breakfast, Arevalo's mother arrived. He and his mother went outside and she informed him "...that there had been a double homicide." Arevalo went back into the restaurant and told appellant and Muro "what had happened." (RT9, 10: 1677-1679, 1693, 1734-1736, 1753-1754, 1778-1779.)

The next day, Arevalo saw appellant at Ray Muro's house cleaning carpet. Appellant was driving his truck. Appellant did not mention anything about a jacket or shotgun or glasses being left at the party. This was the last time Arevalo saw appellant until Arevalo testified in court. (RT9, 10: 1681-1685, 1689-1690, 1758, 1781, 1802, 1808-1811.) At Muro's, appellant did not look any different. (RT10: 1807-1808.) Appellant never told Arevalo that he kept a shotgun in the car and never told Arevalo about a hide-a-key. Arevalo did not know "if there was or there wasn't" a "hide-a-key." (RT9: 1688-1689.)

When Arevalo first spoke with the police, he did not tell them everything he knew. When he saw the videotape of the party, things were somewhat refreshed in his mind. Both he and Muro are in the video. Arevalo said that the person with glasses and a blue shirt shown in the tape is appellant. Appellant is "clean cut." When Arevalo first spoke with the police, he denied knowing the person in the blue shirt. He talked with police about Paul Escoto and Ray Muro. (RT10: 1739-1753, 1783, 1797-1799.) During his second police interview, Arevalo said he knew appellant. (RT10: 1754-1757.) Arevalo "was interviewed a lot." (RT10: 1757.)

Arevalo testified that, during his October 27, 1994 interview, he had been reluctant to provide information. Detective Teague hit him "a few times and [he] got scared." Arevalo's hat was knocked off. (RT10: 1792-1797.)[6]

On one or two occasions, Arevalo saw one of two black shotguns at appellant's house on Hellman. Appellant never mentioned a secret hiding place in the house in Rialto, to which appellant had moved sometime before October 22, 1994. (RT9, 10: 1664,1669, 1671-1674, 1760.)

Arevalo was shown People's Exhibit 26-C, a picture of appellant sometime after the shooting. He had never seen appellant "looking like that." (RT9: 1671.)

Because of the blow to the head, the beer, and the medication, Arevalo's memory of the events is vague and fuzzy. (RT10: 1773-1774. 1804.)

Detective Teague testified that, during a conversation with the district attorney, Arevalo said:

> "That it was possible that Nathan had told him that he had killed someone, that it was possible that Nathan had said that he committed these murders, it was possible that Nathan told him that he had shot someone." (RT10: 1718.)

4. <u>Ray Muro's testimony</u>

Ray Muro had known Mike Arevalo for about three years. Muro lived in a small house in front of Arevalo's father's house. (RT10: 1890-1891.) He met appellant at

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[6] Detective Markel testified he never saw Teague strike Arevalo. (RT21: 3949-3950.)

Black Angus about two months before the October 22, 1994 party. (RT10: 1892-1893, 1955-1956.) Muro testified that he is 5' 11-1/2" and weighs 180 pounds. (RT8: 1457.)

Muro went to the Halloween party with Mike Arevalo in Arevalo's mother's Volvo. Muro did not have a car. Muro, who had been in the Marines, was wearing Marine fatigues. He was not wearing glasses. (RT10, 11: 1893-1896, 1949, 1956, 1981.)

Muro identified appellant from a picture taken at the party. At the party, Muro was "hanging around" in the kitchen with appellant, Arevalo, and Arevalo's Aunt Irma. (RT10, 11: 1893-1896, 1949, 1956, 1981.)

At some point during the party, Muro went outside with Arevalo and Irma. Arevalo left. Muro heard yelling. The front door was closed. Muro went to the door and one of Arevalo's cousins said Arevalo had been hit in the face with a bottle. Muro could not get in. (RT10, 11: 1897-1899, 1956-1963.)

About 15 minutes to one-half an hour later, appellant came outside and ran up to his car, a black CRX. Muro followed him. According to Muro, appellant opened the trunk of the CRX, showed Muro a modified, pistol grip, pump-action shotgun, and said, "I'm going to go back in there and get those people," or "...get that girl." When appellant did this, Muro saw "...a completely different person...like a Dr. Jekyll and Mr. Hyde type... Just was not the person that I knew." Appellant was upset. Muro tried to calm him down and said, "...there wasn't any reason for that...Just put it away." Appellant put the shotgun back in the car and walked back down to the party. (RT10, 11: 1898-1902, 1946, 1949, 1963-1977, 2001, 2009-2014, 2025-2026.)

After the paramedics arrived to treat Adriana, Muro walked with Irma Casas down to Arevalo's aunt's house. After about one-half an hour, they walked back to the party. Arevalo returned from the hospital. He was "bandaged up. Stitched up." Muro went home accompanied by Arevalo, Arevalo's father, and Arevalo's father's girlfriend. (RT10, 11: 1902-1907, 1981.) They came in through the alley leading to the driveway and pulled into the carport. Appellant's car was parked in the alley. Appellant got out of the car. (Although he may have been standing outside the car. (RT11: 1983.)) He was wearing the same clothes he had been wearing at the party. Appellant talked with Arevalo and Muro walked to the house. (RT10: 1907-1909.) When Muro came back out of the house, he saw appellant and Arevalo talking. Muro claimed he heard appellant say to Arevalo that, "the situation had been handled..."[7] He said he saw appellant embrace Arevalo. Arevalo told Muro what had happened at the party. Muro allowed appellant to stay there. (RT10, 11, 23: 1909-1911, 1982-1989, 1993-2001, 2021-2022, 4356.)

Muro testified that, when appellant was at Arevalo's father's house after the party, appellant was wearing his glasses. There was no blood on appellant's clothes. However, Muro testified that "...I didn't know I was supposed to be looking for blood...or that he was not wearing his glasses." Muro did not see any damage to appellant's car, but he could not see the driver's side and was not looking to see if it was damaged. (RT11: 1989-1990, 2016-2018 .) Muro also testified that he assumed appellant was not wearing

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[7] Detective Stephenson testified that, during trial, was the first time he ever heard Muro claim appellant said "the situation is handled." (RT22: 4356.)

his glasses because he wore sunglasses the next morning. (RT11: 2019-2020, 2027-2032.)

Muro admitted that, while at the party, he was "...intoxicated but not to the point where[he] couldn't remember..." (RT11: 2014-2015.)

The next morning, Muro, Arevalo, and appellant went to "Bun and Burger." Appellant was wearing black Rayban sunglasses with black tinted lenses. The night before appellant had been wearing wire-rimmed glasses. The men discussed the attack on Arevalo. (RT10, 11: 1911-1914, 1992-1993, 2004, 2020-2021.)

While the three men were at breakfast, Arevalo's mother arrived. She and Arevalo stepped aside and talked. Arevalo came back and said, "...there was a guy and girl at the party that were shot and killed." "[C]ertain thoughts" were going through Muro's mind. Muro could not finish his breakfast. The men left and went back to Muro's. Muro never saw appellant again. (RT10: 1914-1916.)

Muro gave a statement to the police. (Peo. Ex. 95A; 2 Sup. CTII, 247-306.) When Muro first spoke with the police, he did not tell them anything; he did not want to get involved. He later talked with the police and district attorney because his conscience bothered him. (RT10, 11: 1917-1918, 1953-1954, 1994-1995, 2006.)

5. <u>What the firemen heard and saw</u>

Alex Quintana is employed by the Los Angeles Fire Department. He works at Station 47 on Huntington Drive. The nearest cross street is Monterey Road. (RT12: 2062-2063.) There is a Shell gas station/mini-mart at the corner. (RT12: 2130.)

On October 23, 1994, at about 2:00 a.m., Quintana was in bed, asleep, at the fire station. Other firefighters were coming into the dormitory and woke him up. (RT12: 2036-2064.) As Quintana was laying in bed, he heard running and voices coming from outside. He then heard what sounded like a gunshot, followed by two more gunshots, three to five seconds later. Quintana next heard a woman "begging for her life," saying "no, please don't do it." The woman was pleading for five or six seconds. As Quintana was getting out of bed, he heard another gunshot or shotgun blast. (RT12: 2064-2069.)

Quintana got up, stood on the bed, and looked out the window, which was about 8 feet off the floor. He saw a man with short dark hair holding a shotgun standing over a girl. The shotgun was pointing at the girl's head. The man chambered another round and shot her in the head again. (RT12: 2065, 2069-2071, 2086-2088, 2093, 2110-2112, 2114.)

Quintana testified the man with the shotgun was clean cut, dressed very nicely in a "copper-colored shirt and black pants" and was of "average weight," about 150 pounds, and about 5' 10". The man could have been 6' 2" or 6' 4". According to Quintana, "it's hard to tell [height] from that height." (RT12: 2083-2086, 2094-2099.) Quintana never saw the man's face. (RT12: 2092-2093.) The man was dark-skinned; appellant is "fairly light-skinned." (RT12: 2098-2099, 2115-218.)

The man with the shotgun ran back to his car, a black Honda Civic CRX or a Toyota Celica, drove up Monterey toward Huntington, and disappeared behind a fence. The black car had tinted windows and a modified exhaust system, "one of those loud like

mufflers." People's Exhibit 31, a photograph of a Honda, depicts a car with the "same style but different color." If the car in the picture were black, Quintana would say that that was "the car." A little red sedan was in the area of the fire station. (RT12: 2071-2073, 2099-2104, 2110, 2115-2117, 2119.) The firefighters blocked the road with the fire engines. (RT 2073.)

Donald Jones was one of the firefighters who, at about 2:00 a.m., had just returned to the station from a call. He was awake, laying in bed, upstairs in the dorm area. Jones heard an argument, a shotgun blast, a female saying "no, no," and then another shotgun blast. By this time, Jones was standing on the bed, looking out the window. (RT12: 2122-2128, 2136, 2155-2157.)

When Jones first looked out the window, "the suspect" was standing, looking "toward the station or toward [Jones]." The suspect, who was carrying what appeared to be a shotgun, faced Jones for a few seconds. Jones had a clear view of the person and saw the person's face. Jones estimated the person's age to be 20 to 25 years old. He thought the person was 5' 9" or 5' 10" and 160 to 170 pounds. The suspect was "very clean cut," with a "very neat haircut," and was white or Hispanic with a "very light" complexion. The person was wearing a blue, long-sleeved shirt and white pants. Jones agreed that appellant was about 6' 4". (RT12: 2128-2129, 2136-2145, 2158-2164, 2178-2179, 2194-2195, 2203-2206, 2210-2216, 2223.)

Jones testified the suspect turned around, walked or ran to a dark, possibly black hatchback with dark windows, got in the passenger side, and drove away up Monterey

Road. The car had a loud muffler. (RT12: 2130-2133, 2136, 2139-2146, 2175-2183, 2223-2225.) Jones testified the vehicle had louvers on the back window. It had been parked behind a red or burgundy-colored car. (RT12: 2202-2203, 2208-2210.)

There were two victims, a young man and a young woman. The man was laying in the street by the curb and the woman was on the sidewalk. It was clear to the firefighters that they were dead. Jones went to the corner where a small car was parked with its parking lights flashing. "It looked as though someone had just left it." About one car length behind the car, Jones saw some wire-rimmed eyeglasses with clear lenses. (RT12: 2074, 2077-2081, 2088-2092, 2133-2136, 2139-2140, 2146-2147, 2183.) Quintana saw shotgun shells and "brain matter spread out all over the area." (RT12: 2078, 2082.)

Meanwhile, Jonathan Rodriguez, Yolanda Navarro's brother, was walking to a friend's house when he heard three gunshots. He walked down the hill toward the fire station and saw two bodies. He walked by the young man and over to the girl. He said to himself, "...this poor girl got her brains blown out." (RT13: 2433-2440.)

The firemen were at the scene. Jonathan told Quintana that he thought the girl was his sister. Jonathan saw a pager on the ground. Jonathan went to the fire station, telephoned his mother, and asked her to page Yolanda. Jonathan went back to where Yolanda's body was laying. He heard a pager go off. Jonathan called his parents who soon arrived. They lived "maybe two blocks" away. (RT12, 13: 2073-2077, 2082-2083, 2440-2442.)

Fireman Jones viewed a videotape at the police station. On the tape, Jones saw a

person that "looked similar" to the person he had seen the night of the shooting. Jones testified his hair, complexion, shirt, pants, size and glasses were similar to the suspect's. Jones told the police "that the gentleman that was in the kitchen in that blue shirt looks like the one that I saw that night at the shooting." (RT12: 2147-2153, 2232-2236.) Jones testified that appellant resembles the person he saw on the street. Jones was never shown a photograph of Paul Escoto. (RT12: 2153-2154, 2184-2193, 2225-2229.) Still photos from the video (People's Ex. 60) depict appellant. Jones testified the person in People's Exhibit 60B looked similar to the suspect. (RT12: 2217-2220, 2229-2231.)[8]

6. The coroner's testimony

The coroner, Dr. Lee Bockhacker, performed autopsies on Richard Rodriguez and Yolanda Navarro. Dr. Bockhacker testified that Richard Rodriguez had been shot in the back of the head, causing fractures of the skull and fragments of bone to be dislodged. This gunshot wound was fatal, due to massive injury of the brain. Rodriguez had been shot back to front, with the projectile taking a downward path. This would be consistent with the victim being on his knees with the shooter behind and to the right. (RT13: 2265-2275, 2297, 2321-2338.)

Rodriguez also received gunshot wounds to the back of his left thigh, which fractured his femur, and to the sole of his left foot. A fourth gunshot wound was inflicted

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[8] Detective Teague confirmed that he never showed firemen Quintana and Jones a picture of Paul Escoto or Ray Muro; he claimed this would have been improper. (RT16: 3030, 3051-3056.)

to the back of the knee area of his left leg. These injuries would be consistent with being shot from the rear while running. These wounds were not fatal. (RT13: 2275-2285, 2298.)

Rodriguez had contusions and abrasions to his head area, some of which pre-dated the shooting, some of which were caused by the shooting. There were scrape marks on some of his knuckles and a scrape mark on his left knee. These injuries could have been caused by falling forward to the ground. (RT13: 2285-2293.)

No drugs or alcohol were detected in Rodriguez. (RT13" 2293-2294.) He was 5' 8", 170 pounds. (RT13: 2317-2318.)

Dr. Bockhacker agreed that the cause of Richard Rodriguez's death was consistent with a person running away from the shooter who is behind him, with the non-fatal shots causing the victim to fall to the ground and the fatal shot being fired into the back of the head from two-to-four feet away. (RT13: 2294.)

Dr. Bockhacker testified that Yolanda Navarro suffered a gunshot wound to the left back of her head, which exited through her face. The muzzle of the gun was two to four feet from her head. Wadding from the shotgun shell was recovered from her brain tissue. This was a fatal wound. (RT13: 2298-2309, 2338-2350.)

Yolanda had abrasions or scrapes on her arms, feet, ankle, and knees consistent with falling to the ground before being shot. (RT13: 2309-2316.) Dr. Bockhacker agreed that the scenario of Yolanda's death was consistent with a person being on her knees with her head almost to the ground, being shot from behind from two-to-four feet away.

(RT13: 2309.)

Yolanda's blood alcohol content was .111. She was 5' 2" and weighed 120 pounds. (RT13: 2316-2317.)

Richard Rodriguez had been wearing a blue shirt and white pants. (RT13: 2320-2321.)

With a shotgun blast within two-to-four feet of a victim's head, Dr. Bockhacker would expect to find skull fragments and/or brain matter indicative of the direction of fire. In the instant case, the shots were from the victims' backs; the fragments and matter would be in front of the victims. Scalp and skull fragments were found at the scene. (RT13: 2365-2375, 2378-2384, 2392-2394.)

7. Police investigation

Officer Caesar Gonzalez "set up a crime scene" at Huntington Drive and Monterey Road. He saw the victims, shotgun shells, brain matter, skull fragments, and a red car. Someone pointed out some slightly bent eyeglasses about three feet behind the vehicle. (RT14: 2628-2633.)

Detectives Teague and Markel arrived at the scene of the shooting between 3:00 and 4:15 a.m. on October 23, 1994. (RT7: 1236-1239.) The location of the party was five to ten miles and 10 to 15 minutes away. (RT7: 1239-1240.) There is a gas station/mini-mart near the scene of the shooting. (RT7: 1242-1243.)

Acceleration skidmarks made by a front wheel drive car were noted. The distance between the skidmarks was 4.9 feet. That vehicle had been parked behind the victim's

vehicle, a burgundy Honda, which was parked on Monterey Road. (RT14, 15: 2638-2640, 2769-2770, 2773, 2797-2803.) Appellant's Honda CRX was a front wheel drive car. (RT15: 2803-2805, 2816-2822.) Later, Detective Markel measured the distance between the front wheels of appellant's car. The width of the area between the front wheels was 4', 9". He did not measure the width of the tires. (RT17: 3190-3196.)

Five .12 gauge double 00 shotgun casings were recovered in the area. The brand was Fiocchi. The casings had been ejected from a shotgun. (RT14, 15: 2640-2650, 2668-2670, 2823-2824-2831.) Eyeglasses were recovered from the roadway. (RT14: 2670-2672 .) Shotgun pellets were found and recovered. One pellet was next to the fire station. (RT14, 15: 2672-2675, 2810-2816.) Wadding from shotgun shells was recovered. (RT14: 2675-2779, 2808-2809.) A pager was found near Yolanda's body. (RT14: 2679-2681.) Skull and scalp fragments and body tissue were located. (RT14, 15: 2681-2686, 2745, 2760-2762, 2807-2808.) Shotgun pellet strikes were found on the sidewalk slightly north of Yolanda's body in the grass and on a tree next to the fire station. The shooter would have had to have been facing the fire station when he or she shot. (RT14: 2686-2695.)

According to Detective Teague, the evidence was consistent with Yolanda being shot in the back of the head as she crawled toward the fire station. Regarding Richard, the evidence is consistent with the shooter being behind him. It is Teague's opinion that the shooter was facing the fire station when the shots were fired. (RT14, 15: 2696-2698, 2754-2759, 2831-2832.)

Teague and Markel left the scene of the shooting and went to Huntington Drive and Esmeralda Street, about one-half mile away, where debris from Rodriguez's vehicle was located and recovered, apparently from a traffic accident. (RT7, 15, 23: 1239-1240, 2748-2752, 4373-4374.)

Fireman Donald Jones did not tell Detective Teague that he recognized someone on the videotape of the party. Photographs were not shown to fireman Quintana. (RT14: 2764-2709.) Jones said the car the suspect got into was a black, small, two-door hatchback with tinted windows and a loud muffler. (RT17: 3151-3152.)

The D.M.V. printout for the CRX shows that the registered owner is Salvadore Verdugo or Nathan Verdugo. (RT23: 4374-4375.)

Marie Chance, a criminalist, collected evidence from Richard Rodriguez's red car. This evidence included dark rubber-like scrapings from the side of the car and rear bumper. (RT17: 3319-3330.) Ron Roquel, a criminalist, analyzed the scrapings obtained by Chance. Although the envelopes containing the scrapings described some of the scrapings as "silver paint," the scrapings were not car paint. (RT19: 3586-3594.) Some of the scrapings could have come from a molding piece from a car; other scrapings did not. (RT19: 3594-3597.)

Roquel testified that one of the bumper mounting brackets of the Verdugo's CRX was damaged. Bolts used to mount the left front fender were missing and were inside a ball of masking tape in the engine compartment. (RT20: 3743-3748.) It appeared that both front fenders had been replaced. (RT 3751.)

Detective Walton examined the Verdugo's 1988 Honda CRX and Richard Rodriguez's 1989 "reddish maroon" Honda Civic. (RT19: 3602-3605.) The CRX had recently been painted and had had recent body work, including a new left fender. The left front bumper mount was bent. Molding was missing. (RT19: 3613-3616, 3661-3667.) The red Honda had damage to its right side. (RT19: 3634-3638.) Based on this damage, and measurements of the cars' tire/wheel, bumper, and wheel well heights, and measurements taken at the scene, it is possible that the left side of the CRX hit the red Honda on its right side while at least one of the vehicles was moving. (RT19: 3605-3612, 3618-3622, 3640-3644, 3661, 3673.) Detective Walton did not know whether the two Honda's actually came into contact with each other. (RT19: 3671-3672.)

Molding pieces found in the street were consistent with having come off Rodriguez's red Honda as a result of a collision. (RT19: 3644-3650, 3654-3659.) The molding was twisted off by coming into contact with a rotating tire. (RT19: 3662-3664.)

Criminalist Richard Marouka examined five fired .12 gauge shotgun shells, shell components (pellets and wads), and two .12 gauge shotguns. He testified as to how a pump-action shotgun works and how a shotgun shell behaves when it is fired from a shotgun. Wadding and pellets come out of the gun when it is fired. The wadding does not travel very far. The size of the pellets at issue were "double 00 buck." The brand was Fiocchi. All five shells had been fired from the same shotgun.[9] Mossberg is a common

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[9] The guns in evidence did not fire the five shells.

brand of shotgun. (RT16: 2912-2927.) Lead pellet fragments from Richard Rodriguez's body are consistent with Fiocchi shotgun shells. (RT16: 2927-2930.)

On December 15, 1994, Detective Markel interviewed Juan Carlos Enciso. (RT 3933-3940.) Enciso told Markel about "torching a car" with appellant. It was an act of revenge or retaliation. Markel did not threaten or pressure Enciso. (RT21: 3937-3942, 3947-3949, 3957-3958.) Enciso also told Markel that appellant, in early November 1994, had told him that appellant had killed two people on the freeway in late October 1994. (RT21: 3942, 3945-3946.)

On October 12, 1994, at about 9:30 a.m., Officer Barron stopped a 1988 Honda CRX that was being driven by Paul Verdugo. A ticket was written. The car was black and was registered to Salvadore Verdugo. (RT14: 2662-2665.)

On Tuesday, October 25, 1994, at 10:07 a.m., C.H.P. Officer Georgina Trockel pulled over a 1979 Datsun pickup for speeding on the freeway and no seat belt. Appellant was the driver. He was given a ticket. Appellant driver's license requires him to wear corrective lenses. Officer Trockel would have cited appellant if he had not been wearing glasses. (RT14: 2621-2627, 3123.)

On December 7, 1994, at 8:00 a.m., police executed a search warrant for the Verdugo house at 734 Mariana Street in Rialto. Paul Verdugo was there. His Mossberg shotgun was found in his room. In appellant's room, the police found, among other things, a prescription from Dr. Shuldiner, photos of a yellow CRX, D.M.V. information, a 10/25/94 ticket with appellant's name on it, a Lenscrafter's pamphlet and receipt, a towing

company receipt, a COSTCO receipt (both receipts indicating that "the Honda CRX was black"), a driver's license, and a portrait of appellant wearing glasses similar to those found at the crime scene. (RT21: 3932-2938, 2941-2947, 3023-3026.) The CRX car was not at the house. (RT16: 3040-3041.) When the warrant was executed on December 7, 1994, there were no bars on the doors or windows of the house. (RT16: 2944-2945.)

Teague testified he never hit Arevalo on the head during an interview. Teague was not upset and did not raise his voice. (RT16: 2957, 3022.) During the interview, where he showed the videotape of the party, Arevalo denied knowing the clean-cut person in the blue shirt and glasses standing near to him. (RT 2956-2959.) Arevalo later admitted he had lied and said he and appellant were "tight friends." (RT16, 17: 3042-3045, 3124.)

On November 2, 1994, Teague received a business card with "Verdugo's Location Cleaning" on it, and possibly appellant's name. When Teague telephoned the number on the card, a residence in Rialto, Paul Verdugo answered. Teague spoke with Paul and Sal and told Paul that he wanted to speak with appellant. (RT16, 23: 2959-2961, 2964, 4382-4383.)

Teague took the eyeglasses found at the scene of the shootings to the Doheny Eye Clinic on November 14, or 15, 1994. Appellant purchased eyeglasses at Lenscrafters. (RT16: 2963, 3010-3013.)

On November 2, 1994, Teague contacted the Oceanside police. At about 2:50 p.m., Teague received a telephone call from appellant. Appellant said he was living in Las Vegas and was working at TG&E Construction Company. Appellant refused to give his

address and telephone number. When Teague said he had to speak to him about Arevalo, appellant said he would be coming to Los Angeles. Appellant "...appeared through his voice...to be very nervous..." Teague could not locate a business called TG&E Construction. (RT16: 2966-2967, 2970-2975.)

On December 8, 1994, Teague called appellant's father Salvadore, in an unsuccessful effort to locate appellant. Teague told him and a Verdugo family attorney that appellant was charged with two counts of murder. (RT16: 2977-2979.) A press conference was held on December 14, 1994 and a photograph of appellant was supplied to the media. Efforts to locate appellant were unsuccessful. (RT16, 23: 2979-2985, 3001-3002, 3003-3009, 3026-3030, 4368, 4373-4378.)

Clothing and other items belonging to appellant that Teague had seen in Rialto were found on December 28, 1994 in appellant's truck in his aunt 's garage. Faxes from Doreen Duran, appellant's one-time girlfriend, were found. (RT16: 2985-2986.)

Teague spoke with Doreen Duran on December 28, 1994. He went to her residence, but appellant was not there. (RT16: 2989-2991.) They went to J.P. Hernandez's house, a friend of appellant's. The front and back doors were open and a partially eaten plate of food was on the coffee table. Hernandez later said that appellant had been at the house. Teague could not locate appellant. (RT16: 2995-3001; and see RT 17: 3201-3222.)

On December 29, 1994, appellant left a message on Teague's answering machine saying he wanted to turn himself in. (RT16: 3002-3003.)

Juan Carlos Enciso, appellant's cousin, testified that he spoke to the police at the police station and other places about the murders and appellant. At the station, the police "threatened [him] with another case." (RT16: 3077-3087.) This other case was a "car burning." The police told Enciso that he could be arrested for the burning but, if he told them what appellant had said, they would not prosecute Enciso. (RT16: 3087-3097, 4368.) Enciso told the police that, a week before December 19, 1994, he picked up appellant. Enciso told the police appellant's car had "...crashed during the incident when he had to kill two people." (RT23: 4375-4376.)

Detective Teague eliminated Paul Escoto, Mike Arevalo, and Ray Muro as suspects. (RT17: 3126-3142-3144.) At the time of the shooting, Ray Muro was with Irma Casas at Arevalo's aunt's house. (RT17: 3132-3133.)

Paul Escoto's car had tinted windows. Adriana Castellanos told Teague Escoto's car had a loud muffler. (RT17: 3134.) Escoto's car is rear wheel drive. The inside width of track of the rear tires is 54 inches. (RT17: 3141-3142, 3152.)

8. The testimony of John Paul Hernandez

In November-December 1994, John Paul Hernandez was living on Donnelly in San Gabriel. At some point during this period, appellant stopped by Hernandez's house. The two talked. Hernandez went out to work on his car while appellant remained inside. Appellant left about two hours later, when it was dark. Later, Hernandez was stopped by and talked with the police. (RT17: 3201-3209.)

During this time, appellant was dating a woman, Doreen. Hernandez knew Doreen,

whom he met during the summer of 1994 with appellant at Sharkey's. Sharkey's is about a block and a half from Hernandez's. (RT17: 3209-3211.) While appellant was at Hernandez's, there was a telephone conversation with Doreen. Appellant talked with her. Hernandez went to Sharkey's. Appellant, having already left, did not go with him. Hernandez did not see Doreen or appellant or any police at Sharkey's. (RT17: 3211-3220, 3221.)

Hernandez told Paul Verdugo that the police were looking for appellant. (RT17: 3220-3221.) Hernandez was not hiding appellant. (RT17: 3222.)

9. The Honda CRX

Paul Cuevas knows appellant, appellant's father, Sal Verdugo, and appellant's brother, Paul Verdugo. In November or December 1994, while they were living in Rialto, Sal and Paul contacted Cuevas on a Saturday regarding a "car paint job." Cuevas referred them to a shop where he had previously had body work done. (RT15: 2853-2859.)

The next Monday, Cuevas met appellant and Paul Verdugo. Appellant said they "...should go and get the car painted." The men took a small primer gray car that appellant was driving to the body/paint shop. The car was similar to that depicted in People's Exhibit 32, a picture of the Verdugo's CRX. The car was not damaged. (RT15: 2859-2863, 2865-2866.)

At the shop, Cuevas spoke with the owner and left after about 20 minutes. Appellant and Paul were still there. (RT15: 2863.) Subsequently, Cuevas received approximately five telephone calls from the shop about the car. He contacted the Verdugo

family and told them to pick the car up from the paint shop. (RT15: 2863-2865.)

Jesus Maldonado owns Los Compas Body Shop. Maldonado testified that Cuevas brought him a customer -- "...a young man, tall, olive skin" -- who wanted his car, a Honda Civic, painted yellow. The car was "primer black." People's Exhibit 32 is a picture of the car that was painted. Pieces of molding were missing from the car, but were in the trunk. The car had little door dents. (RT15: 2889-2896, 2898-2903.) Jose Contreras, an employee of the shop, also testified that, in November or December 1994, three men brought in a Honda CRX to be painted yellow. The car was black primer colored and was missing some molding pieces. Contreras did not take any parts off the car before he painted it. (RT15: 2903-2910.)

Maldonado telephoned Cuevas four or five times to have the owners of the car pay for and pick up the car. They never did. (RT15: 2893-2984, 2896-2898.)

10. Appellant is located

On April 27, 1995, a search warrant was executed at the Verdugo home. After Paul Verdugo was removed from the residence, the police searched the home. They did not find anyone. (RT16, 17: 3009-3010, 3155-3166.) However, Officer Snyder noticed something odd about an upstairs linen closet. Upon closer inspection, the police discovered a hidden compartment behind some shelves. After removing the shelves and a panel, appellant was found inside. A drinking container was inside as well. (RT17, 23: 3166-3171, 3176-3181, 4299-4300.)

On April 27, 1995, the Verdugo's Rialto residence had a wrought iron locking door

in the porch/breezeway area. The door had not been there earlier. (RT17: 3174-3176.)

During the search, Detective Spreitzer found a fanny pack containing two handguns on top of the refrigerator in the kitchen. There were no eyeglasses on top of the refrigerator. (RT23: 4299-4303.)

When appellant was arrested, an envelope containing a letter from appellant to his sister, Pauline, (People's Exhibit 57A) was found on him. (CTSII: 40-41;RT23: 4383-4385.)

11. Juan Carlos Enciso's testimony

Juan Carlos Enciso is appellant's step-cousin. Enciso, who was aware of the murders, saw appellant on two occasions after the shootings. Appellant did not talk with Enciso about the murders of Richard Rodriguez and Yolanda Navarro. However, appellant talked about "something that happened to him on the freeway." (RT17: 3229-3240.)

Appellant told Enciso that in November 1994, "...somebody had been shooting at him on the freeway." Appellant said that his car and the other car, possibly occupied by gang members "ended up...front to front..." The occupants were chasing and shooting at appellant. Appellant said he had to shoot at them, which he did. He did not say whether he had hit or killed anyone. (RT17: 3240-3249, 3277, 3376-3386.) Although Enciso may have said appellant said he blew two people away, this does not mean he killed them; but it could. (RT17: 3277-3280, 3375.) Enciso agreed that appellant told a lot of stories. (RT17: 3429-3431, 3462.)

Enciso testified that the police harassed him and threatened him with arrest regarding an incident where Enciso and appellant lit a car on fire. Appellant had been stabbed and he believed that the car's owner, Tommy, had set him up or left him at the location where he was stabbed. Appellant, Enciso and Steve bought gasoline. Appellant poured it on Tommy's car and lit it with a match. Enciso agreed that appellant "took the whimpy way out and lighting his car and running" (RT18: 3426-3427.) Enciso also agreed that appellant was seeking revenge by lighting the car on fire. (RT18: 3439-3454.) Lighting the car was appellant's idea. (RT18: 3454-3461.)

Regarding his interview with the police (People's Exs. 82A, 82C; 1 Sup. CTII, 123-150, 151-184), Enciso was concerned about what appellant's family would think. He did not want to testify. (RT18: 3372-3376.) Enciso had known that appellant was "on the run." (RT18: 3397-3399.)

12. Salvadore Verdugo's testimony

Salvadore Verdugo is appellant's father. In October 1994, he was living in Rialto with his other son, Paul, and appellant. (RT20: 3762-3763.) Appellant was not in a gang. (RT21: 3916.) Salvadore never saw appellant or Paul repair cars. (RT20: 3794-3795.) Appellant helped his brother Mike in construction. Paul did not. (RT20: 3846-3847.) The Rialto house had one refrigerator in the kitchen. (RT20: 3795-3796.)

On October 1994, Salvadore owned a red Honda Prelude and a Honda CRX. For "insurance purposes," appellant was "on" the pink slip for the CRX. Salvadore drove the CRX "most of the time," about 200 miles a day. Appellant drove it "maybe one day" a

week. Paul drove the CRX more than appellant. They all had keys to the CRX. Appellant took the family Cadillac when he went to a nightclub or party. (RT20, 21: 3763-3769, 3837-3838, 3896-3897.)

Prior to October 22, 1994, before moving to Rialto, the hood and both front fenders of the CRX were repaired in Mexico. The car was yellow when these repairs occurred. (RT18: 3371-3781, 3784-3786.) When Salvadore got the car back, the new parts were primered a gray color; the rest of the car was yellow. By October 22, 1994, the entire car had been primered gray. Appellant did not primer the CRX. (RT20, 21: 3786-3794, 3838.)

Danny Cuevas took the CRX to be painted. Salvadore was going to pay $400 for the paint job. However, they never picked up the car after it was painted. (RT20, 21: 3838-3842, 3897.)

Salvadore testified that before October 22, 1994, appellant wore eyeglasses, but not ones similar to the black pair appellant was wearing in court, which had been purchased by Paul. (RT20: 3796, 3848.) Other than when appellant was in school, before October 22, 1994, Salvadore never purchased any eyeglasses for appellant, including Defense Exhibit B. (RT20: 3798-3800, 3847.) People's Exhibit 58, the glasses found at the scene, look similar to Defense Exhibit B, a pair of eyeglasses given to defense counsel prior to opening statements. (RT20, 21: 3847-3848, 3900-3902.)

Regarding Defense Exhibit B, the eyeglasses, Salvadore saw them in appellant's room at the Rialto house about a week after appellant was arrested. Someone

subsequently put them on top of the refrigerator, the only refrigerator in the house. (RT20, 21: 3842-3845, 3889-3891.)

Salvadore never threatened any members of his family. He never told any family member that he was preparing false identification documents for appellant or that the shotgun had been dismantled and thrown away. He did not brag to anyone about the police not being able to find appellant. (RT20, 21: 3850-3851, 3891, 3895-3896.)

The last Salvadore heard, appellant's shotgun had been stolen. (RT20: 3851-3852.)

Salvadore never coached appellant as to what to say if he got arrested. He never told Donna Tucker that she "had balls of steel." (RT20: 3852-3853.)

Salvadore was arrested as a result of appellant being found at the Rialto house. The police told him that appellant had been killed. He eventually found out appellant was alive. (RT21: 3904-3906.) Salvadore kept telling the police appellant was innocent. Teague said, "...I'm going to make sure he's guilty... Do you think they're going to believe L.A.P.D. or a fucking Mexican." (RT21: 3913-3914, 3930.) If Salvadore had believed appellant was guilty he "...would have marched him right in." (RT21: 3922.)

After the murders, appellant did not live with Salvadore. (RT21: 3931.)

13. Paul Verdugo's testimony

Paul Verdugo, appellant's 34-year-old brother, testified that appellant's hair was shorter in 1994, the year of the murders. (RT18: 3510-3511.) Paul is disabled as a result of a car accident and has been on medication since 1994. He suffered a brain injury, and has many medical problems. (RT18: 3567-3570.)

In October 1994, Paul owned a Chevy truck, a Cadillac, and a Datsun pickup truck. Appellant drove the Datsun as well as other vehicles. All family members drove a "dirty black" Honda CRX with a stock, factory muffler that appellant's father had purchased. Appellant would have to ask for permission to drive it; he probably drove it to nightclubs and parties. The CRX was originally yellow, had front wheel drive, and had small factory-installed storage compartments behind the seats. (RT18: 3511-3519, 3570-3572.)

The black plastic-framed glasses appellant was wearing in court were purchased by Paul. Paul did not have appellant's prescription; thus, he took Defense Exhibit B, a pair of metal-framed glasses, to Wal-Mart for comparison and had the plastic lenses made. Metal-framed glasses were not allowed in the jail. (RT18: 3521-3529, 3527-3528, 3546-3547, 3565-3566, 3872-3873.) Paul never purchased any Semester 14 glasses at Lenscrafters. (RT18: 3566-3567.)

Paul testified that, prior to October 22, 1994, appellant had more than one pair of glasses. These included a pair of Raybans and Defense Exhibit B. Paul testified appellant had been wearing Defense Exhibit B since long before he was incarcerated. He was wearing the glasses in a picture distributed to the media. Appellant had "...always had those glasses." He may have had two pairs of these glasses. Paul did not purchase Defense Exhibit B. (RT18: 3525-3532, 3878.)

When the Verdugo's Rialto house was searched on December 7, 1994, appellant was wearing Defense Exhibit B; the glasses were not in the house. People's Exhibit 58, the glasses found at the crime scene, are similar to Defense Exhibit B. Defense Exhibit B

was in the house on top of the refrigerator on the day appellant was arrested. No other similar pair of glasses was in the house. Paul put Defense Exhibit B in his room and kept them there for two years until he gave them to the defense investigator, who gave them to defense counsel, who delivered them to court. He knew the glasses were important because a pair of glasses had been found at the scene. He told defense counsel about the glasses shortly after appellant had been arrested. (RT18, 21: 3534-3541, 3544, 3876-3877, 3879-3881, 3884-3885.)

Paul was unaware of any receipts for the frames and lenses in Defense Exhibit B. (RT21: 3873.) Paul never purchased any glasses similar to Defense Exhibit B for appellant. (RT21: 3875-3876.)

14. Eyeglasses evidence

Lillian Soliz works at Lenscrafters/Eye Exam 2000. On November 24, 1993, Nathan Verdugo came in and filled out an information form, including his address on Hellman. He indicated his last eye exam had been a year earlier. "Pre-testing" results are entered on the form. (RT14: 2543-2553.) The form for the November 1993 examination indicated that Dr. Susan Martinez had performed the prior eye exam. The November 1993 results were minus 2.50, minus 1.00 x 25 for the right eye. There were similar results for the left eye. (RT14: 2552-2555.) The tests showed appellant could "read up close" but had trouble seeing at a distance. (RT14: 2556-2569, 2572-2573.)

Dr. Susan Martinez conducted an eye examination of appellant, and determined that he was indeed nearsighted. (RT14: 2708-2720.) She prescribed new lenses for him. The

prescription was good for one year. (RT14, 23: 2720-2723, 4384-4385.) People's Exhibit 58, the glasses found at the scene, matched the prescription written by Dr. Martinez. (RT14: 2723, 2729.) The glasses appellant was wearing when he came in matched an earlier prescription. (RT14: 2723-2725.)

At night, from four feet away, without glasses, appellant could see the head of a human being. He could also drive at night, but would have trouble seeing at a distance. (RT14: 2729-2732.)

Keith Nakao works for Lenscrafters as a dispensing optician. When he sells a pair of glasses, he provides an information pamphlet to the customer. Using his prescription, Nathan Verdugo purchased some glasses from Nakao on November 24, 1993. The glasses had "featherwate" lenses. The frames were a Semester 14 from the University Collection, made exclusively for Lenscrafters. The frames were tortoise and gold. (RT14: 2580-2593, 2597-2598, 2604-2607.) The glasses that appellant purchased are identical to People's Exhibit 58. (RT14: 2613-2618.)

Defense Exhibit B appears to be used Semester 14 glasses. These glasses are similar to People's Exhibit 58. (RT14: 2607-2614, 2618.) Glasses can be altered to make it seem like they are older. (RT14: 2619.)

Dr. Richard Shuldiner is an optometrist with an office in the Wal-Mart store in Rialto. (RT14: 2395, 2413.) He testified that, on November 12, 1994, a person who identified himself as Nathan Verdugo filled out a patient "history." The form includes a reminder to the doctor to send a letter to the patient "every year to remind them." The

patient noted that he had last had an examination one year ago, that distance vision was not good, and that his near or reading vision was good. The person told the doctor that he had lost his glasses. Test results, which confirmed these vision problems, were noted on the form. It would be difficult for one with this prescription to see and drive at night without glasses; however, people do drive. (RT14: 2397-2403, 2416-2417, 2426-2428, 2431.)

The glasses the patient was wearing when he came in were too weak, only 20/25. A test was performed: the patient's right eye was "minus 250 minus 150 axis 30." The left eye was similar. (RT14: 2403-2412, 2415.)

Dr. Shuldiner gave the patient who had identified himself as Nathan Verdugo a prescription, which was good for one year, but did not provide frames or lenses. (RT14: 2412-2413.) The prescription of the glasses the patient was wearing when he came to see Dr. Shuldiner did not match a November 24, 1993 exam result. (RT14: 2429, 2436; People's Ex. 30.)

On May 12, 1995, Paul Verdugo purchased a pair of brown Landolfi frame eyeglasses for appellant at Wal-Mart Vision Center. Appellant was in custody. Kimberly Franklin handled the transaction and obtained the prescription from Dr. Shuldiner's file. The date of the examination on the prescription was November 12, 1994. Paul came back a few weeks later and said "the person" would not accept the glasses because they had "metal in them." A black plastic "Cats" frame was used for the substitute glasses. (RT23: 4314-4321, 4325.)

In March 1996, Jennifer Edgley was working at Lenscrafters in Arcadia. She

reviewed sales documents and testified that, on March 16, 1996, Sal Verdugo purchased a University Collection, Semester 14 eyeglass frame. He did not purchase lenses. He paid cash. (RT23: 4304-4312.) The lenses in Defense Exhibit B "look like a plastic material as opposed to glass or polycarbonate." People's Exhibit 58, the Semester 14 glasses found at the scene of the murders, had polycarbonate lenses. (RT23: 4312-4313.)

On March 18, 1996, Paul Verdugo purchased a pair of standard plastic eyeglass lenses from Wal-Mart Vision Center. The prescription used for the lenses was appellant's. Although the one-year prescription had expired, the doctor extended it for these lenses only. Paul also brought in a metal eyeglasses frame into which the lenses were installed. The lenses would fit a Semester 14 frame such as Defense Exhibit B. (RT23: 4321-4329.)

The parties stipulated that defense counsel showed Defense Exhibit B (eyeglasses) to "...the prosecution, for the first time prior to his opening statement in this trial..." (RT23: 4332.) After receiving information about Defense Exhibit B, Detective Stephens conducted investigation which resulted in the testimony of Jennifer Edgley and Kimberly Franklin. (RT23: 4336.)

15. Donna Tucker's testimony

Donna Tucker has known appellant since he was three years old. She was married to appellant's oldest brother, Michael Verdugo. Tucker and Michael lived on Hellman Avenue, next door to appellant's father, Salvadore Verdugo. Michael worked in construction. Appellant would help Michael with drywall and framing. Michael was also a wrestling coach. (RT21, 22: 3960-3962, 3964-3965, 4232-4233.)

Tucker knows appellant's sisters, Mary Alice, 38 years old, and Pauline, 21 years old. Tucker was very close to Pauline. Pauline moved to Rialto but left in September 1994. Only Tucker remained in contact with her. (RT21: 3963-3964, 3971-3972.) When appellant's mother died, Mary Alice "took over." Mary Alice lived in Oceanside. (RT21: 3965-3967.)

Appellant's father bought him a yellow Honda CRX. Tucker claimed the CRX had black louvers on the back window. However, Tucker "just recently" mentioned the louvers. (RT22: 4202-4206, 4222-4223.) Indeed, Detective Stephens testified that the first he heard that appellant's car may have had louvers on the back window was during Tucker's testimony. (RT 4341-4347.)[10] Tucker claimed only appellant would drive the CRX. She never saw appellant do any engine work on the CRX. He did work on other cars, including body work on a Scout and changing fenders on a Volkswagen bug. Appellant and Paul worked on cars in their driveways on Hellman. (RT21: 3968-3976, 3980, 4004-4005. The last time Tucker saw the CRX, there was no damage. (RT22: 4108.)

While living on Hellman, appellant showed Tucker a shotgun he had in his room. Paul and Michael Verdugo also had shotguns. Appellant said he wanted to modify the shotgun to a pistol grip. He also said the gun had been stolen, but that he had gotten it

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[10] Detective Kwock also testified that the first time he ever heard about louvers was in court. Donna never told Kwock about working on cars nor about any damage to appellant's car. (RT23: 4398-4400.) Donna never told Detective Markel anything about louvers on the CRX. (RT23: 4454-4457.

back. (RT21: 3976-3980.)

Tucker testified that appellant wore prescription sunglasses and tortoise shell prescription glasses. (RT25: 4004-4005.)

On the morning of October 23, 1994, Tucker received a telephone call from appellant, who asked, "Did you hear the shots in the neighborhood? My friend Mikey told me that there were shots fired in your neighborhood...last night." Appellant sounded "excited." She said she had not heard any shots. (RT21, 22: 4005-4006, 4151-4156.) Sometime later, during that conversation, appellant said he could not come into the area because it was too dangerous for him. (RT22: 4109-4110.)

On November 2, 1994, Tucker saw appellant at a construction site where he had come to clean carpets. He was driving his Datsun pickup. Appellant said that Paul had paged him. Tucker allowed appellant to use the phone in another unit. After the call to Paul, appellant said the police wanted to talk to him about a fight at a party. Tucker said to go ahead and call. Appellant called, and Tucker heard him say that he had left the party early and had not seen a fight. He also said he was calling from a construction site in Las Vegas, but could not give the address or phone number. Appellant told Tucker he had been talking to the police. (RT21: 4006-4011.)

After he got off the phone, appellant told Tucker that, on the way to Magic Mountain, he shot and killed two men. Appellant also said that he left a party and had been chased by "gangs," who crashed into him at Huntington Drive and Monterey Road. Appellant said that a tattooed man started shooting at him. Appellant said he shot the man

-- "...it was him or me..." -- and the girl "...because she saw everything." Appellant said he was going to run away and that he had to call his father. (RT21, 22: 4011-4013, 4156-4160.)

After the telephone call, Tucker and appellant went to a Taco Bell. Appellant called his father and sister, Mary Alice. (RT21: 4013-4014.) The next day Tucker telephoned Sal and told him what appellant had said. (RT21: 4015-4016.)

Tucker next met appellant on November 10, 1994 in a parking lot in South Pasadena, when he came to pick up some equipment. Appellant said he could not go into their neighborhood and that the police and F.B.I. were looking for him. Tucker showed appellant a newspaper article about the murder of Richard Rodriguez and Yolanda Navarro. Appellant said, "Yeah, that's the one," but said that was not the way it happened. He repeated the account of being chased by gang members who shot at him. According to Tucler, appellant said that "...[i]t was a shoot-out. [Appellant] said [i]t was him or me...so I shot him." Tucker claimed appellant said "he killed the girl because she saw everything. He said he got a rush off of that, that it felt really good" When he said this, appellant was smiling and seemed excited. Appellant said his brother Paul helped him get rid of bloody clothes and the shotgun. Appellant said he was going to run away. After appellant left, Tucker telephoned Sal and told him what appellant had said. Sal said he "would handle it." (RT21, 22: 4016-4022, 4110-4111, 4130, 4161-4166.)

Tucker made a number of photocopies of the newspaper article she had shown to appellant. After the police searched her house in December 1994, her husband, Michael

Verdugo, tore up all copies but one. (RT21, 22: 4022-4026, 4168-4171.) In mid-December 1994, Tucker became aware that appellant was wanted for a murder. (RT 4170-4173.) She thereafter started cooperating with the police. (RT16: 3034-3035, 3059-3060.)

At some point, Tucker and Michael Verdugo went to the house in Rialto for the purpose of trying to convince appellant to turn himself in. Michael went in to talk with appellant while Tucker went with Sal to get some food. Sal told Tucker that, "...if anyone talks...they just better watch out. We will keep quiet." (RT21: 4026-4029, 4033-4034.)

When they got back to the house, Tucker went into appellant's room and talked with him. She knelt in front of him and told him to come with her and turn himself in. Appellant said he would never do that and that Sal was having paperwork prepared -- driver's license and social security card -- so that appellant could change his identity. Tucker pulled out an article about the murders. When she asked, "Did you do this?", appellant said that he had. He said firemen had seen him, his fingerprints were on the shotgun shells, and "they had his glasses."[11] Appellant wrote a letter to his sister, Pauline. In the letter, appellant apologized for what he had done. Tucker subsequently Fed Ex'd the letter to Pauline. Tucker heard Paul and Michael in the hall talking about a closet. (RT21, 22: 4034-4041, 4111-4115, 4227-4228, 4250-4255, 4263-4264.)

Sal told Tucker that he was coaching appellant regarding what to say if appellant were to be arrested. After his arrest, appellant called Tucker and said, "tell Dad I

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[11] Tucker did "not exactly" tell this to the police. (RT23: 4443-4449.)

remember everything he said." (RT21: 4041.)

After talking with appellant, Tucker sent a fax to the police stating that appellant had been seen in the Rialto area. (RT21: 4042-4043.) She also received a letter from appellant addressed to Pauline. Tucker noticed that the letter (People's Ex. 34) said something about a shotgun; therefore, she opened the letter. Inside was a copy of the L.A. Times article about the murders. Portions were underlined. Before Tucker could give the letter to the police, her husband got it and showed it to Sal. Tucker eventually got the letter, met the police at the library, and gave it to the police. (RT21, 22: 4043-4044, 4115-4129, 4148-4151, 4233-4236, 4274, 4283.)

In January 1995, Tucker had a telephone conversation with Sal. She told him that appellant should turn himself in. Sal said, "...we were told you're either with us or against us, and if you're against us, watch out." (RT22: 4108-4109.) Sal also told her that the police had come to the Rialto house but were unable to find appellant. (RT22: 4114.)

After appellant's arrest, a family meeting was held. Sal insisted that someone had "snitched on Nathan." Sal said they "went all the way for Nathan" regarding efforts to conceal him. (RT22: 4131-4133.)

Tucker started cooperating with the police in December 1994. (RT16: 3034-3035, 3059-3060.) After appellant's arrest, she gave information to the police regarding her conversations with him as well as other information related to the murders. She made it clear to her husband that she would cooperate with the police. Between December 1994 and May 1995, she had over twenty telephone conversations with the police. She also had

face-to-face meetings with Teague and Markel. She sent them several faxes. (RT22: 4133-4139, 4173-4196, 4264-4266, 4269-4270, 4278.) One of her police interviews was recorded. (RT16: 3031-3032.) Tucker testified, "Detectives Markel and Teague got the entire story." (RT22: 4199.) She told the police that the Verdugo family was threatening her. (RT22: 4231-4240-4246.) Detective Teague wanted to keep Tucker confidential, allegedly to protect her safety. (RT16: 3129-3130.)

Tucker testified that appellant had been so opposed to her marriage to his brother that he threatened to kill them. He said that he knew someone who knew how to make pipe bombs or that "we could...get shot in the back of the head," or he could make it look like a gang killing. After a year, appellant "had settled down" and they had a good relationship, except for when appellant "was on the run." (RT22: 4144-4147, 4237-4238.)

Tucker moved out of her house and left Michael on July 7, 1995. Michael had a girlfriend. (RT22: 4147-4148, 4216-4218.) Michael believes Tucker is hurting the family by testifying. (RT22: 4221-4222.)

Tucker "came forward" and testified because "Nathan said he did this. Because there were two dead kids... I believe that Nathan would have killed again... I see the Verdugos as that type of person [sic] that would turn their back on murder..." (RT22: 4286-4287.)[12]

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[12] The trial court instructed the jury that this testimony should be considered "...only for the purpose of judging this witness' credibility and why she came forward." (RT 4287.)

16. The purchase of shotguns

On November 19, 1990, appellant purchased two Mossberg 500-A, model 50406 shotguns at Big 5 Sporting Goods. The serial numbers of the shotguns were K-677401 and K-677392. Each shotgun holds a total of six shells. (RT14: 2736-2744.)

On April 16, 1992, Officer Lopez went to 3832 Hellman Avenue and took a burglary report from appellant and his brother. Appellant stated that someone had stolen his shotguns, two Mossbergs, serial numbers K-677392 and K-677401. (RT15: 2834-2839.)

On January 17, 1993, police recovered shotgun K-677401. It had a pistol grip and a shortened barrel. (RT15: 2840-2844.) On January 28, 1993, the shotgun was released to appellant. (RT15: 2845-2852.)

Paul Verdugo, appellant's brother, owned a black Mossberg shotgun. The barrel was "the long factory length." (RT18: 3520, 3533.)

On December 7, 1994, the home of Michael and Donna Verdugo, at 3836 Hellman Street, was searched. The police located a shotgun under a bed. A handgun was found under the bed's mattress. These were not the murder weapons. (RT17: 3187-3190.)

B. APPELLANT'S CASE

1. Law enforcement testimony

Detective Kwock testified he never got a message from Donna Tucker regarding louvers. The first time he heard about louvers was in court. She never told him about appellant working on cars. She never mentioned any body damage to appellant's car.

Kwock never asked her about louvers or damage. (RT 23: 4398-4400.)

Detective Teague spoke with fireman Donald Jones over the telephone on October 26, 1994. Jones never said he saw the suspect standing over a victim's body; he said he saw the suspect running northbound and described the suspect as possibly wearing a blue button-type long-sleeved shirt with white pants. The victim, Richard Rodriguez, was wearing a blue shirt and white pants. Jones said he could identify the suspect's body shape and, possibly, the vehicle. The vehicle was a dark two-door with louvers and a loud muffler. (RT23: 4409-4415, 4417, 4433-4436.)

Detective Teague interviewed fireman Quintana on October 24, 1994. Quintana said he saw the suspect stand over the female victim and shoot her in the head. Quintana said the suspect was well-dressed, wearing a copper-colored shirt and black pants. The suspect had dark skin and was about 5', 9" tall. Quintana said the suspect's car was a Honda Civic or a Toyota. (RT23: 4420-4422, 4436-4437, 4439.)

Detective Teague interviewed "a few" people, including Paul and Sal Verdugo and Mike Arevalo, regarding whether appellant's car had louvers. (RT23: 4415.)

When Teague interviewed Ray Muro, Muro was not very cooperative. Teague first talked with Muro on October 29, 1994. Teague subsequently found out that Muro had been with Irma Casas, who was very upset and had been making threats against Adriana Castellanos. (RT23: 4424-4427.) At one of the interviews, Muro stated that appellant had said, "...the situation is handled." (RT23: 4482-4483.)

When Teague interviewed Paul Escoto, Escoto did not say that he spent 45 minutes

at the top of the hill. Escoto said he went up the hill, enjoyed the view, and went to the hospital. Escoto said he had had a "squabble with somebody that was wearing a Kennedy mask." Escoto said this person was outside when he went out. (RT23: 4427-4430, 4433.)

Detective Teague spoke with Donna Tucker. From December 1994 to December 1996, she never mentioned that appellant's car had louvers. He first heard of this "today" during her testimony. She never said appellant did body work on his car. (RT23: 4430-4433.)

Detective Markel spoke with Tucker about fourteen times from December 15, 1994 to May 9, 1995. He received eight faxes from her. During this time period, Tucker did "not exactly" say appellant had killed two people or that he had said firemen were watching or that he did body work on cars. (RT23: 4443-4449.) He spoke with Tucker about six times from May 9, 1995 to January 1997. (RT23: 4449, 4452.) Tucker never called "to chat" nor would Markel call her to "chitchat." (RT23: 4452-4454.)

When Detective Markel looked at appellant's CRX, there was no body damage. (RT 4451.) Tucker never told him anything about louvers on appellant's car; but, Markel did not recall ever asking Donna about louvers. (RT23: 4454-4457.)

At one point, Detective Markel believed that a silver and white substance on the victim's car had possibly come from the car that had hit it. (RT23: 4458-4459.) Ronald Raquel testified the transfer found on the maroon car was not primer and not paint. The Honda CRX had a new fender. (RT23: 4404-4407.)

When Markel interviewed Juan Carlos Enciso, Enciso did not say that appellant's

car had been damaged in a collision and was being worked on. (RT23: 4466-4467.) In a second interview, Enciso said appellant's car had been damaged in an accident when appellant crashed during the incident in which he killed two people. Markel initially thought Enciso was talking about having lit appellant's car on fire. (RT23: 4467-4478.)

2. Ray Muro's testimony

Ray Muro does not wear glasses. He is dark-skinned. For six years, he was an aircraft mechanic in the Marines. (RT24: 4571-4572.)

In the early morning hours of the night of the party, Muro went home with Mike Arevalo, Arevalo's father, and Arevalo's father's girlfriend. Muro had been drinking. (RT24: 4572-4573.) He saw appellant's car parked in the alley with the driver's side against a wall. (RT24: 4579-4580.)

At breakfast the next morning, Muro talked with appellant about "what occurred the evening before." Arevalo had said "that some guy and girl were shot and killed that were at the party." Muro recalled he had seen appellant the prior evening with a shotgun. (RT24: 4573-4574, 4577-4578.)

Muro testified appellant did not say he thought Arevalo had taken his shotgun and that appellant did not ask for the shotgun. Muro did not tell appellant that he (Muro) and Paul had taken care of things or that his Marine training had paid off. Muro did not know where the shotgun was located. (RT24: 4574-4575.)

3. Mary Alice Baldwin's testimony

Mary Alice Baldwin is appellant's sister. She is 15 years older than he. She is a

nurse and lives in Oceanside. (RT28: 5216-5217, 5248.)

Appellant's and Mary Alice's mother died in 1982. Mary Alice's role went from being older sister to also mother and housekeeper. She moved out in 1987 when appellant was about 15 years old. (RT28: 5217-5218, 5249.) She helped appellant with his school work. He had a learning disability. (RT28: 5228-5230.)

Mary Alice testified that her mother did not have a good relationship with Donna Tucker. The two would have "very, very verbal" arguments. Appellant and Pauline would run to Mary Alice and ask "why is Donna yelling at Mom." (RT28: 5218-5220, 5230.)

After appellant was stabbed in early 1994, Mary Alice drove appellant's yellow and black car. She teased him and said the car looked like a bumblebee. She called it "his bee." There was damage to the front of the car. The car did not have louvers. She later saw the car at the house in Rialto. Appellant told her he kept a shotgun in the car, but that Paul and Ray had taken it. (RT28: 5231-5233, 5274-5277.)

May Alice talked with appellant around Thanksgiving 1994 at their father's house. Appellant said he had been threatened and that he and the family would be shot. Appellant told her that Ray and Paul committed the murders. (RT28: 5239-5241, 5264-5265, 5275-5276.) Mary Alice last spoke with appellant in Rialto at their father's house, shortly before appellant was arrested. Appellant said that if he talked and turned himself in, Ray and Paul would kill the family. (RT28: 5206-5271.)

In 1995, Mary Alice spoke with Tucker about Tucker's relationship with Mike

Verdugo. Tucker was unhappy because Mike had had an affair or affairs,"she hated him," and was angry that there was not enough money to fix up the house. (RT28: 5243-5248.) There was a lot of tension in the marriage. (RT28: 5271-5272.)

Mary Alice spoke to Detectives Teague and Markel about the case (RT28: 5233-5235, 5237-5238) when she found out appellant was on the run. (RT28: 5258-5259.) She called her father and he said the police wanted to question appellant. She later spoke with appellant, but he said he would not turn himself in. (RT28: 5260-5264.)

In a telephone conversation, Tucker told Mary Alice that appellant said he had committed the murder. Appellant denied it, saying, "I didn't do it. I'm innocent." (RT28: 5272-5273.)

4. Appellant's testimony

Appellant was born on September 5, 1972, and had no criminal record. (RT24, 25, 26: 4533, 4652, 4915.) He testified that he did not murder Richard Rodriguez and Yolanda Navarro. (RT23, 24: 4491, 4560-4562.)

Appellant never had louvers on the CRX. (RT23: 4500.) Louvers attach by drilling and there were no drill marks on appellant's car. (RT23, 25: 4500-4501, 4640.) The car had an expensive stereo system. Appellant's father and brothers drove the CRX. (RT24: 4617-4619.) The car did not have a loud muffler; it was a stock exhaust. (RT25: 4643-4645.) The CRX is front wheel drive. The car may leave marks in the street if it "peels out and takes off real fast." (RT25: 4677-4680.)

In February 1994, appellant picked up his friend Tommy at a nightclub and took

him to Tommy's house in the projects. As appellant turned his CRX around in the cul-de-sac, Tommy "just took off." Appellant got out and was approached by more than five gang members. One of them hit appellant and "everybody just started jumping on [him]." Appellant was stabbed, kicked and hit with beer bottles and sticks. After he fell to the ground, the assailants took the car stereo and "started bashing the car." They kicked and damaged the fenders, hood, quarter panels, and rear. While on the ground, appellant played dead. (RT23, 24, 25: 4494-4500, 4603-4610, 4613-4617, 4638-4639.)

The driver's door of appellant's car was open and he had the keys. He reached in and started the car. He was half in, half out of the car, but he managed to drive away. As he did so, he was shot at. The assailants followed and continued to shoot at him, but he got away, went to a friend's house, and eventually went to the hospital. After he got out of the hospital, appellant went to his aunt's house. He never went back to the house on Hellman Street. (RT23, 24, 25: 4501-4504, 4610-4612, 4619-4622, 4034-4636, 4649-4650.)

After being stabbed, appellant started carrying his shotgun in his car behind the seat in a long compartment. Detective Valdez had warned appellant, "[I]f you have anything carry it." He always had it in the car. (RT23, 27: 4504-4505, 5056-5058.) Appellant gave information to the police regarding who had attacked him and what had happened. (RT25: 4629-4634, 4638-4639.) Arevalo did not seek revenge on appellant's behalf. (RT25: 4637.) Appellant admitted that he and Enciso torched Tommy's car. (RT27: 5051-5052.)

After the stabbing, appellant would meet his father and brother, but not Tucker,

outside of El Sereno. He met Mike Arevalo at Black Angus and at appellant's aunt's house, and other places. (RT25: 4650-4652.)[13]

After appellant healed from the stab wounds, he had the CRX repaired in September 1994 in Tijuana. Two new fenders and a new hood were put on the car. Dings and dents were fixed. The front half of the car was dark. (RT24, 25: 4506-4507, 4536, 4640-4643, 4646-4649.) Appellant subsequently primered the back half of the car to make it look like "the Night Rider car." (RT24, 25: 4536, 4669-4670, 4798-4805.) He later primered the entire car. (RT26: 5081-5082.) After getting the CRX back, appellant would occasionally drive it. His father drove it, and other cars, to work. His brother Paul also drove the CRX. (RT25: 4667-4669, 4673-4675.)

Appellant did not do body work on cars, contrary to Donna Verdugo's testimony. Johnny Dirski did the bodywork on the Scout. (RT24, 26: 4536-4537, 4826-4828.)

Appellant used to go to Black Angus with, among others, Mike Arevalo, Paul Escoto, and Ray Muro. Once, after the stabbing, Arevalo got into a fight and got kicked out. Outside, Arevalo, armed with appellant's pistol grip shotgun, got into a confrontation. Appellant kept a hide-a-key under the CRX's driver's side fender. Arevalo, Escoto and Muro knew where the key was located. If anyone got kicked out of a club or met a girl, they could use the key to get in the car. Arevalo had previously used the hide-a-key.

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[13] Appellant "knew of" Mike Arevalo but did not become friends with him until about a year before the stabbing. After that, they became good friends. (RT25: 4657-4661; RT25: 4666-4667.)

(RT23, 24, 25: 4507-4511, 4534-4536, 4546-4547, 4593, 4655-4656.)

Appellant found out about the Halloween party from Mike Arevalo. Prior to going to the party, he had been at Magic Mountain with Doreen Duran. Appellant went to the party by himself and parked at the top of the hill. He was wearing white shorts, a long-sleeved blue shirt, and round, metal-framed eyeglasses, similar to People's Exhibit 58. Appellant never took his glasses off at the party. (RT24, 25: 4537-4538, 4698-4705, 4761-4762.) Appellant had about three beers at the party. (RT25: 4709-4711.)

At the party, Paul Escoto, who had been drinking, became involved in an incident with another person. After this incident, "Paul was still pissed off." (RT24, 25, 26: 4539, 4706-4709, 4742, 4871.)

Ray Muro, who was wearing a Marine outfit, was at the party. Muro would brag about the Marines. (RT24, 25: 4541-4542, 4705.)

At the party, appellant's good friend, Mike Arevalo, got hit with a bottle. A "big commotion" ensued and appellant, after waiting "a little bit," "took off out of there." (RT24, 25: 4539-4541, 4711-4716, 4728-4744.) Appellant went to his car and saw that the driver's door was open. His loaded shotgun and a blue Levi's jacket were missing. The hide-a-key was gone. In the jacket were appellant's glasses. Defense Exhibit B looks like the glasses that were in the jacket. (RT24, 25, 26: 4542-4546, 4716-4722, 4744, 4829.)

Finding his shotgun missing, appellant went back to the party and looked for Mike Arevalo, whom appellant believed had taken the gun. Arevalo had been shouting, "Fuck

you, Bitch, you're going to get it..." Appellant told Irma Casas that Arevalo had the gun. Appellant gave her his business card and told her to have Arevalo contact him. (RT24, 25: 4547-4550, 4722-4725, 4744, 4750, 4752.) As he was leaving the party in his car, someone told him to back up. (RT23: 5050.) When he left, he did not follow Richard and Yolanda. (RT23: 5067-5068.)

Appellant left the party and went to Mike Arevalo's father's house to get his shotgun back. Appellant knocked on the door a couple of times, but no one was home. Appellant waited awhile and listened to two songs on the radio. Mike Arevalo arrived with his father and his father's girlfriend, and Ray Muro. Ray looked "jittery" when he went into his house. Arevalo said they would "talk about everything tomorrow." Appellant stayed at Ray's house. Ray was nervous and could not sleep. Appellant was still wearing his glasses. (RT24, 25, 26: 4550-4552, 4725-4727, 4752-4755, 4806-4818, 4893-4850, 5080-5081.)

The next morning appellant got up, went to his car, put his glasses away, grabbed his Rayban sunglasses, and went to breakfast with Mike and Ray. While they were having breakfast, Arevalo's mother arrived. Arevalo went outside and talked with her. (RT24, 25, 26: 4552-4553, 4602-4603, 4840-4841.)

While Arevalo was outside, appellant told Muro that he believed Arevalo had taken his shotgun. Muro said, "[N]o. Me and Paul did." Muro told appellant that, "[h]e and Paul took care of things...his [Marine] training paid off." Appellant said he wanted his gun back. Muro replied, "You're not getting it back." Muro told appellant that he and

Paul had committed the murders. Appellant was told not to call the police. Appellant was afraid for his family believing that Arevalo and his friends would kill them. He decided not to go to the mall with Ray and Mike. (RT24, 25, 26: 4555-4557, 4583-4587, 4842, 4850.)

Appellant tried to but was unable to get his shotgun back. He did not report the missing shotgun to the police and wanted "to cut my losses right there, let it be gone" because his family was at risk. (RT24, 26: 4587-4596, 4857, 4913-4917, 4922-4923.)

At some point after the murders, while appellant was at a job site with Tucker, he got a page from Paul, who said some investigators wanted to talk with him about the party. Appellant called Detective Teague, who told appellant he (appellant) had been a witness to a fight at the party. Appellant did not want to get involved. Appellant lied when he said he was in Las Vegas working for a construction company. He did so because he was merely a witness to a fight at the party and did not want to go through another situation similar to that which followed the stabbing incident; his family had to move to Rialto. Appellant later learned he was the subject of a manhunt. (RT24: 4557-4558.) He did not turn himself in because he had been "told not to deal with them and don't say anything." (RT24: 4559-4560.)

After the party, appellant, his brother, and father drove the CRX whenever they wanted to. After Paul got a ticket, the CRX was taken away by Sal, who wanted to sell it. Appellant took the car to the body shop to have it painted yellow so they could sell it. (RT 4680-4695.) Appellant did not pick up the car after it was painted because "there [were] a

lot of things going on at that time." He was "on the run." (RT25: 4696-4698.)

Appellant first heard about "the case," that he was a suspect, the week following the breakfast with Arevalo and Muro. Arevalo called and told appellant. After the Rialto house was searched, appellant learned the police were looking for him, and he no longer lived at the Rialto house. (RT26: 4859-4863.) He first stayed with Doreen. After hearing publicity about the murders, appellant moved from Doreen's and "went on [his] own." Appellant stayed in many different motels under assumed names in many different places. (RT26: 4874-4880, 4921-4922.) Appellant's father brought and sent him money; his father and brother were doing everything they could to protect appellant. (RT26: 4919, 4992-4954.) From the news media, appellant knew he was being accused of the murders. (RT26: 4901-4903, 4911-4912, 4928-4929, 4955.) Appellant telephoned the police from a pay phone a few times, but did not leave a message. He usually stayed inside during the day. (RT26: 4903-4907, 4928.)

While attempting to evade the police, appellant changed his appearance by letting his beard and hair grow, and by growing a mustache. (RT26: 4949-4931.) He also changed the color of his hair. (RT27: 5053-5054.) While on the run, appellant lost the glasses he had been wearing at the party. He had them replaced in Mexico. (RT25, 26: 4756-4757, 4972-4976.)

Appellant had been in San Diego before returning to his family's house in Rialto. Appellant was arrested that day after he "crawled inside the closet," while Paul was outside with the police. Appellant never drank out of the drinking bottle found in the

closet. (RT26: 4957-4971, 4976-4984.) The "crawl space" in the house had been built by Mike Verdugo. The only time appellant had been in it was when he was arrested. (RT27: 5054.)

Appellant never got along with Donna Tucker. Appellant denied telephoning Tucker on the morning of Sunday, October 23, 1994. He never told her that he had killed two people. Tucker never got down on her knees to plead with him to turn himself in. (RT24: 4558-4559.)

The glasses appellant had been wearing at the party were lost while appellant was on the run. (RT24: 4567-4568.) Regarding Defense Exhibit B, appellant told defense counsel that these were the eyeglasses he had been wearing at the party. This was not true; appellant, while in jail, "had them purchased" because he felt like he was being framed and that Tucker and Detective Teague were lying. He "panicked" and had the glasses purchased. (RT24: 4568-4569.)

Appellant testified that People's Exhibit 58, the eyeglasses found at the scene of the murders, looked similar to his glasses -- "They look like mine." But, People's Exhibit 58 was not the glasses he was wearing at the party. (RT25: 4756-4758, 4771-4772, 4778-4780.)

Appellant testified that he "go[es] through a lot of glasses," including sunglasses, and thus purchases "glasses all over the place." He has been to many Lenscrafters stores. Prior to the Halloween party, he had purchased over 20 pairs of glasses. Sometimes, he did not have a prescription with him and his eyes would be checked "on the spot." The

prices for the glasses were different, anywhere from $40 to $500. Appellant may have purchased over five pairs of glasses similar to People's Exhibit 58. (RT25: 4762-4768, 4772, 4775-4776.)

Appellant did not recognize Dr. Susan Martinez or Lillian Soliz, who had testified during the prosecution's case. Appellant testified it was possible that he had previously seen Keith Nakao. (RT25: 4768-4772, 4780-4781, 4790.)

Appellant did not purchase the eyeglasses which are Defense Exhibit B. Defense Exhibit B is similar to People's Exhibit 58. People's Exhibit 58 "look[s] like a pair" of glasses appellant lost. On the day of the Halloween party, appellant owned two pairs of glasses that looked like 58 and B. Appellant did not drop Exhibit 58 at the corner of Huntington Drive and Monterey Road. (RT25: 4781-4790, 4796-4798.) If People's Exhibit 58 is appellant's glasses, they were in the Levi's jacket taken from his car on the night of the party. (RT25: 4790-4796.)

Appellant told Doreen Duran that he "didn't do it." (RT : 4881-4882.)

Appellant testified that his testimony in court was the truth (RT 4654-4655), but admitted that he lied in a statement he gave to the police in an interview after his arrest. (People's Ex. 101; 1 Sup. CTII, 185-246.) The interview was videotaped (People's Ex. 100), the tape was played for the jury, which followed along with a transcript. (People's Ex. 101; (RT26: 4994-4995.) During the interview, Detective Teague told appellant that the police had shot and killed his brother during the search of the house when appellant was arrested. (RT24, 26: 4562-4563, 4986, 4989.) Appellant lied to Teague and Markel

"to protect what I know." (RT 4567, 4655.) He "stayed away from certain issues" regarding "anything that happened at the Halloween party and anything else dealing with Mike and his friends." He lied when he said he took his truck to the Halloween party; he took the CRX. (RT25: 4675-4676, 4680.) Appellant acknowledged that he had lied about many things in order to "protect where [he] was getting my income," i.e., his father and brother, who had been working with an attorney and an investigator to "find out the facts about this case" (RT26: 4995-4999) and "to keep out Mike and anybody -- Mike's friends, anybody else around him[,] out of it." He also wanted to protect Doreen. Appellant acknowledged that he lied about numerous things, including what he had been wearing to the party, what he had driven to the party, who had invited him to the party (he had been told to keep Arevalo out of it), leaving his glasses and jacket at the party, and the theft of his shotgun. (RT26, 27: 4880-4881, 4985-4999, 5006-5017, 5102, 5048-5050, 5082-5086, 5096-5098.)

Appellant testified that Tucker lied when she said he telephoned her on October 23, 1994, when she testified about the call to Teague, when she testified about appellant saying he was chased by gangs and was shot at, about meeting appellant at Bank of America, about leaving behind carpet cleaning equipment, and claiming that appellant said he shot a girl and got a rush out of it. Virtually every aspect of Tucker's testimony regarding appellant was a lie. Appellant stated he hated Tucker "just as much as she hated me." (RT26, 27: 5027-5034, 5037-5039, 5041-5043, 5086-5094.)

Appellant testified that Ray Muro and Irma Casas had lied at trial. Arevalo lied

about not knowing of the hide-a-key. (RT27: 5047-5048.) Carmel Casas lied about appellant sitting on his car prior to leaving the party. (RT27: 5050.)

Appellant cut an article about the murders out of the L.A. Times and sent it to his sister Pauline"...to show her all the lies that they're talking about." (RT27: 5034-5037.) In the letter (People's Exs. 34B, 102), appellant told her he was moving a lot and that the police were looking for the car, but that they would not find it. He told her his fingerprints were on shotgun shells found at the scene, and that the police had a pair of his glasses. (RT27: 5058-5067.)

Appellant was not at Huntington Drive and Monterey Road when Richard and Yolanda were shot. (RT27: 5069-5072.) He did not drive away, stop at a Shell station and get out in an effort to retrieve his glasses. (RT27: 5074-5075.) His car did not leave the tire marks. (RT27: 5080.)

To protect his family, appellant changed his testimony about being on the run. (RT27: 5077-5074.) In response to the prosecutor's question whether, "'You're not too sure if you stayed in San Diego?", appellant replied, "I'm guessing on everything that you've been asking me." Appellant testified he lied about being in San Diego while he was on the run and about "where I was getting money from." Appellant said, "Look, all I know for sure, I'm a liar or storyteller, but I'm no killer." (RT27: 5043-5045.) Appellant conceded that he had lied during his testimony. (RT27: 5102-5106.)

Appellant never grabbed his brother Mike and threw him against the wall and threatened to kill him. Mike is "a lot bigger" than appellant. (RT27: 5094.) His brother

was an Olympic wrestler and is a wrestling coach. (RT27: 5106-5107.)

Before the October 22-23, 1994, incident, appellant wanted to be a police officer. (RT24: 4562.) He went to the Academy at Rio Hondo to "look[ ] into it." (RT26: 4861, 4936-4937.)

Appellant has fired a shotgun "probably...once." He has shot a handgun. (RT27: 5054-5056.)

C. STIPULATIONS

The parties agreed to the following stipulations:

> "On July 15th of 1996 that fireman Jones, Donald Jones, was interviewed by Detective Markel and Detective Kwock and in part of his statement he said that as he was lying on his bed he heard arguing outside, as the arguing continued he heard the voices of a male and a female get louder, they got closer and more heated. The witness heard a gunshot, followed by the female screaming no, no, no, and then he heard another gunshot.
>
> During this exchange witness Jones got up out of his bed and approached the window on the west wall. Fireman -- firefighter Quintana was already looking out the window at that time." (RT28: 5281);

D. PROSECUTION REBUTTAL

1. Mary Alice Baldwin

After seeing appellant at the Rialto house, Mary Alice Baldwin told the police that she had seen and spoken with appellant. He was fearful and said that he did not commit the murders. (RT28: 5285-5288.) Mary Alice told the police appellant had told her that, as he was going home on the Long Beach freeway, there was gunfire, people were

shooting at him, and that he tried to get away. Appellant said to her "...it was either him or me." Appellant did not say that he had shot anyone. (RT28: 5288-5298.)

On May 23, 1995, Detective Markel spoke with Mary Alice Baldwin. Mary Alice said, "Donna was giving information to the police and that Donna was afraid that this was going to break up her marriage." Mary Alice said she had spoken to appellant at their father's house. Mary Alice said appellant was eight years old when his mother died. She told Sal to put appellant in special education classes but he did not do so. Appellant was really slow in school and was unable to do the school work. (RT28: 5295-5298, 5309.) Detective Markel thought Mary Alice was lying. (RT28: 5298-5301, 5304.)

2. Police testimony

Detective Teague testified that louvers can be mounted on a car by two methods: drill and screw it, or double-sided adhesive, which allows a person to "remove them easily and just use solvent to take the glue off." (RT28: 5319-5320.) Some witnesses thought the suspect's vehicle had louvers. (RT28: 5323.) The police came into possession of appellant's car six months after the murders. There was no way for the police to tell whether it previously had louvers. Teague did not see any drill holes. (RT28: 5323-5326.)

Detective Stephens interviewed Ray Muro. Muro's tape recorded interview (People's Exs. 95, 95A) was played for the jury. (RT28: 5326-5328.) Prior to January 12, 1996, the police did not have any information from Muro regarding appellant having a shotgun. (RT28: 5328-5329.)

V. STATEMENT OF THE FACTS: PENALTY PHASE

A. THE PROSECUTION'S CASE

1. Witnesses regarding Richard Rodriguez

Twenty-year-old Robert Rodriguez, Jr. was the cousin of Richard Rodriguez. Richard felt like a brother to Robert; they grew up together. They went to Disneyland together. Robert looked up to Richard because Richard "...had direction in his life...he wanted to graduate from college." Their families would celebrate birthdays together. (RT31: 5797-5800.)

Richard's death was difficult for Robert: "part of your soul is gone...it's just empty space..." Richard was funny and tried to "make you feel real good about yourself." (RT31: 5800-5801.) Family photographs showed the families together. (RT31: 5802-5805.)

Cynthia Rodriguez was Richard Rodriguez's cousin. She was 11 or 12 when he died. She will never forget the moment she heard he had died. Richard was "special" and "was always there for you." He was going to college and inspired Cynthia to do so. (RT31: 5805-5809.)

Martha Rodriguez was Richard's aunt. Three-year-old Nicholas was her son. (RT31: 5810-5811.) At Richard's funeral, his little cousin Nicholas "pushed all the roses off the grave so he could kiss it. He wanted to kiss that coffin because he missed him." (RT31: 5809.)

When Martha found out that Richard had died, "it took a big part of me." Nicholas

misses Richard, who was his godfather. Nicholas says, "Mama, where's my yellow car that my nino said he was going to buy me?" (RT31: 5811-5814.)

Robert Rodriguez, Sr. was Richard's uncle. Richard "grew up with no father"; therefore, Robert would "always pick him up, and he would always go with us..." Robert had two sons; but with Richard, "I had three boys." Photographs show Richard with Robert's family at family gatherings. (RT31: 5818-5821.)

Robert had a very close relationship with Richard, and misses him. Richard was kind and considerate and wanted to succeed in college. (RT31: 5821-5823.)

Robert went to the scene of the shooting soon after it had occurred. He saw Richard and Yolanda with sheets over them. Robert's sister was there, and she was hysterical. Robert made all the arrangements at the mortuary and cemetery. (RT31: 5823-5827.)

Photographs showed Richard in school and with family members and friends on a number of occasions. (RT31: 5834-5838.)

Carmen Evangelista was Richard's mother. He did not have a father. Richard had a close relationship with his grandmother. (RT31: 5829-5831.) Richard was an excellent student and had good friends. He played sports and received a scholarship. He wanted to be an engineer. There were never any problems with him. (RT31: 5831-5833.)

Carmen last saw Richard at about 8:00 p.m. on the night of the Halloween party. Early the next morning, she paged him but did not get a response. One of Yolanda's sisters called and said there had been an accident. She went to the scene and asked,

"where was the owner of the car." A police officer told her only that there were two victims. Carmen went home. Later, Detectives Teague and Markel came and told her that Richard had died. (RT31: 5838-5842.)

It hurt Carmen to view her son's body and to see him buried. Richard's death adversely affected his grandmother and brothers Michael and Robert. It affected Rita "real bad." Carmen missed the holidays with Richard. As a result of his death, Carmen "feel[s] that my heart has been cut in half." (RT31: 5842-5846.)

2. Witnesses regarding Yolanda Navarro

Twenty-six-year-old Ernestine ("Tina") Chavez was Yolanda's sister. They were "very, very close." Yolanda was Tina's "best friend." Tina has two children, Christine and Andrew. Yolanda was Christine's godmother. Yolanda enjoyed taking care of the children. (RT32: 5872-5874, 5888-5889.) Christine "misses Yoli a lot." She could not understand that Yolanda was dead. (RT32: 5879-5882.)

Tina and Yolanda would celebrate their birthdays together. Photographs showed them together at family functions. (RT32: 5874-5876, 5889-5890.) Without Yolanda, the "holidays are not the same at all." (RT32: 5878-5879.)

Yolanda and her friends would go over to Tina's and swim in the pool. Yolanda never gave Tina any trouble. Yolanda was "a good kid." She wanted to enrol in a nursing program. (RT32: 5876-5878.)

Tina learned about Yolanda's death when her sister-in-law telephoned at 4:00 a.m. saying "we can't find Yoli." Tina went to her mother's house. Tina's brother, Jon,

described what he had seen at the scene. Tina went to the scene and back to her mother's house. Her mother was upset and was taken to the hospital. Tina went back to the scene and saw Yolanda. Tina went to the hospital and told her mother what had happened. The next day Tina and her father went to the scene and saw pieces of skull in the grass -- "It was very hard." Tina helped with the funeral. (RT32: 5882-5888.)

Tina misses "very many things about Yoli." (RT32: 5890-5892.)

Jonathan Rodriguez was Yolanda's older brother. When they were children, they were "very close." As she got older, Yolanda became "really popular." She had a lot of friends. Jonathan and Yolanda became closer when she was in high school. Yolanda was close to Jonathan's two children, who "love their aunt very much." (RT32: 5893-5895.) Now, holidays are "not very good." (RT32: 5901.)

Jonathan learned about Yolanda's death when he came upon the scene shortly after the shootings occurred. (RT32: 5895-5898.) It was difficult for Jonathan to see his mother break down after she learned of Yolanda's death. (RT32: 5898-5899.)

Jonathan helped with the funeral arrangements. At the funeral, he let two doves loose. (RT32: 5899-5900.) Jonathan misses many things about Yolanda. (RT32: 5901-5903.)

Armida Navarro is Yolanda's mother. Yolanda had good school habits and was on the drill team. She was in Brownies and Girl Scouts. Yolanda was close to her siblings and nieces and nephews. (RT32: 5908-5912, 5921-5924.)

Yolanda wanted to be a nurse. On the Wednesday before the shootings, they had

purchased uniforms because Yolanda was going to start work on Monday. (RT32: 5912-5913.)

Yolanda had many friends and "they would all go out together." Richard Rodriguez and Yolanda were good friends. Yolanda was "the most responsible" and took care of her friends. She "was not perfect, but she was a good girl." She wanted to stay close to her mother. (RT32: 5913-5918.)

Yolanda and her mother had a good relationship. Armida testified, "Yoli wasn't just my daughter. She was my friend." The did many things together. When they argued, they would "work out the resolution or solution." (RT32: 5919-5920, 5924-5925.) Yolanda gave her mother a surprise birthday party with a mariachi group. (RT32: 5925-5927.)

Yolanda chose a Quinceanera, a traditional Mexican "coming out" party for girls who turn 15, rather than a trip to Disneyland. (RT32: 5927-5928.)

Yolanda had a "very close" relationship to her father. (RT32: 5928-5930.)

Photographs showed various activities engaged in by Yolanda. (RT32: 5930-5941, 5960-5961.)

Armida learned about Yolanda's death as a result of Jonathan telling her to page Yolanda. Armida went to the scene and then back home. She got sick and went to the hospital. Later, Tina told her that Yolanda had died. (RT32: 5941-5944.)

Items pertaining to Goofy, the Disneyland character, were placed in Yolanda's coffin. (RT32: 5944-5945.) A verse was printed on a leaflet that was given out at the

wake. Special songs were sung. (RT32: 5945-5951.)

The holidays without Yolanda were "not the same." There were "no more holidays." (RT32: 5951-5953.)

During the day on October 22, 1994, Yolanda recorded a cassette of Mexican music for her father. (RT32: 5953-5958.)

In memory of Richard and Yolanda, Wilson High School planted two trees. (RT32: 5958-5960.)

Armida misses Yolanda's companionship the most. It has been hard for her to adjust to Yolanda's absence. (RT32: 5961-5963.)

The parties stipulated that People's Exhibit 122, a photograph, shows the condition of Yolanda when she was found by her brother Jonathan. (RT32: 6058-6059.)

B. APPELLANT'S CASE

William Wright, who is about 10 years older than appellant, has known appellant for many years. Wright met appellant through appellant's brothers. As a child, appellant was very respectful, studious, and quiet. Wright helped appellant with his homework and tutored him. He was very close to his family. Other than his experiences with Donna, appellant was a "happy, industrious...kid." (RT33: 6061-6004.) Paul and Mike Verdugo were normal kids. (RT 6065.) Appellant had a "wonderful family, lot of love." (RT33: 6079.)

As appellant grew older, Wright never saw appellant bully anyone. Appellant was "always doing some kind of job to earn some money." (RT33: 6062-6063.)

Wright believes that, if appellant were to be given life, appellant would be productive in prison. (RT33: 6064.)

Wright was surprised to learn that appellant had "torched" a car. (RT33: 6066.) Wright would find it "very hard to believe" that Paul Verdugo and Sal Verdugo committed perjury and lied to the jury. (RT33: 6082-6083.) Wright never heard anyone say that appellant was a liar and never knew appellant to be violent. Wright did not know the details of the instant case and did not believe that appellant would have committed the charged offenses. (RT33: 6089-6092.)

Wright has known Donna Tucker for many years and does not find her to be a credible person -- "[S]he's always been a liar. She's also been an instigator." (RT33: 6092-6093.)

Mike Verdugo is appellant's older brother. When their father was training with the reserves, Mike would assume the role of man of the house. (RT33: 6094-6095.) Mike was close to appellant, who "was a good kid." (RT33: 6096.) Mike taught appellant right from wrong. (RT33: 6119.)

Mike is a general contractor. (RT33: 6095.) Appellant would help out doing all sorts of construction tasks. (RT33: 6096-6098, 6113-6114.) Appellant also had his own part-time jobs. (RT33: 6099-6100.) He was not part of a gang. (RT33: 6101, 6103.)

Mike was an Olympic team alternate in wrestling and is a coach. It would have been impossible for appellant to have thrown him against a wall, as Tucker said. (RT33: 6096.) Appellant was not a tough guy or a bully. (RT33: 6097.)

Appellant had a good, close relationship with his father. When appellant's mother passed away, his older sister became "like a mom for him." Appellant had a good relationship with Pauline and Paul. (RT33: 6098-6099, 6100.)

Mike testified that, if appellant was given life, appellant could be productive in prison because "[h]e was a hard-working kid." (RT33: 6100-6101.)

Mike was married to Donna Tucker. They are friends and he still loves her. For the last five or six years, Tucker despised appellant. Appellant objected to their relationship. (RT33: 6101-6105.) Mike told Tucker that she was "singlehandedly putting [appellant] away. (RT33: 6116.) Tucker knows that Mike now lives with Debbie. (RT33: 6122.)

It would surprise Mike to learn that his father, his brother Paul, and appellant lied to the jury. Appellant is not a liar (RT33: 6105-6106), but appellant might lie to protect his father. (RT33: 6109.) And, appellant's family would do anything to "keep him from getting railroaded..." (RT33: 6108-6109, 6122.)

Mike knew that appellant had lit a car on fire. Mike conceded that this was a crime. (RT33: 6109-6110.) Appellant is not "into" revenge. (RT33: 6111.)

Mike knew that appellant owned two shotguns. (RT33: 6113.)

When Mike saw appellant at the Rialto house before appellant's arrest, Mike knew he was a suspect. Mike was concerned about having appellant turn himself in. (RT33: 6116-6119.)

Mary Alice Baldwin is appellant's oldest sister. She is the oldest of the Verdugo

children. (RT33: 6132.) She testified that, prior to appellant's mother dying, he "was a real good kid, sweet, lovable...very happy." After his mother died, he "got to be a lot more quiet, more introverted..." Appellant had a good, close relationship with Pauline. He was protective of Pauline and was never hostile toward her. (RT33: 6132-6135.)

When their mother died, Mary Alice took over the mother role. She taught appellant right from wrong. He was a responsible person. Appellant was not violent, nor was he a bully. He was not involved in gangs. Appellant had a hard time comprehending his schoolwork. (RT33: 6135-6137, 6138-6140, 6143.)

If appellant were sent to prison, he could be productive because "he's a very hard worker..." and is helpful. Mary Alice does not believe appellant committed the murders because "that's not his nature." (RT33: 6137, 6141-6142, 6144.)

Mary Alice was unaware that appellant had lit a car on fire. (RT33: 6140-6141.) She would be surprised if she had learned appellant made statements indicative of involvement in the murders. (RT33: 6143-6146.) She did not know that her father and brother Paul lied at trial; this would surprise her. Appellant might have lied because he was scared or was trying to protect their father. She believes appellant would tell the truth. (RT33: 6147-6148.)

Mary Alice did not know that appellant was "on the run." Many facts testified to at trial would surprise Mary Alice. (RT33: 6148-6151.)

When appellant was arrested, Mary Alice learned that appellant had been charged with murder. She did not find out the details of the alleged offenses. She could not

believe the jury convicted him; "I know Nathan. He's very kind hearted...that's not my Nathan." (RT33: 6151-6154.)

Mary Alice testified that Donna Tucker is not truthful and is very vindictive. Tucker lied about the CRX having louvers and about statements attributed to appellant. (RT33: 6155-6156.) Mary Alice testified that Juan Carlos Enciso was "very spoiled" and "very manipulative." (RT33: 6156-6157.)

VI. ARGUMENT: PRE-TRIAL ISSUES

THE TRIAL COURT PREJUDICIALLY ERRED WHEN IT DENIED APPELLANT'S CONFIDENTIAL APPLICATION FOR SECOND COUNSEL, RESULTING IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, RELIABLE DETERMINATION OF GUILT AND PENALTY, AND FUNDAMENTAL FAIRNESS; REVERSAL IS REQUIRED.

1. Introduction

On July 26, 1996, pursuant to Penal Code section 987, subdivision (d) and *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 180 Cal.Rptr.489, appellant filed a confidential application for second counsel. (CT12: 3061-3069, 3070-3077.) The application was supported by counsel's declaration (CT12: 3075-3077) and appellant's declaration as to his indigency. (CT12: 3028, 3049.) On July 29, 1996, without holding a hearing, the trial court denied the application, writing on the bottom of the proposed order "...Counsel for Def. is privately retained – Insuff. affidavit for request to have Court appoint second counsel." (CT12: 3060.) On August 1, 1996, a formal order was filed, denying the application on the grounds that (1) because counsel had been retained, not appointed,

Keenan does not apply, (2) "[t]here is nothing presented...that would indicate the agreement between defendant and counsel was for anything less than full representation...," and (3) counsel's "...affidavit is insufficient. There appear to be neither specific facts nor complexity of issues that require such appointment..." (CT12: 3031.)

However, the trial court was wrong in denying appellant's request. In doing so, it violated his rights to due process, a fair trial, effective assistance of counsel, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16 and 17. Reversal is required.

2. Factual background

In his declaration in support of the application, defense counsel declared that a second attorney was required because, "[t]he facts and issues involved in this case are sufficiently complex to necessitate the appointment of second counsel in order to facilitate the preparation required for a timely trial." Second counsel was "necessary in order to adequately assist in supervising and assimilating information and facts developed by investigators, both law enforcement and defense, from witnesses involved herein, and from experts, as well as to adequately interview witnesses and prepare the necessary motions and the subsequent hearing." Counsel anticipated "many lengthy pre-trial motions, hearings and writs...[and] [s]econd counsel is necessary to assist in the preparation of these motions and related documents." (CT12: 3067.)

Counsel declared,

"[T]his particular case involves issues of such legal complexity, that adequate representation will require extensive research and motion practice preceding trial. The time constraints will mandate that both first and second counsel be thoroughly experienced in capital defense and have access to extensive motion files directed to issues concerning cases involving special circumstances. ROBERT H. BESWICK more than meets this requirement based upon his prior experience. ROBERT H. BESWICK's experience, in capital cases, also includes post conviction remedies, appeals, writs and habeas corpus petitions. The legal issues with which the defense will be confronted in the instant case, lend great importance to ROBERT H. BESWICK's prior experience pursuing pre-trial writs." (CT12: 3068.)

Defense counsel also declared:

"Preparation for the guilt phase will involve not only an investigation of the conduct and acts of the various parties on the date of the crime but also over an extensive period extending both before and after the date of the crime. This will require the accumulation of information from a wider range of sources and will necessitate both conducting interviews of numerous witnesses whose whereabouts may be difficult to trace and locating and organizing records from numerous agencies. These interviews must be conducted by an attorney familiar with all the facts of the case.

In addition to the numerous viable defense issues which should be thoroughly prepared prior to the guilt phase, there exist penalty phase mitigating factors and issues which are highly involved and complex. The investigation and preparation for the penalty phase should be commenced without delay. It will be necessary to conduct prolonged interviews with the defendant on issues relating solely to the penalty phase. The defendant needs to be assured that he has an attorney who is actively pursuing the guilt phase, thereby necessitating the appointment of a second counsel to conduct the penalty phase interviews while enabling lead counsel to maintain the requisite client rapport throughout the guilt phase.

> Based upon the foregoing, it is submitted that second counsel will lend necessary assistance, both in the preparation and in the presentation of this matter for motions and trial including guilt and penalty phase. Therefore, counsel requests that second counsel be appointed for legal research, motion preparation, assisting in the direction of the investigation and presentation of motions and evidence, consultations with the defendant and witnesses and courtroom assistance."

On July 31, 1996, Nathan executed a declaration regarding his indigency. He declared:

> "I have no other source of income from which I could pay counsel for services rendered in my defense against the charge conduct.
>
> I have been incarcerated for almost one year. As a result anything I might of had is no longer available.
>
> I do not have a future source of income against which I could borrow.
>
> I do not have any resources to use in my defense. Consequently, it is in the best interest of justice that alternate counsel be appointed to aid in the preparation of my defense." (CT12: 3028.)

On July 29, 1996, the trial court denied the motion, writing at the bottom of appellant's proposed order, "Counsel for the Def. Is privately retained – Insuff. Affidavit for request to have court appoint second counsel." (CT12: 3060.) A formal order denying the motion was filed on August 1, 1996:

> "The request of privately retained counsel for the appointment of a second counsel to be paid for by the County of Los Angeles is denied.
>
> The Court has read and considered the request by

privately retained counsel George Hernandez, Mr. Hernandez' affidavit, and the declaration of defendant Nathan Verdugo. Counsel cites *Keenan v. Superior Court* 31 Cal.3d 424 for the proposition that upon a showing of good cause, a second attorney should be appointed. Counsel fails to recognize that the *Keenan* court first states that if the defendant cannot afford the hiring of private counsel then counsel must be appointed. (*Gideon v. Wainwright* 372 US 335.)

There is nothing presented to this Court that would indicate the agreement between defendant and counsel was for anything less than full representation of the defendant during all proceedings. Further, counsel Hernandez' affidavit is insufficient. There appear to be neither specific facts nor complexity of issues that require such appointment (*People v. Jackson* 28 Cal.3d 264)." (CT12: 3029.)

3. Standard of review

The denial of a request for the appointment of second counsel is reviewed for an abuse of discretion. (*People v. Ochoa* (1998) 19 Cal.4th 353, 408, 79 Cal.Rptr.2d 408, 441 ["The decision to appoint *Keenan* counsel is reviewed for abuse of discretion."]) However, a sound judicial discretion "is neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice." (*People v. Warner* (1978) 20 Cal.3d 678, 683, 143 Cal.Rptr.885, 887; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977, 60 Cal.Rptr.2d 93, 98.) It must be "exercised according to the rules of law," "grounded in reasoned judgment," and "guided by legal principles and policies appropriate to the particular matter at issue." (*People v. Russell* (1968) 69 Cal.2d 187, 194-195, 70 Cal.Rptr.210, 216; *People*

v. Superior Court (Alvarez), supra, 14 Cal.4th at 977.) Under this standard, it is clear the trial court abused its discretion by denying appellant's motion for second counsel.

4. The Constitutional necessity of second counsel in capital cases

It is well-settled that "...the death penalty is fundamentally and qualitatively different from any other punishment..." (*Sand v. Superior Court* (1983) 34 Cal.3d 567, 572, 194 Cal.Rptr.481, 483; accord, *Woodson v. North Carolina* (1976) 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 ["...the penalty of death is qualitatively different from a sentence of imprisonment, however long."]) And, as stated in *Keenan v. Superior Court, supra,* 31 Cal.3d at 431, 180 Cal.Rptr. at 493:

> "The United States Supreme Court has expressly recognized that death is a different kind of punishment from any other, both in terms of severity and finality. Because life is at stake, courts must be particularly sensitive to insure that every safeguard designed to guarantee defendant a full defense be observed. (*Gardner v. Florida* (1977) 430 U.S. 349, 357 [51 L.Ed.2d 393, 401-402, 97 S.Ct. 1197; *Gregg v. Georgia* (1976) 428 U.S. 153, 187 [49 L.Ed.2d 859, 882-883, 96 S.Ct. 2909].) Thus, in striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime. (*United States v. See* (9th Cir. 1974) 505 F.2d 845, 853, fn.13; *Powell v. Alabama, supra,* 287 U.S. at p.71 [77 L.Ed. at pp. 171-172].)
>
> The Legislature has also recognized that a defendant in a capital case may need certain protections not granted to one charged with an offense carrying a lesser penalty. Section 987.9 demonstrates this concern by its broad language authorizing funds for 'the preparation or presentation of the defense' and its direction that in ruling on a defendant's request the court must be guided by 'the need to provide a complete and full defense."

Given this fundamental difference, Penal Code section 987, subdivision (d) provides for the appointment of a second attorney for a defendant in a capital case:

> "In a capital case, the court may appoint an additional attorney as a cocounsel upon a written request of the first attorney appointed. The request shall be supported by an affidavit of the first attorney setting forth in detail the reasons why a second attorney should be appointed. Any such affidavit filed with the court shall be confidential and privileged. *The court shall appoint a second attorney when it is convinced by the reasons stated in the affidavit that the appointment is necessary to provide the defendant with effective representation.* If the request is denied, the court shall state on the record its reasons for denial of the request." (Italics added.)

In *Keenan v. Superior Court, supra,* 31 Cal.3d 424, 180 Cal.Rptr.489, the Court reversed the denial of a request for second counsel, finding that the trial court had abused its discretion. There, as here, counsel presented the trial court with specific facts and argument demonstrating the dire need for second counsel. The *Keenan* Court noted that:

> "The declarations accompanying the motion stressed the factual and legal complexity of the case. Counsel stated that it would be necessary to interview approximately 120 witnesses in order to develop and prepare potentially meritorious defenses, and that he anticipated extensive scientific and psychiatric testimony would be produced at trial, all of which would require extraordinary preparation by him. In addition, defendant was charged in five other criminal cases pending before the superior court, and counsel had been informed that the prosecution intended to offer at some phase of the trial evidence related to all those cases. Counsel pointed out that this would necessitate his familiarity with the facts and legal issues involved in those charges as well as the immediate homicide case.
>
> The difficulty of preparation was compounded, counsel

> argued, by the inherent problem present in any capital case of simultaneous preparation for a guilty and a penalty phase of the trial. He noted that the issues and evidence to be developed in order to support mitigation of the possible death sentence were substantially different from those likely to be considered during the guilt phase. Counsel acknowledged that some of this task would be undertaken by trained investigators, but contended that supervision and assimilation of the investigative results were of necessity a responsibility for an attorney to perform.
>
> Counsel also informed the court that he intended to make numerous pretrial motions as part of the defense effort and anticipated that review of some of these motions might be necessary. He asserted that only the assistance of another qualified attorney would be useful in preparation and argument of these motions. (31 Cal.3d at 251-252, 180 Cal.Rptr. at 494.)

In *Keenan,* the Court held that the trial court's denial of the motion for second counsel failed to take into account the complexity of the issues, the large number of witnesses, and the need for extensive pretrial motions. (31 Cal.3d at 253, 180 Cal.Rptr. at 495.) Here, the trial court found "neither specific facts nor complexity of issues." (CT 12: 3031.) However, the showing made by appellant, which also included the need for significant investigation assistance, was just as strong as that made by the defendant in *Keenan.* As the *Keenan* Court concluded:

> "[S]ection 987.9, though not providing for appointment of counsel, reflects a legislative intent that the court be guided by a capital defendant's need for a 'complete and full defense.' That intent, together with the constitutionally mandated distinction between death and other penalties, requires that the trial court apply a higher standard than bare adequacy to a defendant's request for additional counsel.

> If it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on the request. Indeed, in general, under a showing of genuine need, and certainly in circumstances as pervasive as those offered by the attorney in this case, a presumption arises that a second attorney is required. The trial court should have found that the presumption was not rebutted here." (31 Cal.3d at 253, 180 Cal.Rptr. at 495.)

(Accord, *Sand v. Superior Court, supra,* 34 Cal.3d at 575, 194 Cal.Rptr. at 485 ["The Legislature's provision of special funding in 'capital cases' reflects a belief that ancillary defense services may be needed both because of the inherent difficulty of preparing for a murder trial and because of the gravity of the potential penalty]; *People v. Mayfield* (1993) 5 Cal.4th 142, 213-214, 19 Cal.Rptr.2d 836, 873 ["It is particularly important in capital cases, which are often factually and legally complex, that courts ensure protection of the defendant's constitutional right to a full defense."]) As in *Keenan,* the trial court in this case erred in failing to find that the "presumption a second attorney is required...was not rebutted." (31 Cal.3d at 253, 180 Cal.Rptr. at 495.)

The federal courts, in fact, always provide for two counsel in a capital case (18 U.S.C.A. sec.3005 ["Whoever is indicted for...capital crime shall be allowed to make his full defense by counsel; and the court...shall promptly, upon the defendant's request, assign 2 such counsel."]) "[T]he purpose of the two counsel provision [is] to reduce the chance that an innocent defendant would be put to death because of inadvertence or errors in judgment of his counsel, and to attempt to prevent mistakes that would be irrevocable because of the finality of the punishment." (*United States v. Shephard* (7th Cir.1978) 576

F.2d 719, 728-729; accord, *United States v. Dufur* (9th Cir.1980) 648 F.2d 512, 515 ["the purpose of the two-attorney right is 'to reduce the chance that an innocent defendant would be put to death because of inadvertence or errors in judgment of his counsel... [T]he statute's purpose...derives from the severity of the punishment."]) This federal purpose for two counsels is equally applicable to capital prosecutions in state cases.

"Recent federal and state case law have emphasized the work required of counsel to provide effective representation in every capital case." (See, e.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 123 S.Ct. 2527; *Williams v. Taylor* (2000) 529 U.S. 362, 120 S.Ct. 1495.) Counsel must start early in investigating and preparing for both the guilt and penalty phases. He has a duty to thoroughly investigate. Police reports, documents, photographs, recorded statements, and all other relevant evidence must be amassed, read, and understood. Appropriate motions must be filed and argued once the evidence is obtained and studied. Experts must be retained. Investigators must be sent out to interview witnesses and to collect evidence. Records and other evidence relevant to the penalty phase must be gathered. Social history reports must be prepared. All reasonably available mitigating evidence must be uncovered. "A capital case is extremely demanding to defend because of the effort and pressure involved." (*United States v. Wilson* (E.D.N.Y. 2005) 354 F.Supp. 2d 246, 249.) Even the most experienced counsel would be hard-pressed to provide such representation without co-counsel by his or her side. Surely, as here, when counsel proclaims his inability to do so, a court must credit that claim and appoint second counsel.

In this case, the court erroneously denied appellant's request for second counsel. First, the court misunderstood the law, and did not realize that he had the power to appoint second counsel under *Keenan* even when lead counsel was retained; second, he erroneously determined that appellant was not indigent; and third, he erroneously ruled that trial counsel had not made a sufficient showing to require the appointment of second counsel.

Here, the trial court noted that appellant's trial counsel had been "privately retained" and denied appellant's motion for second counsel on the ground that "the *Keenan* court... states that if the defendant cannot afford the hiring of private counsel then counsel must be appointed." (CT12: 3031.) The trial court obviously believed that, where the defendant had retained counsel, if a second counsel was necessary, that counsel must also be retained; a second counsel could not be appointed. Of course, neither *Keenan* nor any other case holds any such thing.

In *United States v. Massino* (E.D.N.Y. 2003) 302 F.Supp. 2d 1, two defendants in capital case had retained counsel, yet the Court appointed two additional counsels. The Court explained its cogent reasoning:

> "Representing a defendant in a death penalty case is particularly time consuming, complex and expensive. ... Death penalty cases are bifurcated and involve both a guilt and a penalty phase each of which requires extensive preparation. ... In the penalty phase, counsel must be well versed in the defendant's life history in order to present mitigating information, respond to prosecution evidence that need not satisfy normal rules of evidence, and put on a case for a lesser sentence. *Id.* Because of the nature of death penalty trials and

> the resources required for an adequate defense, it is essential that defendants facing the death penalty have sufficient representation from the onset of the litigation. Defendants DeFilippo and Spirito each have retained one attorney. This court believes that the combination of only one retained counsel and one court appointed counsel may be insufficient to protect the rights of a defendant in some complex death penalty eligible cases such as this. Moreover, should DeFilippo or Spirito become financially unable to maintain private counsel at any time during this litigation in which the Government seeks the death penalty, the rights of these defendants might be jeopardized. When a death sentence is a potential outcome, the court must not risk a trial infected by the possibility of insufficient representation. Accordingly, the court will authorize the appointment of co-counsel for defendants DeFilippo and Spirito." (302 F.Supp. 2d at 1-2.)

The *Massino* Court noted that a third defendant had appointed lead counsel and had "retained three private attorneys who are working closely with his current appointed learned counsel." (302 F.Supp. 2d at 2, fn.1.)

The *Massino* Court also recognized that having counsel experienced in capital cases is essential to proper, constitutionally-mandated representation: "[T]he experience one needs to serve as learned counsel in a death penalty case includes the experience of serving as co-counsel in a death penalty trial." (302 F.Supp.2d at 2.) Appellant's counsel declared that his chosen second counsel, Robert H. Beswick, "is an experienced capital defense attorney having worked...as a defense attorney since 1979 and involved in ten murder cases." (CT12: 3068.) Beswick clearly would have satisfied *Massino*'s requirement of experienced capital counsel.

The *Keenan* Court, in discussing appointment of a second counsel, stated that,

"[t]he right to effective counsel...includes the right to ancillary services necessary in the preparation of a defense." (31 Cal.3d at 247, 180 Cal.Rptr.at 491; and see, in general, Penal Code sec.987.9, which is "intended to supplement pre-existing provisions for employment of defense counsel at public expense by making provision for services ancillary to those of counsel." This fundamental right to ancillary services, which the *Keenan* Court acknowledges includes the appointment of second counsel, does not disappear simply because lead counsel has been retained.

In any event, appellant, in fact, made it clear that he was indeed indigent. Appellant's declaration of indigency states, "I do not have any resources to use in my defense." (CT 3049.)[14]

Keenan and section 987 require appointment of counsel in these situations where it "is necessary to provide the defendant with effective representation." (Sec.987, subd.(d).) And, the overriding intent of *Keenan* and section 987 is to ensure that a capital defendant receives a fair trial in accordance with due process principles. Indeed, as stated in *Keenan*, the statutory provisions regarding appointment of second counsel are intended:

> "...to provide the defendant additional assistance in a capital case when the circumstances warrant it...
>
> Moreover, [the statutes], though not providing for appointment of counsel, reflects a legislative intent that the

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[14] Apparently someone other than appellant, who was indigent, was paying for at least a portion of appellant's defense and was unwilling to pay for a second counsel. Or, as is extremely unlikely, appellant paid something and, as stated in his declaration, was now indigent.

> court be guided by a capital defendant's need for a 'complete and full defense.' That intent, together with the constitutionally mandated distinction between death and other penalties, requires that the trial court apply a higher standard than bare adequacy to a defendant's request for additional counsel. If it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on the request. Indeed, in general, under a showing of genuine need, and certainly in circumstances as pervasive as those offered by the attorney in this case, a presumption arises that a second attorney is required." (31 Cal.3d at 253, 180 Cal.Rptr. at 495.)

The mere fact that appellant's counsel had received compensation from a private party did not preclude appointment of a second counsel; where, as here, such assistance was warranted, such appointment in fact is mandatory.

In *Tran v. Superior Court* (2001) 92 Cal.App.4th 1149, 112 Cal.Rptr.2d 506, the Court held that an indigent capital defendant is entitled to Penal Code section 987.9 funds where others have retained counsel for him. "'[Penal Code section 987.9] does not limit application to cases where counsel has been appointed but to the "indigent defendant"...'" (92 Cal.App.4th at 1154, 112 Cal.Rptr.2d at 509.) The Court determined that forcing others to pay for ancillary services where counsel has been retained for an indigent defendant would "impinge[ ] on [the defendant's] right to counsel of his choice" and "would interfere with the principle that, when possible, a defendant should be afforded retained counsel of choice." (92 Cal.App.4th at 1156, 1157, 112 Cal.Rptr.2d at 511, 512.) The same logic applies here; by limiting the right to second counsel only to indigent defendants who have not been able to procure retained counsel, a court interferes with the

defendant's right to counsel of his or her choice. Under the trial court's view of the situation, if an indigent defendant requires second counsel, he would have to fire his retained counsel of choice. *Tran*, however, precludes this unconstitutional result.

Other cases have ruled similarly. In *People v. Worthy* (1980) 109 Cal.App.3d 514, 167 Cal.Rptr.402, an indigent defendant was represented by a private attorney whom the defendant had agreed to pay, but who told the court he was "serving pro bono, because appellant was destitute." The trial court denied a request for ancillary services, believing it had no power to allow them. (Id. at 518.) While acknowledging that there was no specific statutory authority for the requested relief, the court noted that trial courts have "inherent power to guarantee to criminal defendants a fair trial. [Citation.]" (Id. at 521.) Since the defendant's indigent status was established, he was "constitutionally entitled to those defense services for which he demonstrate[d] a need. [Citations.]" (Id. at 520.) He did not sacrifice this entitlement by appearing through private counsel: "The test of entitlement to county assistance in defense preparation must be indigency. A test based upon the status of defense counsel would be constitutionally infirm. If a criminal defendant requires the services of investigators or scientific or medical experts to assist him in preparation of his defense, that assistance must be provided. Whether it is paid for by the government or by the defendant depends solely on the defendant's economic status. (Id. at 520.)

In *Taylor v. Superior Court* (1985) 168 Cal.App.3d 1217, 1218-1219, 215 Cal.Rptr.73, 75, a burglary defendant was represented by a community organization that provided free legal service to indigent persons. The trial court denied his application for

funds to hire a fingerprint expert, stating that the organization should apply its own funds for this purpose. (Id. at 1219.) When told that the organization depended on federal funds, budgeted by the mayor, who had not authorized their expenditure for expert witnesses, the trial court "expressed its opinion that the county should not be required to furnish funds to a federally funded agency." (Ibid., fn. omitted.) If denial of the motion "place[d] petitioner in a position where he [could not] obtain adequate defense," the court opined, "his alternative [was] to apply to the public defender who [could] provide a complete and adequate defense." (Ibid.) The reviewing court rejected an argument that "the county's duty to provide ancillary services to the indigent criminal defendant was fulfilled by making such services available through representation by the public defender's office." (Id. at 1220.) Such a regime would unduly interfere with "the defendant's right to choose his own counsel which has been described as 'one of this nation's most fundamental freedoms.' [Citation]" (Ibid.) "When the defendant is already represented by [retained] counsel, the court has no authority based upon its discretion to appoint [publicly funded counsel] and...has severely limited discretion to intrude in the established attorney-client relationship... [T]his limited discretion is abused where necessary ancillary services are denied to an indigent defendant; the court may not require defendant to accept the public defender as his counsel." (*Taylor v. Superior Court, supra,* 168 Cal.App.3d at p.1220.)

The trial court stated that nothing had been presented "...that would indicate the agreement between defendant and counsel was anything less than full representation of the

defendant during all proceedings." (CT12: 3031.) But, the very fact that the application for second counsel was filed belies this interpretation. Clearly, whatever agreement appellant and/or the person paying the retainer had with trial counsel, it was not sufficient to cover "full representation," i.e., a second counsel.

Finally, the trial denied the application because "[t]here appear to be neither specific facts nor complexity of issues that require such appointment." (CT12: 3031.) However, counsel declared that, "[t]he facts and issues involved in this case are sufficiently complex to necessitate the appointment of second counsel..." Second counsel was necessary to interview witnesses, assist with motions, and investigate guilt phase evidence. In order to "...maintain the requisite client rapport throughout the guilt phase, "second counsel was needed to collect penalty phase information and mitigating evidence. Trial counsel conceded that he, personally, had "weaknesses" that would be offset by second counsel. (CT 3075-3077.) As in *Keenan* (31 Cal.3d at 252-253,180 Cal.Rptr. at 491, 494, 495), counsel's declaration provides more than sufficient basis for appointment of a second counsel. And, given that the instant case was trial counsel's first capital trial (RT 5226),[15] the assistance of a second counsel was necessary.

Appellant was prejudiced as a result of the denial of the application. From counsel's handling of the case, it is clear he had many weaknesses. He lacked the ability to properly object or to conform his conduct to that expected of capital counsel, as

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[15] In conjunction with the motion for second counsel, it does not appear that the trial court (Judge Reid) had been informed that this was counsel's first capital case.

evidenced by the innumerable reprimands and sanctions imposed by the trial court. (See, e.g., RT 1377, 1379, 1925, 1983-1984, 2031-2032, 2109, 2200, 2814, 3932-3935, 5977-5986.) The jury was aware of many of these reprimands and their resulting likely less-than-confident view of counsel would necessarily negatively impact their view of appellant and his case. Appellant suffered prejudice by not having experienced second counsel.

5. Conclusion

The Court's ruling must be viewed in light of the overarching principle that a defendant's fundamental rights are infringed when a court, lacking adequate cause to do so, interferes with the defendant's ability to present the best defense he can. "While we have recognized competing values of substantial importance to trial courts..., the state should keep to a 'necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources [citation]. A criminal defendant's right to decide how to defend himself should be respected unless it will result in 'significant prejudice' to the defendant or in a 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' [Citation.] In other words, we demand of trial courts a 'resourceful diligence directed toward the protection of [the right to counsel] to the fullest extent consistent with effective judicial administration. [Citation.]" (*People v. Ortiz* (1990) 51 Cal.3d 975, 982-983, 275 Cal.Rptr.191, 196.) The fact that counsel is retained by persons other than the indigent defendant cannot justify the denial of appointment of second

counsel.

The trial court prejudicially denied appellant's application for second counsel. As a result, his rights to due process, a fair trial, effective assistance of counsel, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, article 1, sections 15 and 17 were violated. Reversal is required.

VII. ARGUMENT: GUILT PHASE ISSUES

A. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT EXCLUDED EVIDENCE THAT THE INVESTIGATING OFFICERS HAD BEEN SUSPECTED OF FABRICATING EVIDENCE; AS A RESULT, APPELLANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, PRESENT A DEFENSE, A RELIABLE DETERMINATION OF GUILT AND PENALTY, RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES, AND FUNDAMENTAL FAIRNESS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND CALIFORNIA CONSTITUTION, ARTICLE 1, SECTIONS 7, 15, 16, 17 AND 28 WERE VIOLATED. REVERSAL IS REQUIRED.

1. Introduction

Appellant testified that he did not commit the charged murders. Consistent with that defense, he testified that had Defense Exhibit B, the eyeglasses, been fabricated not to cover up a crime, but because he believed he was being framed by the police and that Detective Teague and Donna Tucker were lying and fabricating evidence against him. (RT24: 4568-4569.) To prove appellant's belief was genuine and had a basis in fact, counsel sought to introduce evidence that appellant was aware Detectives Teague and Markel had, in fact, been under investigation for fabricating evidence in another case and,

to fight back, appellant had Defense Exhibit B manufactured. Counsel was *not* trying to show that Teague and Markel had actually fabricated evidence (apparently, they were eventually cleared), but was attempting to inform the jury that there was, indeed, a factual basis for appellant's belief. The trial court, however, excluded the evidence. (CT9: 2372, 2735-2736; RT24: 4515-4531.) Thus, the jury was left with the impression that appellant caused the glasses to be manufactured because he was trying to cover up his supposed role, rather than trying to counter evidence he believed was being fabricated by the police and Tucker. Consequently, the prosecution was allowed to present evidence which it could argue showed a consciousness of guilt, but appellant was prevented from presenting a defense related to that very evidence. The trial court's ruling was erroneous, and devastating to the defense.

The trial court's ruling excluding the evidence violated appellant's rights to due process, a fair trial, present a defense, a reliable determination of guilt and penalty, confront and cross-examine witnesses, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16, 17 and 28. Reversal is required.

2. Standard of review

Exclusion of evidence is reviewed under the abuse of discretion standard. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008, 95 Cal.Rptr.2d 377, 459.) "[E]rror in the... exclusion of evidence warrants reversal of a judgment...if an examination of 'the entire cause, including the evidence,' discloses the error produced a 'miscarriage of justice.'"

(*People v. Mullens* (2004) 119 Cal.App.4th 648, 659, 14 Cal.Rptr.3d 534, 540.) Applying this standard, reversal is required in this case.

3. The facts

Regarding Defense Exhibit B, the eyeglasses, appellant testified that he "[h]ad them purchased...[w]hen I was in jail." He conceded that these were not the glasses he had been wearing at the party. The eyeglasses were purchased because, as appellant testified, "I panicked, felt like I was being framed, no one was going to believe me, that I lost the glasses, so I had those purchased." Appellant testified, "I was hearing stuff that Donna was saying which wasn't true. Second, what [Detective] Teague -- what I found out later, he lied about my father and my brother. Wasn't true." (RT24: 4568-4569.)

To counter the great prejudice from the evidence of the fabricated eyeglasses, defense counsel sought to introduce evidence that Detectives Teague and Markel had been suspected of fabricating evidence in other cases. Consistent with appellant's testimony, it was counsel's position that appellant had the eyeglasses manufactured because appellant believed the police and Tucker were fabricating evidence against him; the glasses were *not* manufactured in an effort to cover his supposed role in the alleged offenses. Evidence that the detectives had, in fact, been investigated for such improper conduct would have provided a factual basis for appellant's belief. As counsel argued:

> "I guess when it's a person's state of mind -- a lot of people act irrationally, but if their state of mind is , look, they've got this witness -- and this is his belief -- that they've got Donna Verdugo to testify to things that he didn't -- that he never told her, if they get a -- if they've got -- excuse me -- if

they've got -- if the detective had lied to him regarding his father and now he finds out they fabricated evidence with respect to -- this is his belief -- whether -- I know they've been cleared, once again, but his belief and his state of mind that they fabricated evidence, look, these guys are trying to frame me and now I don't have my glasses and they're going to think, look -- look -- this is his state of mine -- is, look, I better get some glasses in or else.

Because of their attempt to frame me, in his mind, he did something and he panicked because I think the jury will want to know, and I think legitimately so, if these aren't your glasses why did you do it, why did you go out and buy these and so -- and this is his explanation." (RT24: 4520);

"These glasses are...clearly the most damaging thing that's in this trial. I think everything else is pretty much hearsay but -- and somewhat circumstantial but in this case he has offered fabricated evidence.

And I think he's going to testify to that and I think he gets to offer why he fabricated the evidence." (RT24: 4522);

"And then he's going to say and when he heard -- sometimes it's the last straw that breaks the camel's back, and when he heard that Teague and Markel were charged with fabricating evidence and there was issues regarding the Christopher Commission on Teague or Markel -- I'm not sure -- I believe he believed both. I'm not sure if this is correct or not. This is why, in a sense, it pushed him over the edge." (RT24: 4525); and,

"Credibility is the -- the thing we have in this case is the credibility of Nathan Verdugo, whether he's being honest or not, and if they believe that he's being half-honest or he's not completely telling the truth, because of the issues that Donna Verdugo lied as well with respect to other cases, then it was in his mind that these guys were out to get me and that's why he did what he did. I believe that's his testimony." (RT24: 4527.)

The trial court excluded the evidence that the detectives had been investigated for fabricating evidence because, or so the trial court believed, only appellant's father and brother were involved in fabrication of the eyeglasses: "I don't see anything tying the defendant to it." (RT 24:4528.) The trial court also ruled that the fact the detectives had been investigated was not "probative" because:

> "I would think any defendant in that situation would have been jumping for joy to see this happen rather than being pushed over the edge to fabricate evidence because in his mind he should have logically thought that, you know, now they're--all the things that I know are out there in the public and this is going to help me at trial.
>
> And, as I say, they're substantially cleared and we're going to get into a big collateral issue on the lack of substance of charges against them that he read and all that.
>
> And so for all those reasons it seems to me that the probative value is substantially outweighed by the prejudice.
>
> So, once again, you're precluded from getting into the fact that he read these things about the detectives or heard them or whatever." (RT24: 4530.)

4. Appellant's constitutional rights were prejudicially violated by the erroneous exclusion of evidence.

A defendant in a criminal case has the fundamental constitutional right to due process and a fair trial. (*Chambers v. Florida* (1940) 309 U.S. 227, 236-237, 60 S.Ct. 472, 477.) A critical component of due process is the right to present a defense. (*People v. Jones* (1990) 51 Cal.3d 294, 320-321, 270 Cal.Rptr.611, 658 ["...the defendant [has] a due process right to defend against the charges against him."]; *Washington v. Texas* (1967) 388

U.S. 14, 19, 87 S.Ct. 1920, 1923 ["...the right to present a defense, the right to present the defendant's version of the acts as well as the prosecution's to the jury so it may decide where the truth lies."]; *In re Martin* (1987) 44 Cal.3d 1, 30, 241 Cal.Rptr.263, 281 [same, citing *Washington v. Texas, supra.*].)

In conjunction with presenting a defense, "a criminal defendant is constitutionally entitled to present all relevant evidence of significant probative value in his favor..." (*People v. Marshall* (1996) 13 Cal.4th 799, 836, 55 Cal.Rptr.2d 347, 366; accord, *United States v. Scheffer* (1998) 523 U.S. 303, 308, 118 S.Ct. 1261, 1264 ["a defendant's right to present relevant evidence..."]; *United States v. Janis* (8th Cir.2004) 387 F.3d 682, 688 [same.]) Here, evidence that the detectives were under investigation for fabricating evidence (see CT 2372) was relevant to appellant's state of mind when he "had them [the glasses] purchased." (RT 3563, 4568-4569.)

In the absence of any factual basis for appellant's belief that he was being framed by the police, the jury would readily find him untruthful and disregard the entirety of his testimony. As explained in *Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1841, 41 Cal.Rptr.2d 192, 198:

> "The law of California and other jurisdictions has long recognized a false exculpatory statement is evidence of a guilty conscience in the context of criminal cases. The underlying principle is that a false statement is evidence of a declarant's state of mind and demonstrates his knowledge he has committed a wrong. Furthermore, from this consciousness of guilt the jury is entitled to infer other facts bearing on a defendant's guilt."

(And see, *People v. Frierson* (1985) 39 Cal.3d 803, 814, 218 Cal.Rptr.73, 79-80 ["...in the absence of any defense evidence relating to defendant's state of mind the jury was left without any evidentiary basis...to reject [the prosecution's theory]"]) Without the evidence that the detectives were, in fact, under investigation for fabricating evidence, the jury had no evidentiary basis for appellant's belief that he was being framed and thus no basis to reject the consciousness of guilt inference. Appellant was thus severely prejudiced.

The prosecution presented evidence through Sal and Paul Verdugo showing that Defense Exhibit B -- which was virtually identical to the glasses found at the scene -- had been manufactured long after the murders had been committed. Appellant testified he "had them purchased," i.e., that *he* had them fabricated. The fabrication of evidence demonstrates a consciousness of guilt regarding the party responsible for the fabrication (*People v. Bell* (2004) 118 Cal.App.4th 249, 256, 12 Cal.Rptr.3d 808, 813; CALJIC Nos. 2.04, 2.05), as the jury was instructed. (CT9: 2434, 2435; RT29 5593-5594.) The prosecutor argued this inference to the jury: "Why did they manufacture these glasses? Remember consciousness of guilt? Would an innocent person do this? Absolutely not... The fact that they tried to pull the wool over your eyes, the defendant having his father perjure himself and Paul Verdugo perjure himself, is beyond belief." (RT 29: 5422; and see, (RT29: 5402-5411, 5420-5422, 5554-5557). Thus, to dispel this exceedingly damaging inference, it was imperative that appellant be permitted to introduce evidence of the reason why he had the glasses purchased, i.e., he knew the detectives were under investigation for fabricating evidence, was afraid they were fabricating evidence against

him, and had the glasses purchased in an effort to counter the evidence supposedly being fabricated against him. This reason was based on an undisputed fact -- the detectives *were* being investigated. The jury should have been so informed. Even though the detectives were eventually cleared (RT2, 18, 23: 384-394, 3565, 3565, 3813-3817, 4347; and see RT33: 6122-6123), the jury should have been aware that they had been under investigation.

The trial court excluded the evidence because, in its view, appellant should have been "jumping for joy" rather than being involved with the fabrication of evidence. But, what the trial court believes a defendant should have done is irrelevant, and not a proper ground to exclude evidence of what the defendant actually did.

Fabrication of evidence by the defense shows a consciousness of guilt. But, if such fabrication is undertaken not to cover up one's guilt, but to counter what was believed to be false prosecution evidence, the prejudicial inference disappears. And, had the jury known that there was a factual basis for appellant's belief he was being framed, his credibility regarding other aspects of the case would have been bolstered. Clearly, appellant was severely prejudiced by the exclusion of the evidence.

5. Conclusion

As a matter of law, the exclusion of the evidence that the detectives were being investigated was extremely prejudicial to appellant. As a result, his rights to due process, a fair trial, present a defense, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments were

violated. (See, *People v. Quartermain* (1997) 16 Cal.4th 600, 626, 66 Cal.Rptr.2d 609, 624 [recognizing that exclusion of evidence can constitute Federal constitutional error.]) Had the excluded evidence been admitted, this Court cannot say beyond a reasonable doubt an outcome more favorable to appellant would not have occurred. (*Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824.) Reversal is required.

B. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY FAILING TO DISCLOSE MATERIAL REQUIRED TO BE PROVIDED TO THE DEFENSE BY *BRADY V. MARYLAND* AND PENAL CODE SECTION 1054.1, THUS DEPRIVING APPELLANT OF HIS STATE AND FEDERAL CONSTITUTIONAL AND STATE STATUTORY RIGHTS, REQUIRING REVERSAL OF HIS CONVICTION.

1. Introduction

Under *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, the prosecutor has the duty to disclose to the defense evidence which may be exculpatory or favorable to the accused's case. Penal Code section 1054.1 provides a similar obligation. Here, on numerous occasions, the prosecutor failed to comply with *Brady* and section 1054.1 when he withheld and concealed evidence from the defense, thereby causing appellant severe prejudice. As a result, appellant's rights to due process, a fair trial, to counsel, to present a defense, to confront and cross-examine witnesses, to a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal constitution and Article I, sections 15, 16, and 17 of the California Constitution, as well as his state statutory rights were violated. Reversal is required.

2. Standard of review

In *In re Brown* (1998) 17 Cal.4th 873, 886, 77 Cal.Rptr.2d 698, 706, the Court discussed the standard of review applicable to *Brady* violations:

> "'The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'"

(Accord, *Kyles v. Whitley* (1995) 514 U.S. 419, 434, 115 S.Ct. 1555, 1565-1566.) Reversal is required where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley* (1985) 473 U.S. 667, 683, 105 S.Ct. 3375, 3383; accord, *In re Sassounian* (1945) 9 Cal.4th 535, 544, fn.6, 37 Cal.Rptr.2d 446, 452, fn.6.) Applying the above standard, reversal is required.

3. The prosecutor's failures to disclose evidence

Early in the trial, the trial court stated, "I want both sides to...promptly comply with discovery. As soon as there is something that should be given to the other side, do it..." (RT8: 1467.) The prosecutor failed to follow the trial court's directive and the law. As detailed below, time and time again, the prosecutor withheld crucial evidence from the defense.

a. Prosecutor's notes re interview with Ray Muro

The prosecutor failed to disclose notes he had taken on February 3, 1987 regarding Ray Muro's "the situation is resolved" statement. This statement referred to Muro's claim

that at Arevalo's house after the shooting, he had heard appellant say to Arevalo, "the situation is resolved." The prosecutor acknowledged that he had not given defense counsel his notes, but said that he had told counsel about the statement "months ago." Defense counsel responded that the prosecutor "may have" only orally informed him about the statement, but "it's never been in writing," and requested that the statement be stricken. The trial court, which did not "really find a violation," denied the request, but gave defense counsel "additional time before you cross this witness." The trial court ordered the prosecutor to turn over his notes redacting any work product. (RT10: 1927-1932.)

b. <u>The detective's opinion</u>

Richard Rodriguez's red or maroon car had white markings on its side. (RT13: 2456.) This would reasonably lead one to believe that the vehicle that had collided with the car was white. Appellant's car was not white. However, in the midst of trial, at a hearing out of the jury's presence, Detective Walton opined for the first time that the supposed paint transfer on the victims' car "could have come from any color car or it could have just been the wax or laquer transfer from the outer coating, protective coating...which may have changed color due to heat and friction..." (RT13: 2446-2447; and see RT13: 2262-2263, 2443-2467.)

At no time previously had Detective Walton ever expressed this opinion. (RT13: 2452.) When he told Detective Markel about "a paint transfer," Markel "said don't worry about any paint transfer...the paint transfer wouldn't matter as to color." (RT13: 2454, 2463.) Although the trial court ruled that Walton was not an expert and could not testify

as to any paint transfer, the detective's opinion had never been disclosed to the defense prior to trial.

c. Detective Teague's opinion as to the direction the shots were fired.

In December 1994, Detective Teague told the prosecutor's office that, in his opinion, the shooter was facing toward the fire station. (RT15: 2771.) Teague so testified at trial. (RT15: 2758-2759, 2761.) However, this opinion was never memorialized in a report (RT15: 2771) and, as defense counsel explained, was never communicated to the defense. (RT15: 2775-2791.) Because evidence as to the direction the shooter had been facing was critical to the ability of the fireman to describe the shooter, defense counsel moved for a mistrial due to prosecutorial misconduct based on failure to disclose Teague's opinion. (RT15: 279.) The trial court denied the mistrial motion on the ground that the prosecution had no obligation to disclose orally given opinions. (RT15: 2786-2791.) The trial court permitted the defense to "recall Detective Teague for further cross-examination on that issue." (RT15: 2786-2787.) Defense counsel objected to this remedy, stating "[t]he problem I have to now attempt to find an expert where the defense was never given notice that this witness would be giving expert opinion...that's the prejudice." The trial court responded, "go out and get one..." (RT15: 2787.)

d. Nondisclosure of measurements of Escoto's car

It was the defense's theory of the case that Escoto and/or Muro were the actual shooters. In an attempt to disprove this theory, the prosecution introduced evidence

regarding various measurements and observations of Escoto's car to show that his car could not have left the tire tracks at the scene. (RT17: 3147, 3151.) However, when counsel moved for a mistrial on the ground of "a complete denial of due process," the trial court said, "You can have a continuance...if you want." However, the prosecution did not promptly disclose these measurements to defense counsel. (RT17: 3148-3150.)

e. Failure to disclose notes re witness J.P. Hernandez

After J.P. Hernandez testified (RT17: 3201-3222), the prosecution, for the first time, "indicated that there were some notes on J.P. Hernandez." The notes included Hernandez's phone number, remarks by Hernandez regarding "licensed professionals ...being liars or something," and that Hernandez had previously been arrested for "felony D.U.I" and assault on a police officer. The prosecution failed to disclose these notes regarding the investigation of witness J.P. Hernandez until after he had testified. When defense counsel moved for a mistrial, the trial court said, "You want him back? We'll get him back... It's a no harm, no foul kind of situation." (RT18: 3361-3366.)

f. Failure to disclose expert opinions about various aspects of the alleged collision between the suspect's and the victim's vehicles

Detective Walton testified as an expert regarding various aspects of the possible collision between the suspect's vehicle and that of the victims. (RT19: 3602-3622.) Although the defense was provided with a report and handwritten notes, "there [was] nothing about the bumper damage. There is nothing about the molding damage. There is nothing about the ultimate opinion as to with respect to the angle of the car. This is all

new discovery." Defense counsel moved for a mistrial. The trial court agreed that the prosecutor had failed to disclose expert opinions regarding the alleged collision between the victims' and suspect's cars. (RT14: 3622-3634.) The trial court stated to the prosecutor, "It seems like every expert you're putting on is expressing an opinion that he [defense counsel] hasn't been provided before and it really does put him in a difficult position." (RT14: 3625.) Nevertheless, the trial court tacitly denied the mistrial motion, telling counsel, "[s]o as to these opinions I will again allow you to defer cross, if you want further time on this... [T]he remedy...is to give you a little additional time if you want to consult with an expert..." (RT19: 3631-3633.)

g. Donna Tucker's claim she was threatened

Defense counsel stated that a statement to Detective Teague from Donna Tucker "that she was threatened by the Verdugo family is not on any statement that they have provided to the defense... I think this is a discovery violation." (RT17: 3128.) The prosecutor did not deny that the statement had not been disclosed. However, the trial court ruled that oral statements need not be disclosed, and thus did not find any violation. (RT17: 3126-3129.) But, any evidence that Tucker had been threatened was certainly relevant to her credibility and, indirectly, to appellant's guilt or innocence.

h. Failure to turn over notes regarding Donna Tucker's statements

After the shooting, work was done on the Verdugo's CRX. Donna Tucker testified that appellant had previously worked on a Scout and a Volkswagen bug. (RT21: 3972-

3976.) She also testified that the CRX had louvers on the back window. (RT21: 3980.) Fireman Jones had testified that the suspect's car had louvers. (RT12: 2202-2203, 2208-2210.) Defense counsel objected and moved for a mistrial on the ground that he had never been provided with any discovery regarding the "Baja bug" or louvers. He stated he had information someone else had repaired the Scout. The prosecutor admitted that he had made notes regarding these points over a week before, yet had only given them to counsel that day. The trial court denied the mistrial motion and told counsel to "[g]et your investigator over the noon hour...any motion for continuance you're going to have to show me due diligence." (RT21: 3980-3992.)

i. Failure to disclose relocation of Donna Tucker

Donna Tucker was a pivotal witness against appellant. Anything that would have tended to impinge her credibility or show bias would have redounded to appellant's benefit. Thus, the prosecution was required to disclose to the defense that it had assisted in relocating Donna Tucker and had paid for a number of months of her rent. When, after trial, defense counsel informed the trial court of the prosecution's failure to disclose this critical evidence, the trial court merely told the prosecution to produce it. (RT35: 6429-6431.) The failure to disclose the facts regarding Donna's relocation was a ground for appellant's motion for new trial. (CT10: 2729-2730, 2739; CT11: 2792.) The motion was denied. (CT11: 2904: RT39: 7181-7243.)

Regarding most of the above discovery violations, the trial court believed that they were merely "technical." (RT19: 3621.) In fact, the numerous violations constituted a

denial of a myriad of appellant's state and federal constitutional rights and state statutory rights. The remedies offered by the trial court, in most instances, a continuance or a deferral of cross-examination of the witness to whom the violation pertained, were wholly inadequate; an attorney in a capital case cannot be expected to prepare that case on the fly or effectively respond to surprise evidence in a limited amount of time.

4. The prosecution's discovery obligations.

Under *Brady v. Maryland, supra,* 373 U.S. at 87-89, 83 S.Ct. at 1196-1197, a prosecutor must disclose to the defense all potentially exculpatory evidence. (Accord, *Banks v. Dretke* (2004) 540 U.S. 668, 682, ftn. 5, 124 S.Ct. 1256, 1267, ftn.5 ["'the suppression by the prosecution of evidence favorable to an accused upon request violates due process...'"]) In *Stickler v. Greene* (1999) 527 U.S. 263, 2380-281, 119 S.Ct. 1936, 1948, the Court recognized that *Brady* is not limited to strictly exculpatory evidence:

> "In *Brady,* this Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence. Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' Moreover, the rule encompasses evidence 'known only to police investigators and not to the prosecutor. In order to comply with *Brady,* therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" (Citations omitted.)

(Accord, *Basden v. Lee* (4th Cir.2002) 290 F.3d 602, 608 ["...a State violates a defendant's due process rights when it fails to disclose to the defendant prior to trial 'evidence favorable to an accused...where the evidence is material.'"]; *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 398 ftn.4, 122 Cal.Rptr.2d 99, 109, ftn.4.)

Under *Brady,* the prosecution must disclose "[i]mpeachment evidence...as well as exculpatory evidence." (*United States v. Bagley* (1985) 473 U.S. 667, 676, 105 S.Ct. 3375, 3381); accord, *In re Sassounina, supra,* 9 Cal.4th at 544, 37 Cal.Rptr.2d at 451 [prosecution must disclose evidence "if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses."]; *People v. Mailing* (2002) 103 Cal.App.4th 1071, 1078, 127 Cal.Rptr.2d 305, 310 ["Due process of law requires the prosecution to divulge...all information that could impeach prosecution witnesses...."])

The prosecution's disclosure obligations under *Brady* "'extends to evidence reflecting on the credibility of a material witness [and]...includes "any inducements made to prosecution witnesses for favorable testimony."'" (*In re Pratt* (1999) 69 Cal.App.4th 1294, 1312, 82 Cal.Rptr.2d 260, 271.) And, as stated in *People v. Phillips* (1985) 41 Cal.3d 29, 46, 222 Cal.Rptr.127, 136:

> "Since a witness' credibility depends heavily on his motives for testifying, the prosecution must disclose to the defense and jury any inducements made to a prosecution witness to testify and must also correct any false or misleading testimony by the witness relating to any inducements."

Pursuant to *Brady,* a prosecutor must disclose notes he or she made in conferring with experts and other witnesses. (*Paradis v. Arave* (9th Cir.1997) 130 F.2d 385, 392-393;

Benn v. Lambert (9th Cir.2002) 283 F.3d 1040, 1061-1062.)

The prosecution must disclose any exculpatory evidence possessed by *any* member of the prosecution team. As stated in *People v. Superior Court* (2000) 80 Cal.App.4th 1305, 1314-1315, 96 Cal.Rptr.2d 264, 271:

> "A prosecutor's duty under *Brady* to disclose material exculpatory evidence extends to evidence the prosecutor–or the prosecution team–knowingly possesses or has the right to possess. The prosecution team includes both investigative and prosecutorial agencies and personnel. [Citation.] In *Kyles v. Whitley* (1995) 514 U.S. 419, 437 to 438, 115 S.Ct. 155, 131 L.Ed.2d 490, the Supreme Court held that a prosecutor has a duty to learn of favorable evidence known to other prosecutorial and investigative agencies acting on the prosecution's behalf, including police agencies. The scope of the prosecutorial duty to disclose encompasses exculpatory evidence possessed by investigative agencies to which the prosecutor has reasonable access. (*People v. Robinson* (199) 31 Cal.App. 4th 494, 499, 37 Cal.Rptr.2d 183.)
>
> A prosecutor has a duty to search for and disclose exculpatory evidence if the evidence is possessed by a person or agency that has been used by the prosecutor or the investigating agency to assist the prosecution or the investigating agency in its work. The important determinant is whether the person or agency has been 'acting on the government's behalf' (*Kyles v. Whitley, supra,* 514 U.S. at p. 437, 115 S.Ct. 1555 of 'assisting the government's case.' (*In re Brown, supra,* 17 Cal.4th at p. 881, 72 Cal.Rptr.2d 698, 952 P.2d 715.)"

(Accord, *People v. Salazar* (2005) 35 Cal.4th 1031, 1042, 29 Cal.Rptr.2d 16, 24.)

Penal Code section 1054.1 places a *Brady*-type obligation on prosecutors to disclose evidence:

> "The prosecuting attorney shall disclose to the

> defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
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> ***
>
> (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
>
> (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
>
> (e) Any exculpatory evidence.
>
> (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

(Accord, *People v. Bohannon* (2000) 82 Cal.App.4th 798, 804-805, 98 Cal.Rptr.2d 488, 492.) "The rationale of the discovery statute is to prevent 'trial by ambush.'" (*People v. Cabral* (2004) 121 Cal.App.4th 748, 752, 17 Cal.Rptr.3d 456, 459.) Clearly, the prosecutor's duties under section 1054.1 are broader than his *Brady* obligations.

5. The prosecutor committed prejudicial *Brady* error

The prosecutor's failure to disclose the above-noted information violated his constitutional obligations under *Brady* and his statutory duties under section 1054.1 and caused appellant substantial prejudice.

a. Failure to turn over raw work

In several instances, the prosecutor failed to turn over notes he had taken during interviews of witnesses. He did not disclose the notes regarding Ray Muro's claim that appellant told Arevalo, "the situation is resolved," withheld notes regarding J.P. Hernandez, and failed to turn over notes regarding Donna Tucker's statements as to louvers on the CRX, and that appellant had previously worked on cars. Appellant was entitled to discovery of these "raw notes." (*San Diego Police Officers Ass'n. v. City of San Diego* (2002) 98 Cal.App.4th 779, 784, 120 Cal.Rptr.2d 609, 612 ["A criminal defendant would be entitled to raw notes..."])

Muro's testimony that appellant said to Arevalo "The situation is resolved" was exceedingly damaging to appellant's case. Under *Brady* and section 1054.1, to properly prepare his defense and to preclude being taken by surprise, appellant had the right to receive the prosecutor's notes as to this supposed statement as soon as the notes were made, not months later. The only appropriate sanction would have been to strike the statement, as appellant requested. By allowing the statement to remain, the trial court perpetuated the great prejudice caused by the statement.

The notes regarding J.P. Hernandez, which, *inter alia,* disclosed a prior felony conviction, would have enabled counsel to effectively impeach the witness. Under section 1054.1, the prosecution must disclose a witness's felony convictions. (*People v. Martinez, supra,* 103 Cal.App.4th at 1079, 127 Cal.Rptr.2d at 310; *People v. Little* (1997) 59 Cal.App.4th 426, 433, 68 Cal.Rptr.2d 907, 911.) Simply ordering the witness back was

not a proper solution; appellant's motion for a mistrial should have been granted.

The prosecutor's undisclosed notes regarding Donna Tucker's claim that appellant had previously worked on cars and that the CRX had louvers on the back window would have provided defense counsel an opportunity to effectively meet her similar trial testimony. The previously undisclosed claim that appellant had worked on cars permitted the jury to infer that he repaired his damaged CRX, which would show a consciousness of guilt. If the notes had been timely disclosed, counsel could have subpoenaed the person who actually worked on the "Baja bug," thereby impeaching Donna's testimony. Fireman Jones testified that the suspect's car had louvers. Knowing in advance that Donna was going to say the CRX had louvers would have allowed defense counsel sufficient time to amass contrary evidence and to effectively counter her claim that the CRX had louvers, which was made for the first time at trial. Such evidence would have shown that the CRX was not the suspect's car. The withholding of this critical, prejudicial evidence warranted a mistrial, as counsel requested, not just an admonition to "get your investigator."

b. <u>The detectives' opinions</u>

As explained above, from the white markings on the victim's red car, a jury could readily infer that it had been hit by a white car. Appellant's CRX was black. The conclusion is thus reasonably drawn that the CRX did not hit the victim's car thus showing that appellant was not the suspect.

At trial, for the first time outside the presence of the jury, Detective Walton opined that the white, paint-like markings on the victim's red car might not be paint. (RT13:

2446-2447.) This opinion had never been disclosed to the defense. Defense counsel was taken by surprise when this opinion was divulged. Although Detective Walton did not present this opinion to the jury, had it been revealed in a timely manner, counsel may have been able to obtain an expert to testify that the white markings were, indeed, white paint from a white car.

Detective Walton, also for the first time at trial, gave his opinion about various aspects of the collision -- bumper damage, molding damage, angles of the vehicles. (RT19: 3602-3672.) Walton's opinions bolstered the prosecution's claim that appellant's CRX was probably the vehicle with which the victim's red car collided. Had these opinions been disclosed in a timely manner, counsel could have consulted an expert and would have been in a position to effectively cross-examine Walton. As a result of the withholding of Walton's opinion, counsel could not effectively prepare his defense.

As early as December 1994, Detective Teague informed the prosecutor that the shooter was facing the fire station. However, this opinion was never disclosed to the defense and was revealed for the first time at trial. This opinion was critical to the prosecution's case because it bolstered the firemen's claim that they saw, and thus could describe, the suspect. Had counsel been informed in a timely manner about this opinion, he would have consulted an expert long before trial commenced and thus would have been prepared to effectively counter or deal with Teague's damaging conclusion. The trial court's remedy -- "go out and get [an expert]" -- was no solution at all.

Penal Code section 1504.1, subdivision (f) requires the prosecutor to disclose

"any...statements of experts made in conjunction with the case." The prosecutor prejudicially failed to comply with this due process-based requirement by withholding the expert-type opinions of Walton and Teague. The only proper, effective remedy was a mistrial, as the defense requested.

c. Failure to disclose facts relating to Donna Tucker

It is undisputed that the prosecution failed to disclose that it had assisted Donna Tucker in moving and that it had provided her with rent money. Obviously, such preferential conduct given to a crucial prosecution witness can reasonably be considered an inducement to testify favorably to the prosecution's theory of the case. Such assistance and monetary payments certainly affect a witness's credibility. Such inducements must be disclosed. (*In re Pratt, supra,* 69 Cal.App.4th at 1312, 82 Cal.Rptr.2d at 271.) Clearly, the prosecution violated its duty to disclose the inducements given to Donna Tucker.

In *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1380-1384, 66 Cal.Rptr.2d 494, 507-509, the Court reversed the defendant's conviction where the prosecutor failed to disclose inducements made to crucial prosecution witnesses. A similar result is warranted here. The failure to disclose the benefits bestowed upon Donna was prejudicial to appellant. She was a crucial prosecution witness. If the jury had known that she had received special treatment, it readily could have rejected her testimony on the basis that it was given only in return for the gifts given to her by the prosecution.

The prosecution also failed to reveal that Donna told Detective Teague she had been threatened by the Verdugo family. Such threats readily could have affected her

credibility. Defense counsel should have been made aware of this statement in a timely manner so as to effectively prepare the defense case.

d. Withholding of evidence regarding Escoto's car

Fireman Quintana stated that the suspect's car may have been a Toyota Celica. (RT12: 2100.) Escoto owned a Toyota Celica. (RT9: 1487.) It was the defense's theory that Escoto may have been the perpetrator because his car supposedly matched the suspect's vehicle. (RT29: 5468-5475, 5491-5494.) At trial, the prosecution introduced evidence regarding measurements of Escoto's car and acceleration marks left at the scene by the suspect's car which showed that Escoto's car could not have been that of the perpetrator. However, the prosecutor had not previously disclosed this crucial evidence to the defense. As a result counsel was taken by surprise and was unable to effectively counter this new evidence. Had the evidence been disclosed in a proper, timely fashion, as required by *Brady* and section 1054.1, counsel would have been prepared to meet the evidence.

6. The withheld evidence was material

The withheld, undisclosed information was material. Appellant's alleged statement that "the situation is resolved" was a devastating piece of evidence, yet the prosecutor withheld notes related thereto. From information previously disclosed, appellant's counsel believed that the marks on the victims' car was actually paint transfer made by a white car; appellant's car was black. Thus, Detective Walton's opinion that the marks could have come from any color car and may not have been paint at all was clearly material and

should have been disclosed. Donna Tucker was a pivotal witness against appellant. Thus, virtually anything pertaining to her testimony was material. It was appellant's theory of the case that Paul Escoto was one of the actual killers. Measurements pertaining to his car were therefore material.

Of course, each of the above failures to disclose evidence, alone, was exceedingly prejudicial and demands reversal. Even if, *arguendo,* a single failure does not warrant reversal, the cumulative prejudice resulting from the prosecution's consistent course of withholding material evidence certainly does. (*People v. Hill* (1998) 17 Cal.4th 800, 844, 72 Cal.Rptr.2d 656, 681) "A series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error..."]; *United States v. Rivera* (10th Cir.1990) 900 F.2d 1462, 1469 ["The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error."]; *United States v. Necolchea* (9th Cir.1993) 986 F.2d 1273, 1282-1283, citing *Rivera, supra*; *Walker v. Engle* (6th Cir.1983) 703 F.2d 1959, 1963 ["Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair."]; *United States v. Hernandez* (6th Cir.2000) 227 F.3d 686, 697 [same, citing *Walker, supra.*) The cumulative prejudice from the prosecution's constant defalcations require reversal.

Appellant was prejudiced by the untimely disclosure of the evidence. Trial counsel was, indeed, subject to "trial by ambush." As a result of not receiving the evidence in a

timely manner, counsel could not properly or effectively prepare for cross-examination of witnesses; his ability to impeach the witnesses was adversely impacted. He was, in effect, prevented from obtaining in an expeditious manner paint and collision experts. Timely disclosure of the information would have enabled counsel to adjust his theory of the case to fit the facts. Had the information been disclosed in a proper, timely manner, it is reasonably probable a result more favorable to appellant would have occurred. Clearly, appellant was prejudiced as a result of the prosecutor's violation of his duties under *Brady* and section 1054.1.

7. Conclusion

The prosecutor's repeated failure to abide by his disclosure duties resulted in a verdict that is not worthy of confidence. Obviously, the *Brady* error constitutes federal constitutional error. And, pursuant to *Hicks v. Oklahoma* (1980) 447 U.S. 343, 100 S.Ct. 2227, so does the prosecutor's failure to comply with his statutory duties under section 1054.1. As a result of the prosecutor's failure to timely disclose material evidence, appellant's rights to due process, a fair trial, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16 and 17 were prejudicially violated. Reversal is required.

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C. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S REQUEST TO EXAMINE WITNESSES REGARDING DONNA TUCKER'S PSYCHIATRIC TREATMENT.

1. Introduction

It is clear that Donna Tucker was a critical, if not dispositive, witness against appellant. In order to attack her credibility, defense counsel sought to elicit evidence from Mary Alice Baldwin regarding Tucker's psychiatric hospitalization. Counsel also requested that Tucker be brought back to be questioned in that regard. After a hearing at the bench, the trial court disallowed any such inquiry. (RT28: 5220-5228.) The trial court's ruling was incorrect. As a result, appellant's rights to due process, a fair trial, confront the witnesses against him, to present a defense, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16, 17 and 28 were prejudicially violated. Reversal is required.

2. Factual and Procedural Background

When, during the defense case, appellant's trial counsel learned that Tucker had been admitted to a psychiatric hospital about three months previously, he sought to elicit evidence from Mary Alice Baldwin, appellant's sister, regarding Tucker's possible mental problems and treatment. Counsel argued that that constituted exculpatory evidence regarding a witness' credibility. The trial court, finding the offer of proof to be vague and

from an improper source, disallowed any such inquiry. (RT28: 5222-5227.)[16]

3. The trial court prejudicially erred when it prevented appellant from presenting evidence that Donna Tucker, a key prosecution witness, had been hospitalized in a psychiatric institution just three months before.

A defendant in a criminal case has the fundamental constitutional right to present a defense. *Washington v. Texas* (1967) 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 ("...the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."); *In re Martin* (1987) 44 Cal.3d 1, 30, 241 Cal.Rptr.263, 281 (Same, citing *Washington v. Texas, supra.*) One of the most effective ways of presenting a defense is to cross-examine the prosecution's witnesses. This is so because cross-examination is "'the "greatest legal engine ever invented for the discovery of the truth."'" (*Lilly v. Virginia* (1999) 527 U.S. 116, 124, 119 S.Ct. 1887, 1894.)

Under the Sixth Amendment, a defendant "shall enjoy the right...to be confronted with the witnesses against him..." This right is "basic to our adversary system of criminal justice," is "part of the 'due process of law' that is guaranteed by the Fourteenth

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[16] In a letter from Tucker to Pauline Verdugo, filed in support of appellant's motion to continue the motion for new trial, Tucker mentioned "my stay in the cookie factory at A.V. Hospital." (CT10: 2655.) When, in conjunction with the motion for new trial, defense counsel sought to question Detective Stephens about his knowledge of Tucker's psychiatric hospitalization, the trial court stopped him. (RT 6644-6645.) The trial court and the parties subsequently discussed the issue. (RT 6679-6704.) The trial court ruled that questioning Tucker about her psychiatric problems "...is not a proper area of inquiry." (RT36: 6768-6769.)

Amendment," and "...guarantee[s] that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice -- through...the cross-examination of adverse witnesses..." (*Faretta v. California* (1975) 422 U.S. 806, 818, 95 S.Ct. 2525, 2532-2533; accord *Pointer v. Texas* (1965) 380 U.S. 400, 400-401, 85 S.Ct. 1065, 1066; *Hill v. Hofbauer* (6th Cir.2003) 337 F.3d 706, 714 ["The Sixth Amendment...guarantee includes the right to cross-examine witnesses."]; *In re Terry* (1971) 4 Cal.3d 911, 922, 95 Cal.Rptr.31, 39 [the "...right of confrontation under the Sixth Amendment of the federal Constitution, [is] made applicable to the states by the Fourteenth Amendment."])

A basic purpose of the right to cross-examine adverse witnesses is to attack their credibility. One effective method of doing so is to present evidence of the witness's psychiatric problems. As stated in *United States v. Lindstrom* (11th Cir.1983) 698 F.2d 1154, 1160:

> "Certain forms of mental disorder have high probative value on the issue of credibility. ...many types of 'emotional or mental defect may materially affect the accuracy of testimony...

(And see *People v. Gurule* (2002) 28 Cal.4th 557, 592, 123 Cal.Rptr.2d 345, 374 ["Of course, the mental illness or emotional instability of a witness can be relevant on the issue of credibility, and a witness may be cross-examined on that subject, if the illness affects the witness's ability to perceive, recall or describe the events in question."]; *People v. Anderson* (2001) 25 Cal.4th 543, 578-579, 106 Cal.Rptr.2d 575, 604 [recognizing that

"...examination of a witness about treatment for mental illness might sometimes be relevant..."])

A defendant has a right to present evidence of a witness's psychiatric problems if the witness has mental deficiencies which may affect her ability to know, comprehend, and relate the truth. (*Freeman v. United States* (D. Mass. 2003) 284 F. Supp.2d 217, 225; *United States v. Jackson* (D. Kan.1994) 155 F.R.D. 664, 671.) Unlike in *Anderson, supra,* where "counsel was allowed to cross-examine [the witness] about the specific delusions that might impair the accuracy of her testimony" (25 Cal.4th at 579, 106 Cal.Rptr.2d at 604), here, the jury was never informed regarding Tucker's mental problems.

Donna Tucker was a crucial prosecution witness. She testified, *inter alia,* that appellant made admissions to her inculpating himself in the murders. He supposedly mentioned "shots in the neighborhood." (RT21, 22: 4005-4006, 4151-4156.) She claimed he told her he shot and killed two guys, who crashed into his car. (RT21, 22: 4011-4013, 4156-4166.) She claimed to have knelt on the floor in front of appellant and to have told appellant to turn himself in. (RT21: 4034-4041.) She claimed appellant worked on cars (RT21: 3968-3976, 3980, 4004-4005), thus bolstering the prosecution's claim that appellant repaired his car after supposedly running into the victims' car. She testified appellant's car had louvers (RT22: 4202-4206, 4222-4223); the suspect's car had louvers. Appellant showed Tucker a shotgun, and said he wanted to modify it to have a pistol grip (RT21: 3976-3980); Ray Muro testified he saw a pistol grip shotgun in the trunk of appellant's car. (RT10: 1899.)

Clearly, any evidence tending to cast doubt on Tucker's credibility and calling into question her ability to observe, remember, and relate what was relevant would have redounded to appellant's benefit. The "jury might have received significantly different impression of [Tucker's] credibility had...counsel been permitted to pursue his proposed line of cross-examination." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680, 106 S.Ct. 1431, 1436.) The fact that Mary Alice Baldwin, through whom appellant sought to present the evidence, was not a psychiatrist went only to the weight of the evidence, not its admissibility. Further, appellant should have been allowed to "bring [Tucker] back," as counsel requested. (RT 28: 5222.) Evidence that Donna had undergone psychiatric treatment would have provided appellant powerful evidence with which to attack her damaging testimony. The trial court erred by excluding any inquiry.

4. Conclusion

As shown, the error involving the exclusion of evidence regarding Tucker's mental health problems involves appellant's fundamental constitutional rights. This Court cannot say beyond a reasonable doubt that if appellant had been permitted to elicit evidence of Tucker's psychiatric problems, a more favorable outcome would not have resulted. (*Chapman v. California, supra,* 386 U.S. 18, 87 S.Ct. 824.) Thus, reversal is required.

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D. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY WITHDRAWING FROM THE JURY THE OPTION OF FINDING APPELLANT GUILTY OF THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER AS TO RICHARD RODRIGUEZ. AS A RESULT, APPELLANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, A RELIABLE DETERMINATION OF GUILT AND PENALTY, A JURY TRIAL, AND FUNDAMENTAL FAIRNESS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND THEIR CALIFORNIA COUNTERPARTS WERE VIOLATED; REVERSAL IS REQUIRED.

1. Introduction

As a matter of law, voluntary manslaughter is a lesser included offense of first degree murder. Where a defendant is charged with first degree murder, the trial court is required to instruct sua sponte regarding voluntary manslaughter, if warranted by the evidence. In the instant case, given the equivocal state of the evidence regarding how Rodriguez's and, allegedly, appellant's vehicles collided -- Was it an accident? Did Rodriguez ram appellant? Did appellant run into Rodriguez? -- the jury should have been given the option of finding appellant guilty of voluntary manslaughter as to Richard Rodriguez. The failure to so instruct prejudicially violated appellant's rights to due process, a fair trial, a reliable determination of guilt and penalty, a jury trial, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments, as well the California Constitution, article 1, sections 7, 15, 16, and 17. As a result, reversal is required.

2. The facts

At a pre-instruction conference, the parties and the trial court discussed whether

voluntary manslaughter instructions should be given regarding Richard Rodriguez. (RT28: 5309-5315.) Appellant argued that the hitting of Arevalo, appellant's good friend, on the head with a beer bottle and severely injuring him was sufficient evidence of provocation for the instruction as "to both of them." (RT 28: 5314.) Appellant requested the instruction be given "...with respect to both victims." (RT28: 5314.)

Relying on *People v. Spurlin* (1984) 156 Cal.App.3d 119, 202 Cal.Rptr.663, and focusing only on the issue of provocation as it related to the hitting of Arevalo with the beer bottle, the trial court refused to give the voluntary manslaughter instruction as to Rodriguez because, "...I can't figure out any way [appellant] could have mistakenly believed that the male victim was responsible for that hitting." (RT28: 5314.) The manslaughter instruction was given as to Yolanda Navarro only. (CT 2594-2599; RT29: 5614, 5620-5626.)

However, the evidence established another source of provocation vis-a-vis Richard --- the collision between the two cars. As explained, *infra,* the jury should have been instructed with voluntary manslaughter as to Rodriguez.

3. Standard of review

In the instant case, as to Rodriguez, there was evidence from which the jury could readily have found appellant not guilty of capital murder and guilty of the lesser included non-capital offense of voluntary manslaughter. In such a situation, the failure to instruct the jury regarding the lesser included offense requires a per se reversal of the judgment without application of any harmless error test. This is so because the absence of "...the

'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake." (*Beck v. Alabama* (1980) 447 U.S. 625, 637, 100 S.Ct. 2382, 2389.)

Relying on *Beck*, the Court in *Hopper v. Evans* (1982) 456 U.S. 605, 610-611, 102 S.Ct. 2049, 2052-2053 explained:

> "The *Beck* opinion considered the alternatives open to a jury which is...unable to convict a defendant of a lesser included offense when there was evidence which, if believed, could reasonably have led to a verdict of guilt of a lesser offense. ...we concluded that 'in every case [it] introduce[s] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.' [Citation.]
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> ...*Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence."

(Accord, *People v. Breverman* (1998) 19 Cal.4th 142, 166, 77 Cal.Rptr.2d 870, 885 ["...the denial of instructions on lesser included offenses in a capital case...violate[s] the federal Constitution."])

Also relying on *Beck, supra*, the Court in *Hogan v. Gibson* (10th Cir.1999) 197 F.3d 1297, 1312 stated:

> "By denying the jury the option to convict [the defendant] on a lesser, non-capital offense supported by the evidence, thus leaving only a choice between conviction of capital murder and acquittal, [the State] may have '[e]ncouraged the jury to convict for an impermissible reason -- its belief that the

> defendant is guilty of some serious crime and should be punished...' ...[Defendant] must, therefore, be retried."

The *Hogan* Court acknowledged that, "A *Beck* error can never be harmless... '[T]he jury [in a capital case] must be permitted to consider a verdict of guilt of a noncapital offense "in every case" in which "the evidence would have supported such a verdict."'" (197 F.3d at 1312, n.13; emphasis added.)

California Courts have applied a similar rule. (*People v. Ray* (1975) 14 Cal.3d 20, 32, 120 Cal.Rptr.377, 379 ["...an erroneous failure to instruct on a lesser included offense constitutes a denial of the right to have the jury determine each material issue presented by the evidence, and such error cannot be cured by weighing the evidence..."]; *People v. Webber* (1991) 228 Cal.App.3d 1146, 1165, 279 Cal.Rptr.437, 447 [Same, citing *Ray*.])

Here, the trial court failed to instruct the jury with the lesser included offense of voluntary manslaughter as to Rodriguez. Under the evidence presented, the jury readily could have found appellant guilty of voluntary manslaughter and not guilty of capital murder. Therefore, reversal is required per se. Even if, *arguendo*, the error is subjected to a harmless error test, the state cannot show beyond a reasonable doubt that appellant suffered no prejudice. Appellant's constitutional rights were violated and he was severely prejudiced. (*Chapman v. California, supra*, 386 U.S. 18, 92 S.Ct. 824.) Thus, reversal is necessary under any standard.

4. The law regarding instruction on lesser included offenses

In *People v. Breverman, supra,* 19 Cal.4th at 153-154, 77 Cal.Rptr.2d at 875-876,

this Court held that voluntary manslaughter was a lesser included offense of murder:

> "'Murder is the unlawful killing of a human being with malice aforethought. (Sec. 187, subd.(a).) A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of...voluntary manslaughter. (Sec.192.)' Generally, the intent to unlawfully kill constitutes malice. 'But a defendant who intentionally and unlawfully kills lacks malice...when the defendant acts in a "sudden quarrel or heat of passion" (Sec.192, subd.(a))...' Because heat of passion... reduce[s] an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice* that *otherwise inheres* in such a homicide, voluntary manslaughter ...is considered a lesser necessarily included offense of intentional murder." (Citations omitted.)

(Accord, *People v. Rios* (2000) 23 Cal.4th 450, 460-461, 97 Cal.Rptr.2d 512, 520-521; *People v. Lee* (1999) 20 Cal.4th 47, 58-59, 82 Cal.Rptr.2d 625, 631 ["...manslaughter has been considered a lesser, necessarily included, offense of intentional murder."])

In *any* case involving the question whether there is sufficient evidence to prove all the elements of the greater offense, the trial court must instruct the jury *sua sponte* with any lesser included offense. As explained in *People v. Breverman, supra,* 19 Cal.4th at 154-155, 77 Cal.Rptr. 2d at 876-877:

> "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. ... The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged. ...

> [I]nsofar as the duty to instruct applies regardless of the parties' requests or objections, it prevents the strategy, ignorance, or mistakes of *either* party from presenting the jury with an unwarranted all-or-nothing choice, encourages a verdict ... no harsher *or more lenient* than the evidence merits, and thus protects the jury's truth-ascertainment function. These policies reflect concern [not only] for the rights of persons accused of crimes [but also] for the overall administration of justice.
>
> *[E]very* lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury." (Citations and internal quotation marks omitted; emphasis original.)

(Accord, *People v. Horning* (2004) 34 Cal.4th 871, 904-905, 22 Cal.Rptr.2d 305, 332 ["A court must generally instruct the jury on lesser included offenses whenever the evidence warrants the instruction."]; *People v. Lopez* (1998) 19 Cal.4th 282, 288, 79 Cal.Rptr.2d 195, 198 ["This sua sponte duty to instruct [on lesser included offenses] exists even if the defendant expressly objects to the instruction."]) "[A] trial court 'is justified in withdrawing' the question of [second] degree 'from the jury'" only "[w]here the evidence points indisputably to a killing committed in the preparation of [robbery or burglary]..." (*People v. Mendoza* (2000) 23 Cal.4th 896, 908-909, 98 Cal.Rptr.2d 431, 442.)

Federal law is in accord with California's regarding the duty to instruct on lesser included offenses. As stated in *Beck v. Alabama, supra*, 447 U.S. at 636-637, 642-643, 100 S.Ct. at 2389-2390, 2392:

> "[W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense--but leaves some doubt with respect to an element that would justify conviction of a capital offense--the failure to give the jury the

'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments:

> 'Death is a different kind of punishment from any other which may be imposed in this country. ... From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.' ... ...

Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the State] is constitutionally prohibited from withdrawing that option from the jury in a capital case.

***

[Failure to provide a 'third option'] interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the one hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason--its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason--that, whatever his crime, the defendant does not deserve death. In any particular case these two extraneous factors may favor the defendant or the prosecution or they may cancel each other out. But in every case they introduce a level of uncertainty and unreliability into the factfinding process that

cannot be tolerated in a capital case."

(Accord, *Schad v. Arizona* (1991) 501 U.S. 624, 646-647, 111 S.Ct. 2491, 2504-2505; *Schmuck v. United States* (1989) 489 U.S. 705, 717, n.9, 109 S.Ct. 1443, 1451, n.9 ["...where the jury suspects that the defendant is plainly guilty of some offense, but one of the elements of the charged offense remains in doubt, in the absence of a lesser offense instruction, the jury will likely fail to give full effect to the reasonable doubt standard, resolving its doubts in favor of conviction. The availability of a lesser included offense instruction protects the defendant from such improper conviction."]; *Hopkins v. Reeves* (1998) 524 U.S. 88, 95, 118 S.Ct. 1895, 1900 ["...the denial of the third option of convicting the defendant of a noncapital lesser included offense 'diminish[ed] the reliability of the guilt determination.'"]; *Hopper v. Evans, supra,* 456 U.S. at 612, 105 S. Ct. at 2053 ["[A] lesser included offense instruction should be given if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater."]) The *Hopper* Court also noted that "...*Beck*...held that the defendant was entitled to a lesser included offense instruction as a matter of due process." (456 U.S. at 609, 102 S. Ct. at 2052; accord *People v. Avena* (1996) 13 Cal. 4th 394, 424, 53 Cal.Rptr. 2d 301, 318; *People v. Kaurish* (1990) 52 Cal.3d 648, 696, 276 Cal.Rptr.788, 812.)

5. The trial court was required to instruct sua sponte regarding <u>voluntary manslaughter</u>.

Regarding voluntary manslaughter,"no specific type of provocation is required... Generally, it is a question of fact for the jury whether the circumstances were sufficient to

arouse the passions of the ordinarily reasonable person." (*People v. Fenenbock* (1996) 47 Cal.App.4th 1167C, 1704-1705, 54 Cal.Rptr.2d 608, 617.) And, "...provocation can arise as a result of a series of events over time..." (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1245, 7 Cal.Rptr.3d 401, 410.)

Here, the evidence showed that appellant was extremely upset and angry over the injuries caused to his friend. It is reasonably inferred from the fact that, because the jury rejected voluntary manslaughter as to Yolanda Navarro, this anger would not alone have resulted in a manslaughter verdict vis-a-vis Rodriguez had the manslaughter instruction been given as to him also. However, the injury to Arevalo was not the only thing that the jury could have reasonably determined sufficiently aroused appellant's passions to justify a voluntary manslaughter verdict. It is clear that Rodriguez was driving his car and it was the prosecution's theory that his car collided with appellant's. But, it is not known how the accident occurred: Did Rodriguez run into appellant? There was evidence that appellant had a great deal of pride regarding his CRX. From this evidence, had it been instructed on manslaughter, the jury readily could have found that the accident by itself, or coupled with appellant's anger over the injury to Arevalo, constituted sufficient provocation to reduce murder to voluntary manslaughter.

This evidence clearly "...raise[s] a question as to whether all the elements of the charged offense were present." (*People v. Breverman, supra,* 19 Cal.4th at 154, 77 Cal.Rptr.2d at 876.) The jury obviously believed appellant shot Rodriguez; but left without a non-malice option, and therefore an all-or-nothing choice, the jury "fail[ed] to

give full effect" to the reasonable doubt standard, adversely affecting appellant's rights and in violation of federal and state constitutional law. (*Schmuck v. U.S., supra,* 489 U.S. at 717, n.9, 109 S.Ct. at 1451, n.9.)

There was substantial evidence to support a verdict of voluntary manslaughter as to Richard -- appellant's alleged anger regarding the injury to Arevalo, the collision with Rodriguez's car, and the reasonable inference that appellant was upset over the damage to his car as a result of the collision. This "is evidence that would justify a conviction of such a lesser offense." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, 65 Cal.Rptr.2d 145, 211- 212.) The trial court thus was required to instruct the jury regarding this lesser included offense. *Only* where the evidence points *undisputedly* to the greater offense is a trial court justified in not giving the jury the option of a lesser verdict. (*People v. Turner* (1984) 37 Cal.3d 302, 327, 208 Cal. Rptr.196, 211; accord, *People v. Wade* (1971) 15 Cal.App. 3d 16, 25, 92 Cal.Rptr.750, 755.) Here, the evidence does *not* undisputedly point to murder. Thus, reversal is required per se.

6. Assuming, *arguendo*, that the error is subject to a harmless error test, reversal is required because appellant suffered severe prejudice as a result of the failure to instruct the jury on voluntary manslaughter as to Richard.

The jury was fully aware that a young man had been killed. It was unlikely that the jury would acquit appellant even if unconvinced regarding his guilt of first or second degree murder. Reasonably acting on "...its belief that the defendant is guilty of some serious crime and should be punished" (*Beck v. Alabama, supra,* 447 U.S. at 643, 100

S.Ct. at 2392), the jury reached the only viable option available, guilty of first degree murder. However, as shown, the evidence also would have supported a voluntary manslaughter conviction, yet the trial court's error prevented the jury from rendering such a verdict and from considering every material issue in the case bearing on the question of appellant's guilt or innocence of the charged offense.

The multiple murder special circumstance requires more than one conviction for murder. (Penal Code sec.190.2, subd.(a)(3).) Had the jury been properly instructed, it could very well have returned a voluntary manslaughter verdict as to Rodriguez. If such a verdict had been returned, this special circumstance would not have been proved and appellant would not now be facing a death sentence nor would he have received a sentence of life without the possibility of parole. Thus, the error is especially prejudicial in this case.

7. Conclusion

A conviction of first degree murder regarding Rodriguez was not a foregone conclusion. The evidence clearly supported jury instructions on voluntary manslaughter. Obviously, appellant was severely prejudiced as a result of the failure of the trial court to instruct on this lesser offense. Appellant's rights to due process, a fair trial, a jury trial, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as their California analogues, were violated by the trial court's failure to give the jury the option of voluntary manslaughter. Reversal of the judgment as to Richard is required.

E. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO INSTRUCT THE JURY SUA SPONTE WITH CALJIC NOS. 4.21 AND 4.21.1 REGARDING VOLUNTARY INTOXICATION.

1. Introduction

Murder is a specific intent crime. Evidence of voluntary intoxication may negate specific intent. During the guilt phase, Mike Arevalo testified that appellant had been drinking beer at the party. (RT9: 1640.) Appellant testified that he had three beers. (RT 4910.) It is common knowledge that alcohol affects different people different ways. Given this evidence and general knowledge, the trial court was required to instruct the jury sua sponte with CALJIC Nos. 4.21 and 4.21.1 regarding the effect of voluntary intoxication on specific intent. However, it did not do so; thus, the jury never properly considered how appellant's consumption of alcohol could have affected -- and perhaps negated -- the specific intent necessary for murder. As a result of the court's failure to instruct the jury regarding voluntary intoxication, appellant's rights to due process, a fair trial, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the California Constitution, article 1, sections 7, 15, 16 and 17 were prejudicially violated. Reversal is required.

2. Due process and fundamental fairness required that the trial court sua sponte instruct the jury regarding voluntary intoxication.

The United States Constitution, pursuant to the Fifth and Fourteenth Amendments, guarantees a criminal defendant due process of law. Regarding due process in general, the

Court in *Chambers v. State of Florida* (1940) 309 U.S. 227, 236-237, 60 S.Ct. 472, 477 stated:

> "[A]s assurance against ancient evils, our country, in order to preserve 'the blessings of liberty,' wrote into its basic law the requirement...that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed."

Due process is not rigid and unbending but "...is a flexible concept that varies with the particular situation." (*Zinermon v. Burch* (1990) 494 U.S. 113, 127, 110 S.Ct. 975, 985; accord, *Morrissey v. Brewer* (1972) 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 ["...due process is flexible and calls for such procedural protections as the particular situation demands... Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'"]) Here, appellant has been condemned to suffer the ultimate grievous loss -- forfeiture of his life. Under the facts of this case, the demands of due process mandated the trial court to instruct the jury sua sponte. Its failure to do so violated appellant's constitutional rights and prejudiced the defense.

Penal Code section 22, subdivision (b) states, "[e]vidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually found a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." A defendant is entitled to an instruction based on section 22 "when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's actual formation of

specific intent.'" (*People v. Williams* (1997) 16 Cal.4th 635, 677, 66 Cal.Rptr.2d 573, 598; accord, *People v. Aguirre* (1995) 31 Cal.App.4th 391, 37 Cal.Rptr.2d 48; *People v. Siegel* (1934) 2 Cal.App.2d 620, 622, 38 P.2d 450.)

Here, there was undisputed evidence that appellant consumed at least three beers at the party. It is common knowledge -- as Penal Code section 22 recognizes -- that consumption of alcohol can negate the specific intent necessary for murder. Although appellant's defense was that someone else committed the murders, this defense was rejected by the jury. Thus, the jury was left with evidence of a murder committed by appellant, who the jury knew had been drinking. If an intoxication instruction had been given, the jury readily could have found from the evidence of alcohol consumption that appellant lacked the required specific intent. But, without an intoxication instruction, the jury never would have "'understood deliberation and premeditation to be "mental states" for which it should consider the evidence of intoxication.'" (*People v. Hughes* (2002) 27 Cal.4th 287, 342, 116 Cal.Rptr.2d 401, 443.)

Although defense counsel argued, "what makes you think he's going to shoot this guy and this girl when he's not drunk" (RT29: 5533), *the evidence* shows that appellant drank three beers. From the evidence, and the jurors' common knowledge and experience (*People v. Pride* (1992) 3 Cal.4th 195, 268, 10 Cal.2d 636, 681 ["lay jurors are expected to bring their individual backgrounds and experiences to bear on the deliberative process."]), the jury could have found that appellant was intoxicated despite counsel's contrary argument. If the voluntary intoxication instruction had been given, the jury readily could

have found lack of specific intent despite counsel's argument.

Appellant acknowledges that *People v. Saille* (1991) 54 Cal.3d 1103, 1117-1120, 2 Cal.Rptr.2d 364, 372-375 held there was no sua sponte duty to instruct regarding intoxication. However, "]t]he trial court has a duty to help the jury understand the legal principles the jury is asked to apply." (*People v. Giardino* (2001) 82 Cal.App.4th 454, 465, 98 Cal.Rptr.2d 315, 323; accord, *People v. Beardslee* (1991) 53 Cal.3d 68, 97, 279 Cal.Rptr.276, 291.) A trial court has a "duty to ensure a fair and impartial trial to all parties to a criminal action" (*United States v. Ford* (6th Cir.1987) 830 F.2d 596, 603; accord, *Selson v. Kaiser* (10th Cir.1996) 81 F.3d 1492, 1497 ["We have stressed that the trial judge 'has an "'independent duty to ensure that criminal defendants receive a trial that is fair...'"'"]) Given this overriding obligation to ensure a fair trial, the trial court in the instant case was obligated to instruct sua sponte with CALJIC No. 4.21 and 4.21.1.

3. Conclusion

Appellant was severely prejudiced by the failure of the trial court to sua sponte instruct the jury regarding intoxication. This failure resulted in a violation of appellant's rights to due process, a fair trial, a reliable determination of guilt and sentence, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts. If the instruction had been given, this Court cannot say beyond a reasonable doubt that a result more favorable to appellant would not have occurred. (*Chapman v. California, supra,* 386 U.S. 18, 87 S.Ct. 824.) Therefore, reversal is required.

F. THE CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTIONS UNDERMINED THE CONSTITUTIONAL REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364, 90 S.Ct. 1068, 1073.) Thus, in accordance with CALJIC No. 2.90, the trial court instructed the jury at both the guilt and penalty phases that appellant was presumed to be innocent until the contrary was proved and that this presumption placed upon the state the burden of proving him guilty beyond a reasonable doubt. (CT9: 2459, 2580; RT29: 5610-5611.) (See, *Taylor v. Kentucky* (1978) 436 U.S. 478, 98 S.Ct. 1930; *People v. Soldavini* (1941) 45 Cal.App.2d 460, 114 P.2d 415.) In addition, the jury was also instructed on the meaning of reasonable doubt in two interrelated instructions which discussed the relationship between proof beyond a reasonable doubt and circumstantial evidence, and which addressed proof of specific intent and/or mental state. (CT9, 10: 2432, 2485, 2553, 2606; RT29: 5591-5592, 5629-5630.)[17] Except for the fact that they were directed at different evidentiary points, these instructions (CALJIC Nos. 2.01 and 8.83) informed the jury, in essentially identical terms, 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

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[17] At the penalty phase, the trial court did not re-read the reasonable doubt and circumstantial evidence instructions, but provided the jury copies of the written instructions. (RT35: 6329.)

the unreasonable." (Emphasis added.)[18]

This repeated directive was contrary to the requirement that appellant may be convicted only if guilt is proved beyond a reasonable doubt. (*In re Winship, supra*, 397 U.S. 358, 90 S.Ct. 1068; *Jackson v. Virginia, supra,* 443 U.S. 307, 99 S.Ct. 2781.) As a result, appellant's federal and state rights to due process of law, to a jury trial, and to a reliable determination of guilt and penalty were violated. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, 100 S.Ct. 2227, 2229.)

The problem with the instructions lies in the fact that they *required* the jury to accept an interpretation of the evidence that was incriminatory but only "appear[ed]" to be reasonable. This instruction is constitutionally defective for at least two reasons. First, telling jurors that it "*must*" accept a guilty interpretation of the evidence as long as it "appears to be reasonable" is blatantly inconsistent with proof beyond a reasonable doubt; it allows a finding of guilt based on a degree of proof below that required by the Due Process clause. (See, *Cage v. Louisiana* (1990) 498 U.S. 39, 111 S.Ct. 328 (per curiam).

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[18] The issue of the erroneous circumstantial evidence instructions has not been waived. (See Pen. C. sec. 1259 ["The appellate court may also review any instruction given, refused or modified even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."]; *People v. Hannon* (1977) 19 Cal.3d 588, 600, 138 Cal.Rptr.885, 892 ["Lack of objection...did not...waive defendant's right to appellate review of the propriety of the court's jury instruction..."]; *People v. Hempstead* (1983) 148 Cal.App. 3d 949, 956, 196 Cal.Rptr 412, 416 ["...in a criminal case an appellate court may review the giving of an instruction despite the absence of an objection below if the substantial rights of the defendant are affected."]; *United States v. Olano* (1993) 507 U.S. 725, 736, 113 S.Ct. 1770, 1779.) Here, as a matter of law, appellant's substantial rights were prejudicially affected, and a miscarriage of justice has occurred. This Court, thus, may review the error.

Cage v. Louisiana, supra, emphasizes the requirement that jury instructions must not subtly compromise the fundamental concept of proof beyond a reasonable doubt. In *Cage*, the jury was instructed to find the defendant not guilty if it "entertain[ed] a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt..." (*Id.*, 488 U.S. at 40, 111 S. Ct. at 329.) The instructions went on to equate reasonable doubt with "such doubt as would give rise to a grave uncertainty" and "an actual substantial doubt," and stated that "[w]hat is required is not an absolute or mathematical certainty, but a moral certainty." (*Id.*; emphasis omitted.) The Supreme Court looked to "how reasonable jurors could have understood the instruction," and concluded it was unconstitutional:

> "It is plain to us that the words 'substantial' and 'grave' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." (*Id.*, 498 U.S. at 41, 111 S.Ct. at 329-330 (footnote omitted).)

If, as the Supreme Court held in *Cage*, due process of law is violated by a jury instruction informing the jury that only a "substantial doubt" or "grave uncertainty" will amount to a reasonable doubt, then it violates due process to effectively instruct a jury that no reasonable doubt exists where a guilty interpretation of the evidence merely "appears to be reasonable."

The instructions given in appellant's case were also unconstitutional for a second

reason. Here, the instructions *required* the jury to draw an incriminatory inference when such an inference merely appeared to be reasonable. The jurors were told that they "must" accept such an interpretation. Thus, the instructions operated as an impermissible mandatory, conclusive presumption of guilt upon a finding that a guilty interpretation of the evidence "appears to be reasonable," thereby violating appellant's right to a jury trial. (*Carella v. California* (1989) 491 U.S. 263, 109 S.Ct. 2419; *Sandstrom v. Montana* (1979) 442 U.S. 510, 99 S.Ct. 2450.)

It is no answer to appellant's argument to point out that the instructions demanded that the jury accept a guilty interpretation of the evidence only where such an interpretation "appears to be reasonable" and where an innocent interpretation "appears" to be unreasonable. A defendant is not required to put forward any theory of innocence in order to be entitled to an acquittal. A juror may well conclude from the prosecution's evidence that only incriminatory inferences "appear" to be reasonable and yet also conclude that a conviction is unwarranted because the apparently incriminating inferences are not convincing enough to amount to proof beyond a reasonable doubt.

Justice Mosk has observed that the reasonable doubt standard is designed to embody "the *intensity* of the juror's belief in guilt." (*People v. Brigham* (1979) 25 Cal.3d 283, 300, 157 Cal.Rptr.905, 916 (conc. opn.), original emphasis.) The instructions in the present case did away with the need for such intensity. Indeed, while a conviction in a capital case calls for particularly strong confidence as to the defendant's guilt and the propriety of the death penalty (*Beck v. Alabama, supra*, 447 U.S. at 638, 100 S.Ct. at

2390), the "appears to be reasonable" standard used at appellant's trial authorized a conviction on less proof than is called for in civil cases.

It is likewise no answer to appellant's argument that the concept of reasonable doubt was also explained in CALJIC 2.90 (CT9: 2459, 2580; RT29: 5610-5611) because the instruction here defines reasonable doubt in arcane and confusing terms that are unlikely to be informative to any average juror. (See, *People v. Brigham, supra*, 25 Cal.3d at 292-303, 157 Cal.Rptr. at 911-921 (conc. opn. of Mosk, J.).) Faced with such a vague definition, a juror would naturally look to the far simpler, clearer, and more accessible language of the "appears to be reasonable" instructions. Jurors' reliance on this simpler language was especially likely in the present case because that language was repeated in essentially the same form on two separate occasions during the guilt phase and the jury had the instructions with them during the penalty phase.[19]

The erroneous reasonable doubt/circumstantial evidence instructions require reversal of appellant's conviction. Of course, the error is reversible without any inquiry into the trial evidence, both because it involved the basic standard of proof to be applied at the trial, and thus undermines the accuracy of the verdicts in the case, and because the error operated as an improper mandatory, conclusive presumption. (See *Carella v.*

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[19] Even if one were to assume that the jurors relied on CALJIC No. 2.90 for an understanding of reasonable doubt and also that they would have derived an appropriate understanding of the concept from it, the most that could be concluded is that the instruction conflicted with the language appellant challenges in the circumstantial evidence instructions. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Francis v. Franklin* (1985) 471 U.S. 307, 322, 105 S.Ct. 1965, 1975.)

California, supra, 491 U.S. at 267-273, 109 S.Ct. at 2421-2424 (conc. opn. of Scalia, J.).)

Even if this Court were disinclined to go so far as to declare the error reversible per se in this case, reversal is required nevertheless because the error here cannot be deemed to be harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 87 S.Ct. 824.) The improper instructions were orally delivered twice in the guilt phase and considered by the jury in both phases. Moreover, appellant's case was precisely the kind of case that would be most adversely affected by the improprieties in the instruction: The prosecution case depends *entirely* on circumstantial evidence and inferences drawn therefrom. There were more than enough serious weaknesses and gaps in the prosecution's case to cause a reasonable juror to harbor a reasonable doubt about appellant's guilt and the appropriateness of death as the proper penalty; if the trial court had not instructed the jurors that they "must" accept "apparently reasonable" interpretations of the evidence that pointed toward guilt, that reasonable doubt would have resulted in appellant's acquittal or a life without possibility of parole decision.[20] [21]

The errors in the instructions' explanation of reasonable doubt/circumstantial evidence violated appellant's constitutional rights; thus, reversal of the judgment is

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[20] It should also be borne in mind that, as a result of the erroneous instructions, the wrong standard was used to determine guilt; thus, the deference normally accorded a fact finder's judgment is not appropriate. (*Rogers v. Richmond* (1961) 365 U.S. 534, 546-47; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496; *People v. Frank* (1964) 225 Cal.App.2d 339, 342.)

[21] Although this argument was rejected in *People v. Wilson* (1992) 3 Cal.4th 926, 942-943, 13 Cal.Rptr.2d 259, 268-269, appellant respectfully submits that the issue was wrongly decided and should be reconsidered.

required.

VIII. ARGUMENT: PENALTY PHASE ISSUES

A. THE TRIAL COURT DEPRIVED APPELLANT OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS WHEN IT FAILED TO TELL THE JURY, IN RESPONSE TO ITS QUESTION, THAT APPELLANT WOULD NEVER BE RELEASED ON PAROLE IF LIFE WITHOUT POSSIBILITY OF PAROLE WAS FOUND TO BE THE APPROPRIATE PENALTY; THE DEATH SENTENCE SHOULD BE REVERSED.

1. Introduction

While the jury was deliberating regarding the appropriate penalty, it asked the trial court whether life without possibility of parole really meant that appellant would never be released on parole. (CT10: 2537; RT35: 6338.) Over appellant's objection, and rather than directly telling the jury that life without the possibility of parole means exactly what it says, as appellant urged, the trial court instructed the jury that it was not to speculate on matters of law as to which it had not been instructed. (CT10: 2537; RT35: 6341-6342.)

From the question, it is clear the jury was seriously contemplating a sentence of life without the possibility of parole. But, given the trial court's cryptic, evasive response, the jury rendered the only sentence it -- erroneously -- believed would keep appellant from ever being set free, death. As a matter of law, the trial court's response was error under *Simmons v. South Carolina* (1994) 512 U.S. 154, 114 S.Ct. 2187, was prejudicial and violated appellant's rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16, and 17. Reversal of the death

sentence is required.

2. Factual and procedural background

In his penalty phase closing argument, the prosecutor expressly referred to "future dangerousness" (RT34: 6268) and told the jury to reject defense counsel's argument that life without parole was the appropriate sentence:

> "I'm sure he's going to get up here and tell you life without parole, do you know what that's like? That means my client's never going to get out. He's going to be in prison for the rest of his life. He will never see the light of day again. He's never going to be able to breathe fresh air again.
>
> He's going to be in prison. He's not going to have the niceties of life, have a home, of his family. He won't have his friends. He's not going to have his brothers, his sisters, and other family members.
>
> When he makes that argument, if he does, just remember the real focus -- keep focused. I've been told that by the judge in this case, and it's important for you jurors to keep focused too.
>
> The focus should be on the harm that the defendant caused by his concerted decision-making when he methodically, cruelly, and calmly decided to kill Richard and cruelly and calmly made Yolie beg for her life before he executed her.
>
> ***
>
> He will try and tell you that he will not have a life in prison. There is a life when you're sentenced to life without the possibility of parole. And when there is life, there is hope.
>
> Hope of what? Who knows? Remember the family went all the way for Nathan. How much further will they go? We don't know. Will he try and escape? We don't know.
>
> But he's got the hope, and whatever he can think of in

that mind of his, whatever he can conjure up. He's got hope." (RT34: 6252-6255.)

In defense counsel's closing argument, he argued that life without possibility of parole would protect society and keep appellant behind bars for life. (RT35: 6316, 6325, 6327.) Also, the following colloquy took place:

> "The D.A. and I agree on one thing, and that's that Nathan will die in prison, whether you put him to death or whether he dies 50 years from now, he will die in prison.
>
> Mr. Duarte: I object to that last comment. There has been no testimony that the D.A. agrees to that.
>
> THE COURT: Overruled." (RT35: 6316.)

During deliberations in the penalty phase, the jury asked, "In the event the defendant is given life in prison without the possibility of parole, is he still given a parole hearing and a chance of being released?" (CT10: 2537; RT35: 6338.) Appellant urged the trial court to instruct the jury that "life without possibility of parole means life without the possibility of parole..." (RT35: 6339-6341.) The prosecutor believed that even with a sentence of life without possibility of parole, a defendant "is given a parole hearing. As a result of that parole hearing and also as a result of the powers of the governor, there is a chance he could be paroled. So I don't think the question should be answered in the negative." (RT35: 6338.)

The trial court refused appellant's suggested answer, which accurately and directly responded to the question. Instead, the trial court told the jury:

> "You were instructed on the applicable law and should

not consider or speculate about matters of law on which you were not instructed in arriving at a verdict of death or life in prison without the possibility of parole." (RT35: 6341-634 .)

3. Standard of review

Failure to properly instruct the jury regarding as to the meaning of life without possibility of parole is reversible per se. In *Simmons v. South Carolina, supra,* 512 U.S. 154, 114 S.Ct. 2187, the jury asked whether a life sentence carries the possibility of parole. The trial court did not answer the question and told the jury not to consider parole eligibility. The Court held this answer was error and reversed without undertaking a harmless error analysis. Thus, *Simmons* error is reversible per se.

If, *arguendo,* a harmless error test is applicable, the "harmless beyond a reasonable doubt" standard of *Chapman v. California, supra,* 386 U.S. at 24, 87 S.Ct. at 828 must be applied. Under this exacting standard, appellant's death sentence must be reversed.

4. The trial court should have told the jury that life without possibility of parole means that no parole is possible, ever.

As shown, the prosecutor argued that appellant's future dangerousness mandated death. From the comments of the prosecutor, the jury obviously believed that, even if appellant were to be sentenced to life without possibility of parole, he could nevertheless be released on parole at some future date. The instructions given after penalty phase arguments (RT35: 6329-6336) did not explain that life without the possibility of parole means no parole, ever. And, even if they did, the jury did not understand the law. Thus, given the issue of future dangerousness, protection of society, and the jury's concern that

appellant might one day be paroled, the trial court was obligated to answer the jury's question along the lines suggested by appellant, that "...life without possibility of parole means exactly that -- life without possibility of parole." (RT35: 6340.)

In *Simmons v. South Carolina, supra,* 512 U.S. 154, 114 S.Ct. 2187, the prosecutor argued that the defendant's future dangerousness warranted a death sentence. Defendant requested that the trial court instruct the jury that life without possibility of parole means just that -- he will never be released. The trial court refused to give the instruction. During deliberations, similar to the instant case, the jury asked "'Does the imposition of a life sentence carry with it the possibility of parole?'" Over the defendant's objection, the trial court told the jury:

> "You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The term life imprisonment and death sentence are to be understood in their plan [sic] and ordinary meaning." (512 U.S. at 160, 114 S.Ct. at 2192.)

The defendant argued that the trial court prejudicially erred when it told the jury not to consider the issue of parole. The United States Supreme Court agreed, and reversed:

> "The Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.' *Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393 (1977). In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration. This grievous misperception was encouraged by

the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility, and by the State's repeated suggestion that petitioner would pose a future danger to society if he were not executed. Three times petitioner asked to inform the jury that in fact he was ineligible for parole under state law; three times his request was denied. The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole. We think it is clear that the State denied petitioner due process.

***

...The jury was left to speculate about petitioner's parole eligibility when evaluating petitioner's future dangerousness, and was denied a straight answer about petitioner's parole eligibility even when it was requested.

***

...the trial court admonished the jury that 'you are instructed not to consider parole' and that parole 'is not a proper issue for your consideration.' Far from ensuring that the jury was not misled, however, this instruction actually suggested that parole *was* available but that the jury, for some unstated reason, should be blind to this fact." (512 U.S. at 161-162, 165-166, 170, 114 S.Ct. at 2192-2193, 2195, 2197.)

And, as Justice O'Connor stated in her concurring opinion in *Simmons*:

"When the State seeks to show the defendant's future dangerousness, however, the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case. I agree with the Court that in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention--by way of argument by defense counsel or an instruction from the court--as a means of responding to the State's showing of future dangerousness.

***

...common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole. While it may come to pass that the 'plain and ordinary

> meaning' of a life sentence is life without parole, that the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison. ...
>
> Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury--by either argument or instruction--that he is parole ineligible." (512 U.S. at 2200-2201, 114 S.Ct. at 177-178.)

(Accord, *Kelly v. South Carolina* (2002) 534 U.S. 246, 248, 122 S.Ct. 726, 629; *Shafer v. South Carolina* (2001) 532 U.S. 36, 39, 121 S.Ct. 1263, 1266-1267; *Ramdass v. Angelone* (2000) 530 U.S. 156, 166, 120 S.Ct. 2113, 2119 ["Future dangerousness being at issue, ...due process entitled the defendant to inform the jury of parole ineligibility, either by a jury instruction or in argument..."]; *Tigner v. Cockrell* (5th Cir.2001) 264 F.3d 521, 525 ["a state must give a jury instruction regarding parole ineligibility if (1) the state introduces the defendant's future dangerousness in asking for the death penalty, and (2) the alternative sentence to death is life without the possibility of parole."]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1271, 74 Cal.Rptr.2d 212, 246.)

Here, the prosecutor argued that appellant would be a threat to society if not executed. As noted above, the prosecutor expressly mentioned the concept of future dangerousness and argued appellant "...does not care now about things. What makes you think he's going to care then, later on?" (RT34: 6268.) The prosecutor belittled a hypothetical defense argument that appellant "will never see the light of day again...never...

breathe fresh air again..." (RT34: 6253), thereby implying that appellant might one day be out among society. The prosecutor argued that appellant might "...try and escape...he's got the hope..." (RT 6255), thus urging the jury to impose death in order to avoid the danger to society a future escape would bring. The prosecutor encouraged the jury to "consider the facts from the entire trial..." which included the murder of Richard and Yolanda, and the torching of Tommy's car, which the prosecutor stated was "violent." (RT34: 6238.) The prosecutor argued appellant "...was a violent person" (RT34: 6238), had no remorse (RT34: 6274-6275), and "doesn't care." (RT34: 6276.) Appellant should receive the death penalty because "...[h]e is still part of society." (RT34: 6299.) These arguments, coupled with the argument equating appellant with serial killers (RT34: 6255-6256, 6257), "...invited [the jury] to infer 'that [appellant] is a vicious predator who would pose a continuing threat to the community.'" (*Kelly v. South Carolina, supra,* 534 U.S. at 256, 122 S.Ct. at 733.)

The prosecutor argued that appellant's future dangerousness was a reason to impose the death penalty. Thus, the trial court had a *sua sponte* duty to instruct the jury that life without possibility of parole meant appellant would never be released on parole. (*Kelly v. South Carolina, supra,* 534 U.S. at 256-257, 122 S.Ct. at 733 ["a trial judge's duty is to give instruction sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part."]) Even if the trial court was not required to so instruct *sua sponte*, in the face of the evidence and argument relating to future dangerousness and the jury's question whether appellant would

ever be eligible for parole, the trial court was required to accurately and truthfully answer the question. As stated in *Simmons v. South Carolina, supra,* 512 U.S. at 165, ftn.5, 114 S.Ct. at 2194, ftn 5:

> "...the State may not mislead the jury by concealing accurate information about the defendant's parole ineligibility. The Due Process Clause will not tolerate placing a capital defendant in a straitjacket by barring him from rebutting the prosecution's arguments of future dangerousness with the fact that he is ineligible for parole under state law."

The *Simmons* Court also stated, "[b]ecause truthful information of parole ineligibility allows the defendant to deny or explain the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court." (512 U.S. at 169, 114. S.Ct. at 2196; and see, *Fleenor v. Farley* (S.D. Ind.1998) 47 F.Supp. 2d 1021, 1063 ["...when jury speculation is inevitable because of some particular event, it is better to entrust the jury with complete and accurate information."]; *McClain v. Calderon* (9th Cir.1998) 134 F.3d 1383, 1385 ["jury must be given accurate information to the likelihood that the defendant will be released from incarceration if he were sentenced to LWOP."])

In *People v. Arias* (1996) 13 Cal.4th 92, 172-173, 51 Cal.Rptr.2d 770, 821-822, this Court held that, "[t]he due process deficiencies in the *Simmons* trial do not exist in a California capital penalty trial. Every California penalty jury is specifically instructed that it must choose...death or '...life without the possibility of parole.'" But, in *Arias,* the jury never asked whether life without the possibility of parole really meant life. Here, by stark

contrast, despite the instructions (CT 2539, 2547; RT 6330, 6334), the jury did *not* understand that life without possibility of parole meant just that; otherwise the jury never would have asked its question. As stated in *Shafer v. South Carolina, supra,* 532 U.S. at 53, 121 S.Ct. at 1273-1274, where the jury asked, "Is there any remote chance for someone convicted of murder to become elig[i]ble for parole?," the "jury left no doubt about its failure to gain from defense counsel's closing argument or the judge's instructions any clear understanding of what a life sentence means." Thus, the deficiencies present in *Simmons* and *Shafer* are also present here, i.e., a jury that misunderstood the sentence it was being asked to impose. Although this Court has said, "[t]he term 'life without the possibility of parole' is clear and unambiguous" (*People v. Prieto* (2003) 30 Cal.4th 266, 270, 133 Cal.Rptr.2d 18, 53), the jury's question in this case establishes that this proposition is not necessarily true in every case, and, as a matter of law, was not true in this case.

"[T]he court has an obligation to rectify any confusion expressed by the jury regarding instructions..." (*People v. Smithey* (1999) 20 Cal.4th 936, 1009, 86 Cal.Rptr.2d 243, 244.) Here, the trial court failed in this critical obligation. Indeed, the response to the jury's question "did nothing to ensure that the jury was not misled and may very well have been taken to mean 'that parole was available but that the jury, for some unstated reason, should be blind to this fact.'" (*Shafer v. South Carolina, supra,* 532 U.S. at 53, 121 S.Ct. at 1274.)

Appellant was severely prejudiced as a result of the trial court's misleading answer.

From the jury's question, it can be readily inferred that the jury was seriously considering a sentence of life without possibility of parole, but would not render such a verdict if appellant could be paroled. Certainly, a death sentence was not a foregone conclusion. Appellant introduced substantial evidence at the penalty phase demonstrating that his life should be spared. His young age was a strong factor favoring life. He had no prior convictions. The jury may very well have had a lingering doubt as to appellant's guilt. However, by not directly answering the jury's question with the truth, the jurors were left with the impression that the parties and trial court were trying to hide the "fact" that appellant could be granted parole. But, of course, this is not the case -- appellant would never have been paroled. The trial court's answer did nothing to disabuse the jury of its idea that appellant could eventually be released if sentenced to life without the possibility of parole. Reversal is required per se. In any event, this Court cannot say beyond a reasonable doubt that, if the trial court had given a direct, nonevasive answer, an outcome more favorable to appellant would not have resulted.

5. Conclusion

As a result of the trial court's inaccurate, misleading answer to the jury's question about parole eligibility, appellant's rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16, and 17 were violated. Reversal of the sentence of death is required per se. (*Simmons v. South Carolina, supra,* 512 U.S. 154, 114 S.Ct. 2187.) Even under a harmless error test, reversal

is necessary. (*Chapman v. California, supra,* 386 U.S. at 24, 87 S.Ct. at 828.).

B. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO LIMIT THE VICTIM IMPACT EVIDENCE PRESENTED BY THE PROSECUTION AT THE PENALTY PHASE; REVERSAL IS REQUIRED.

1. Introduction

At the penalty phase, the prosecution presented the victim impact testimony of three witnesses regarding Yolanda Navarro's death. It also presented the testimony of five witnesses regarding Richard Rodriguez's death. (RT31, 32: 5802-5846, 5872-5903, 5908-5964, 6058-6059.) Photographs, documents, and a tape recording were also introduced to demonstrate the incredible impact the deaths of the two young people had on their families.

Defense counsel recognized that victim impact evidence is admissible. (RT32: 5786.) However, he also knew that there comes a point where it becomes inflammatory and highly prejudicial. Therefore, he interposed numerous objections to the mountain of victim impact evidence presented by the prosecution. However, the objections were overruled and the prosecution continued to pile on the evidence.

As a result of the trial court's failure to limit the amount of victim impact evidence, appellant's rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16, and 17 were prejudicially violated. Reversal is necessary.

2. Standard of review

The introduction of inflammatory evidence is reviewed for an abuse of discretion. (See, e.g., *People v. Scheid* (1977) 16 Cal.4th 1, 18, 65 Cal.Rptr.2d 348, 357-358; *People v. Hart* (1999) 20 Cal.4th 546, 615-616, 85 Cal.Rptr.2d 132, 174.)

3. Victim impact evidence may be unfairly prejudicial.

As a matter of law, "victim impact evidence may be deemed inadmissible if it is so inflammatory that it would tend to divert the jury's attention from the task at hand." (*People v. Roldan* (2005) 35 Cal.4th 646, 732, 27 Cal.Rptr.3d 360, 429; accord, *People v. Brown* (2004) 33 Cal.4th 382, 396, 15 Cal.Rptr.3d 624, 635 [introduction of victim impact evidence "not without limits...and 'only encompass evidence that logically shows the harm caused by the defendant.'"]) *Payne v. Tennessee* (1991) 501 U.S. 808, 825, 111 S.Ct. 2597, 2608 recognizes that, where "victim impact evidence...is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (Accord, *United States v. Barnette* (4th Cir.2004) 390 F.3d 775, 799 ["victim impact evidence is subject to the constraints of the Due Process Clause of the Fourteenth Amendment and evidence that 'is so unduly prejudicial that it renders the trial fundamentally unfair' is inadmissible."])

This Court has acknowledged that """the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason.""" (*People v. Robinson* (2005) 37 Cal.4th 592, 651, 36 Cal.Rptr.3d 760, 807.) "The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict

will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of due process." (*Cargle v. State* (Okla.1995) 909 P.2d 806, 830.)

In *Salaza v. State* (Tex.2002) 90 S.W. 3d 330, the defendant was found guilty of murder. At the punishment stage, the prosecution introduced emotional testimony from the 20-year-old victim's parents. A videotape consisting of 140 still photographs recounting the victim's life from babyhood to adulthood and accompanied by heart-wrenching songs was played for the jury. The jury sentenced the defendant to 35 years in prison. On appeal, the Court held that introduction of the music-accompanied video was error. The Court stated:

> "Defendants are not nameless, faceless ciphers in the courtroom. They are physically present and able to offer a human face and evidence of their humanity. But other defendants and juries must also know that the homicide victim is not a faceless, fungible stranger. Every homicide victim is an individual, whose uniqueness the defendant did or should have considered, regardless of whether the murderer actually knew any specific details of the victim's life or characteristics.
>
> On the other hand, the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial. ...[*W*]*e caution that victim impact and character evidence may become unfairly prejudicial through sheer volume.* Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice. ...
>
> ***
>
> [T]he probative value of the video montage was minimal, [and] the risk of unfair prejudicial was [significant].

> Nearly half of the photographs showed Jonathon Bishop as an infant, toddler, or small child, but appellant murdered an adult, not a child. He extinguished Jonathon Bishop's future, not his past. The probative value of the vast majority of these 'infant-growing-into-youth' photographs is *de minimis*. However, their prejudicial effect is enormous because the implicit suggestion is that appellant murdered this angelic infant; he killed this laughing, light-hearted child; he snuffed out the life of the first-grade soccer player and of the young boy hugging his blond puppy dog. The danger of unconsciously misleading the jury is high. While the probative value of one or two photographs of an adult murder victim's childhood might not be substantially outweighed by the risk of unfair prejudice, what the State accurately characterizes as a 'seventeen-minute montage' of the victim's entire life is very prejudicial both because of its 'sheer volume,' and because of its undue emphasis upon the adult victim's halcyon childhood. Because the probative value of much of the video montage is low and the potential for unfair prejudice high, these two factors weigh against admissibility." (90 S.W.3d at 335-336, 337.)

Here, as demonstrated below, the introduction of the unnecessarily extensive, sympathy-inducing, emotion-laden victim impact evidence deprived appellant of his right to a reasoned moral response to the penalty issue and rendered his trial fundamentally unfair.

4. The extensive, unnecessary victim impact evidence and appellant's objections

Robert Rodriguez, Jr., Richard's cousin, testified about his close relationship with the victim and how the victim's death affected him and his family. (RT31: 5796-5805.) Photographs showing the victim and his family at Disneyland, at their grandmother's for Easter, at a wedding, a confirmation, and "growing up" were introduced. (RT31: 5802-5805.) Fourteen-year-old Cynthia Rodriguez, another cousin of Richard's testified

regarding her relationship with him and how his death affected her and the family. (RT31: 5805-5810.) She testified Richard was going to college and "it was special for him." (RT31: 5807.) She testified the funeral was "terrible" and that "little Nicholas...picked all the roses off the grave so he could kiss it." (RT31: 5809.)

Martha Rodriguez, Richard's aunt, testified in a similar fashion. (RT31: 5810-5814.) In emotion-laden testimony, she explained how Richard's death adversely affected her son, three–year-old Nicholas. Nicholas says, "Where's my Nino?" "My Nino supposed to buy me a yellow car." (RT31: 5811-5812.) She explained that they go to the cemetery "a lot" and how three-year-old Nicholas "...cleans the plaque and kisses it..." (RT31: 5812-5813.)

After Martha Rodriguez concluded her testimony, appellant, citing *People v. Edwards* (1991) 54 Cal.3d 787, 1 Cal.Rptr.2d 696 and Evidence Code section 352, argued that the victim impact evidence was becoming inflammatory, cumulative, and unduly prejudicial. After argument, the trial court overruled the objection. (RT31: 5815-5817.)

Robert Rodriguez, Sr., Richard's uncle, gave similar victim impact evidence. (RT31: 5818-5827.) Photographs were introduced showing Richard and family members at an Easter gathering, communion and confirmation family gatherings. He also testified about Disneyland excursions with Richard and how he thought of Richard as a son. Richard was a "real sweet guy." Robert Rodriguez, Sr. testified how he found out about the killing and how he reacted when he saw the bodies at the scene. He presented evidence about the funeral and how he had to borrow money for the ceremony. And,

"...the next morning we went to Yolie's funeral." (*Id.*)

Carmen Evangelista, Richard's mother testified. (RT31: 5829-5846.) She provided evidence of Richard's childhood and of her and her family's relationship with Richard and how his death had severe adverse consequences for them. She also testified regarding photographs of Richard together with other family members. Photographs of Richard graduating from sixth grade and high school, at Disneyland, at his senior prom, at the Sadie Hawkins dance, and other photographs intended to elicit an emotional response were introduced. Evidence was presented regarding awards Richard had won in school. Carmen testified about how she learned of Richard's death. She testified "it hurted [sic] me so much" to view his body. The holidays are not the same without Richard. As a result of Richard's death, "half my heart is not there."

Prior to the prosecution's presentation of victim impact evidence relating to Yolanda Navarro, appellant objected on relevance, hearsay, and section 352 grounds to introduction of a 42-minute-long tape of songs Yolanda had made for her father on the day she died. He argued the tape was "unduly prejudicial in that it...plays to the emotions...and the sympathies of this particular jury." The trial court noted that Yolanda's father had passed away following the incident and queries whether the tape would raise questions whether Yolanda's death "causally relate[d]" to her father's. After argument, the objection was overruled. (RT32: 5860-5870.)

Twenty-six-year-old Ernestine Chavez, Yolanda's older sister, presented victim impact evidence regarding how she and her family were affected by Yolanda's death.

(RT32: 5872-5892.) She testified that Yolanda was her "best friend" and that they were inseparable." They teased Yolanda about her curly hair. Yolanda liked taking care of Ernestine's two young children and was the godmother to Ernestine's four-year-old daughter. The daughter asks, "Where is Yolie?" Ernestine testified about photographs of Yolanda and the children, and others, at Chuck-E-Cheese and at a birthday party for her mother. Yolanda was "a good kid" and was "not disrespectful." She wanted to be a nurse. Ernestine testified about how she learned of the shootings and how, at the scene, she "could see [Yolanda's] hair sticking out, and I saw the skirt she was wearing, and I saw her on the floor." She explained how she told her mother that Yolanda had been shot. Ernestine told of returning to the scene and seeing "pieces of...I guess the skull or I don't know, pieces of her and maybe even possibly Richard." She testified about picking out Yolanda's coffin. When Ernestine sees a young girl with her hair up, she thinks it is Yolanda.

Jonathan Rodriguez, Yolanda's brother, testified about how his sister's death affected him and the family. (RT32: 5892-5903.) He testified that, as they were growing up, he "took care of her, held her in my arms as a baby, changed her, fed her..." He discussed photographs of her when she was a little girl. (People's Ex. 112A-C.) She was "really popular... She was always smiling." Yolanda was very close to Jonathan's children. Over appellant's objection (RT32: 5896), Jonathan again told the jury the heart-wrenching account of how he discovered his sister's bloody body on the sidewalk. He "went up to the girl, and...said, wow, they blew her brains out." He explained how he felt

when he saw Yolanda's body. When their mother learned of the shooting, she got sick and was taken to the hospital. Jonathan testified about the funeral and going to the cemetery with his son. "He asks me why I'm crying, and I say because I miss her, and he starts crying..." Jonathan "was wondering like maybe when [Yolanda] had a baby, I would be holding her baby too..."

Yolanda's mother, Armida Navarro, presented victim impact testimony. (RT32: 5908-5964.) She testified about Yolanda's birth and attendance at school. Yolanda had been in Brownies and Girl Scouts. Yolanda "loved to read." She was on the high school drill team. Yolanda had a close relationship with her siblings and nieces and nephews. Armida testified regarding Yolanda's aspirations -- "She decided she wanted to be a nurse." The Wednesday before the shooting, they bought Yolanda nurse uniforms for a job in the hospital she was supposed to start on Monday. Yolanda was the "most responsible" of the group she associated with. She was "not a gang banger... She was a good girl." Yolanda loved the Disney character Goofy. Armida testified Yolanda "wasn't just my daughter. She was my friend." Yolanda gave Armida a special birthday party for Armida's 48th birthday. Photographs of the party (People's Ex. 110) were shown. Yolanda was "very close" to her father. He would call her "my chuleta...pork chop." Photographs of Yolanda as a young child were shown (People's Ex. 111) as were photos of their last Mother's Day together (People's Ex. 113) and at a graduation party, prom night, and other occasions. (People's Exs. 114A-G, 115 A-E, 121 A-G.) Armida testified about how she learned of Yolanda's death -- "I was beeping her, and she wasn't

answering" (RT32: 5941) -- and how she had to go to the hospital because she got sick. When defense counsel asked to approach the bench or for "five minutes at least," the trial court refused. (RT32: 5943; and see RT32: 5979-5980 ["You allowed her to cry. I asked for a break, and you allowed her to cry in front of these people."].) Armida explained that she can no longer drive near where the shooting occurred. A memorial was set up near the fire station. She testified about the church services, the funeral and the brochure and program for the memorial service at the high school. (People's Exs. 117, 118.) (Appellant objected to these exhibits on the ground they were irrelevant, cumulative, and unduly prejudicial under section 352. The objection was overruled. (RT32: 5945-5959.)) A photograph of the plaque erected at the high school in memory of Yolanda and Richard was shown. (People's Ex. 120.)

Armida told the jury that she "never saw [Yolanda] again. ...[S]he had to have a closed casket." (RT 32: 5943.) She explained that, at the cemetery, "they released all these beautiful white doves...it was so beautiful because the kids were saying, 'Momma, there goes Yoli.'" (RT 32: 5950.) The prosecutor also used Yolanda's father's death against appellant: Armida testified that Yolanda's father died "seven months after Yolie died." She testified, "There's no more holidays... We're missing two of the biggest elements of the family..." Armida testified that Yolanda recorded a tape of Mexican music for her father the weekend she was killed. A portion of the tape (People's Ex. 119) was played for the jury.

Over appellant's objection, the prosecution introduced a photograph of Yolanda's

body at the scene of the shooting. (People's Ex. 122; RT32: 6054-6059.)

The prosecutor's closing argument at the penalty phase exacerbated the inherent inflammatory, prejudicial nature of the sympathy-inducing evidence. For example, he urged the jury to have "pity or sympathy...for the victims in this case, and that being Richard Rodriguez, his family, the impact this case had on the family and Yolanda Navarro's family, and Yolanda Navarro." (RT34: 6231-6232.) He told the jury, "Yolie and Tina had to share a birthday cake for how many years? We showed you a photo when they finally had their own birthday cake. The family couldn't afford it." (RT34: 6248-6249.) Yolanda is "never going to be able to see her friends again and her godchild Christine in this photo with Goofy..." (RT34: 6252-6254.) In page after page of argument designed to evoke pity and sympathy and an emotional reaction from the jury, the prosecutor detailed the victim impact evidence. (RT34: 6277-6299, 6309-6310.) "Every single day...these two families awake they're without Richard, without Yolie..."; "I can't go to Disneyland with my cousin anymore"; "little Nicholas...wanted to kiss that coffin because he missed him..."; "my nino supposed to bring me a yellow car. He's still waiting... Richard used to always take him to McDonalds. Happy meals. Never again." The prosecutor stressed Jonathan's anguish at seeing his sister laying on the bloody sidewalk at the scene and "that they blew her brains out." (RT34: 6289.) The prosecutor, because "we didn't hear from the little kids...," "read" hypothetical letters from little Nicholas to Richard and little Christine to Yolanda. (RT34: 6296-6299.) The prosecutor went on and on reiterating all the victim impact evidence. As a result, the prejudice

inherent in the evidence itself was intensified and enhanced.

5. The emotion-laden victim impact evidence was extremely prejudicial to appellant.

The above-stated account of the prosecution's victim impact evidence is an abbreviated version. The witnesses' actual testimony was given in much greater detail. The witnesses discussed many other aspects of Richard's and Yolanda's lives, from childhood to their deaths. The expansive testimony of the witnesses prevented the penalty verdict from being "a 'reasoned moral response.'" (*People v. Robinson, supra,* 37 Cal.4th at 651, 36 Cal.Rptr.3d at 807.) As in *Salaza, supra,* "[t]he danger of misleading the jury is high." (90 S.W. 3d at 337.) The extensive heart-breaking testimony was not necessary to convey the "victim impact" of their deaths. The numerous photographs, obviously intended to arouse and play to the jurors' emotions and sympathies, were also unnecessary, and compounded the prejudice. Playing a portion of the tape of songs Yolanda had made for her father on the day she died provided an overly-dramatic backdrop to the evidence. The evidence ranged far beyond that necessary to "show[ ] the harm caused by the defendant." (*People v. Brown, supra,* 33 Cal.4th at 396, 15 Cal.Rptr.3d at 635.) The prosecutor's lengthy argument regarding the victim impact evidence was intended to arouse the juror's passions and evoke an emotional rather than a reasoned verdict. Although victim impact evidence is certainly admissible, the overwhelming amount of pity-inducing evidence in the instant case was "so inflammatory that it...divert[ed] the jury's attention from the task at hand." (*People v. Roldan, supra,* 35 Cal.4th at 646, 27

Cal.Rptr.3d at 429.) The evidence was so touching, moving, and heart breaking, that "the jurors were so overwhelmed by emotion that they were unable to make a rational determination of penalty." (*People v. Jurado* (2006) 38 Cal.4th 72, 134, 41 Cal.Rptr.3d 319, 369.)

6. Conclusion

The trial court committed error when it overruled appellant's objections to the cumulative, unduly prejudicial, unnecessarily protracted victim impact evidence. The overwhelming, sympathy-and-pity-inducing victim impact evidence was overly inflammatory. Unlike the situation in *Roldan,* the evidence was *not* "...relatively short and subdued..." The testimony was lengthy and came from many witnesses, at least one of whom was crying during her testimony. As a result of the inflammatory nature of the victim impact evidence, the jury's attention was diverted from the critical task at hand -- whether appellant should live or be put to death. As a result, appellant's rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16 and 17 were prejudicially violated. Reversal is required.

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C. THE ADMISSION OF THE VICTIM IMPACT EVIDENCE WAS IMPROPER IN OTHER ASPECTS.

1. The victim impact evidence was not limited to the facts or circumstances known to appellant when he allegedly committed the crime.[22]

In the words of one commentator:

> "Traditionally, the American criminal justice system has been guided by the principle that personal harm is properly avenged by the State, acting in the name of the individual harmed. Only by interposing the State between the victim and the accused, the thinking has been, can punishment be fairly measured and imposed, and the unseemly and socially destabilizing specter of privatized justice and revenge thereby avoided."

(Logan, Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials, 41 Ariz. L. Rev.143, 143 (1999) [footnotes omitted].) The admission of so-called "victim impact" evidence in some capital proceedings changes this tradition.

The United States Supreme Court first addressed the use of evidence, in capital cases, of the impact of a murder on the victim's family in *Booth v. Maryland* (1987) 482 U.S. 496. In *Booth,* the Court addressed a Maryland statute that permitted the introduction of information relating to the (1) personal characteristics of the murder victim and the emotional impact of the killing on the victim's family and (2) family members' opinions and characterizations of the crime and the defendant. The Court characterized both types

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[22] In *People v. Roldan* (2005) 35 Cal.4th 646, 732, 27 Cal.Rptr.3d 360, 429, this Court, without explanation, stated "[w]e disagree with this argument."

of evidence as irrelevant and rejected the assertion that such information was needed to allow jurors to assess the "gravity" of the offense. (482 U.S. at 504.) According to the *Booth* opinion, victim impact evidence improperly served to refocus the sentencing decision from the defendant and his criminal act to "the character and reputation of the victim and the effect on his family," despite the fact that the defendant was perhaps wholly unaware of the personal qualities and worth of the victim. (482 U.S. at 504.) The opinion explained:

> "One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors are generally aware of these feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant... The admission of these emotionally-charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decision making we require in capital cases."

(482 U.S. at 508-509.)

Four years later, after a change in personnel, the Court reversed *Booth* in *Payne v. Tennessee, supra,* 501 U.S. 808. In *Payne,* a mother and her 3-year-old daughter were killed with a butcher knife in the presence of the mother's 2-year-old son, who survived critical injuries suffered in the same attack. The prosecution presented the testimony of the boy's grandmother regarding how he missed his mother. (501 U.S. at 816.) The Court concluded "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." (501

U.S. at 827.)

In finding no Eighth Amendment bar to victim impact evidence, however, the *Payne* opinion did not mandate the introduction of such evidence, nor did it suggest that such evidence should be admitted in all capital cases. Justice O'Connor stated in her concurrence: "we do not hold today that victim impact evidence must be admitted, or even that it should be admitted." (502 U.S. at 831.) To the extent that such evidence is not constitutionally prohibited, it is left to the statutory scheme of the individual states to determine whether and how to permit the introduction of evidence of this type. The general constitutional guidelines regarding capital sentencing remain unaffected: the need for "extraordinary measures" to ensure the reliability of decisions regarding the punishment imposed in a death penalty trial. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 conc. opn. of O'Connor, J.); see *Gardner v. Florida* (1977) 430 U.S. 280, 305.)

In other words, while *Payne v. Tennessee* holds that the Eighth Amendment does not bar evidence of the victim's characteristics from the penalty phase per se, the matter is still controlled by statutory guidelines and the need to ensure that "the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 423.)

Under the California statutory scheme, there is no "victim impact" sentencing factor. The aggravating evidence at penalty phase is limited to evidence relevant to the specific aggravating factors under Penal Code section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 763, 771-776.) However, in *People v. Edwards* (1991) 54 Cal.3d 787, 835-836,

this Court held that *some* evidence of certain characteristics of the victim can be used as a proper consideration at penalty phase under section 190.3 factor (a) because they might relate to "circumstances of the crime." *Edwards* has come to stand for the proposition that "evidence of the harm caused by the defendant's actions is admissible at the penalty phase under section 190.3, factor (a), as one of the 'circumstances of the crime.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 992.)

This Court has not defined specifically the boundaries for the admission of victim impact evidence,[23] but there appears to be a need for some connection to the defendant's knowledge or perception. (See, e.g., *Edwards, supra,* [Photographs of the victims at the time of the shooting admitted to show their size and stature at the time the defendant saw them]; *People v. Wash* (1993) 6 Cal.4th 215, 267 [Evidence of the victim's plans to join the Army, which she had discussed with the defendant, allowed as relevant to circumstances of the crime.].) Justice Kennard has offered a sensible and logical guideline. In the concurring and dissenting opinion in *People v. Fierro* (1991) 1 Cal.4th 173, 264, Justice Kennard discussed the proper scope of section 190, subdivision (a) in relation to victim traits:

> "As used in section 190.3, 'circumstances of the crime:' should be understood to mean those facts or circumstances

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[23] The *Edwards* opinion noted: "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne* ..." (54 Cal.3d at 835-836.) Since *Edwards*, little further explication of the boundaries of the holding have been offered. In his dissent in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 492 fn. 2, Justice Mosk noted that the Court's *Edwards* language lacked specificity.

> either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase. This definition appears most consistent with the rule of construction that listed items should be given related meaning and with the United States Supreme Court's understanding of the term as reflected in its opinions."

(1 Cal.4th at 264.) Under this interpretation, characteristics of the victim unknown to the defendant should not be admitted as a penalty phase consideration.[24]

Here, the victim impact evidence admitted was unrelated to appellant's knowledge, and unrelated to his moral culpability. There is no evidence that he was aware of any aspect of the victim's lives.

The question before the jury at a sentencing phase involves an assessment of the moral culpability of a defendant. A series of United States Supreme Court opinions have instructed that the question whether an individual defendant should be executed is to be determined on the basis of "the character of the individual and the circumstances of the crime." (*Zant v. Stephens* (1983) 462 U.S. 862, 879; see also *Eddings v. Oklahoma, supra,* 455 U.S. 104, 112; *Enmund v. Florida* (1982) 458 U.S. 782, 801.) Unless the evidence introduced in aggravation has some bearing on the defendant's personal responsibility and

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[24] In considering the scope and logic of the California capital sentencing scheme, it should be noted that the California statutes allow a time and place for a victim's next of kin to express their feelings of loss during a criminal homicide proceeding. That time is not at the penalty-phase trial of a capital case. Rather, that time is when the sentence is formally imposed. Penal Code section 1191.1 mandates notice and an opportunity for the victim's next of kin to "express his, her or their views concerning the crime, the person responsible, and the need for restitution" when final judgment is pronounced. The victim's families were given this opportunity at the imposition of sentence. (See RT39, 7339-7345.)

moral guilt, its admission creates the risk that a death sentence will be based on considerations that are constitutionally impermissible or totally irrelevant to a proper sentencing process.

Justice Kennard's approach to victim impact evidence, discussed in her opinion in *Fierro,* seeks to avoid these problems. This type of evidence should only be allowed if it relates to "circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase." (1 Cal.4th at 264.)

Here, the relationship of the victims with their families were not known to the defendant. Nor did the defendant know anything about the victims. The victim impact evidence admitted here was beyond the knowledge of the defendant and unrelated to his moral culpability. Consequently, the evidence was outside the proper scope of the aggravating evidence.

2. The due process clause, Penal Code section 190.3, subdivision (a), and unforeseeable ex post facto judicial enlargements of criminal statutes.

The Ex Post Facto Clause of the Constitution applies to legislative enactments which retroactively expand criminal liability, but not to judicial decisions which do the same. (*Rogers v. Tennessee* (2001) 532 U.S. 451, 456-462, 121 S.Ct. 1693.) However, there are similarities between such legislative enactments and judicial decisions, and because notions of fundamental fairness can be offended by both, some judicial expansions of criminal liability offend the Fourteenth Amendment's Due Process Clause,

if applied retroactively.

The leading case on such judicial expansions has long been *Bouie v. City of Columbia* (1964) 378 U.S. 247, 84 S.Ct. 1697. As summarized in *Rogers, supra,* the High Court in *Bouie* did as follows:

> "...[W]e considered the South Carolina Supreme Court's retroactive application of its construction of the State's criminal trespass statute to the petitioners in that case. The statute prohibited 'entry upon the lands of another...after notice from the owner or tenant prohibiting such entry....' 378 U.S. at 349, n. 1 (citation and internal quotation marks omitted.) The South Carolina court construed the statute to extend to patrons of a drug store who had received no notice prohibiting their entry into the store, but had refused to leave the store when asked. Prior to the court's decision, South Carolina cases construing the statute had uniformly held that conviction under the statute required proof of notice before entry. None of those cases, moreover, had given the 'slightest indication that that requirement could be satisfied by proof of the different act of *remaining* on the land after being told to leave.' *Id.* at 357.
>
> We held that the South Carolina court's retroactive application of its construction to the store patrons violated due process. Reviewing decisions in which we had held criminal statutes 'void for vagueness' under the Due Process Clause, we noted that this Court has often recognized the '*basic principle that a criminal statute must give fair warning of the conduct that it makes a crime.*" [Citations deleted.] Deprivation of the right to fair warning, we continued, can result both from vague statutory language and from *an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face.* [Cite.] For that reason, we concluded that 'if a judicial construction of a criminal statues is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct, in issue," [the construction] must not be given retroactive effect.' [Citation] We found that the South Carolina court's construction of the statute violated this principle because it was so clearly at odds

> with the statute's plain language and had no support in prior South Carolina decisions. [Citation] (*Rogers v. Tennessee, supra,* 532 U.S. at pp.4560458; italics added.)

This Court has often noted and applied the same principles of federal constitutional law. Examples of its doing so include *People v. Morante* (1999) 20 Cal.4th 403, 431; *People v. Davis* (1994) 7 Cal.4th 797, 811 ("...[A] judicial enlargement of a criminal statute that is not foreseeable, 'applied retroactively, operates in the same manner as an ex post facto law...'"); and *People v. Cuevas* (1995) 12 Cal.4th 252, 275.

Here, the only conceivable basis for admitting the volume and type of victim impact testimony was Penal Code section 190.3, subdivision (a). The year after the decedents' deaths, that portion of the statute read as follows:

> "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." (1995 Ed.)

Nothing in this statute, or in California case law as of October 1994, even hinted that the sheer amount of sympathy-inducing evidence, intended only to bias the jury against appellant, would be admissible as a "circumstance[ ] of the crime of which the defendant was convicted," under section 190.3, subdivision (a). Also, the only High Court case ever to have admitted victim impact evidence included three dissenters and a three-member concurrence which twice noted the *brevity* of the victim impact evidence allowed therein. Moreover, that evidence pertained solely to the physical and emotional suffering

of a *victim* who somehow survived his own horrendous injuries from the knife attack.

Likewise, nothing in section 190.3, subdivision (a) -- or in the two-plus years of California case law between this Court's holding in *People v. Edwards* (1991) 54 Cal.3d 787, 1 Cal.Rptr.2d 696 and the instant crimes -- suggested numerous family members would be allowed to present such emotion-laden testimony. Indeed, the opposite was true. Anyone who had read *Booth* and *Payne* would have concluded such testimony was improper, and thus *not* admissible as a "circumstance[ ] of the crime."

Finally, anyone who had read the opinions in *Payne* would have concluded, despite arguably contrary indications from this Court, that the quantity and type of victim impact testimony allowed at appellant's trial likely would be disapproved by a majority of the United Sates Supreme Court. Hence, such a person would have concluded this quantity of victim impact evidence violated the Sixth, Eighth and Fourteenth Amendments.

Thus: (1) *If* this Court allows this kind of evidence which the trial court allowed here; and (2) *if* this Court rules family members may testify about how much more difficult and painful life now is; and (3) *if* this Court approves the extreme volume of victim impact evidence allowed herein:

Appellant respectfully submits these rulings would be judicial enlargement of Penal Code section 193.3(a), and would be both unforeseeable and indefensible under the law which existed at the time of the crimes. Thus, assuming *arguendo,* the sheer volume of this evidence otherwise can survive scrutiny under federal constitutional law and State law, then as a constitutional imperative under the Fourteenth Amendment's Due Process

Clause, they were still inadmissible at appellant's trial for capital murder. (*Bouie v. City of Columbia, supra,* 378 U.S. at pp.349-356.)

D. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR OF CONSTITUTIONAL MAGNITUDE BY ALLOWING THE PROSECUTOR TO CROSS-EXAMINE DEFENSE WITNESSES REGARDING A SUPPOSED PRIOR BAD ACT OF APPELLANT WHEN THE PROSECUTOR DID NOT HAVE A GOOD FAITH BELIEF THAT THE INCIDENT ACTUALLY OCCURRED; REVERSAL OF THE PENALTY PHASE IS REQUIRED.

1. Introduction

Over appellant's objection, the trial court permitted the prosecutor to cross-examine two defense penalty phase witnesses regarding whether they were aware of a supposed prior incident of violence between appellant and his sister Pauline. The prosecutor, however, did not have a good faith belief that this incident ever occurred. No evidence was ever introduced showing the incident occurred. And, indeed, in conjunction with the new trial motion, Pauline denied the supposed act ever happened.

As will be shown below, it was error to have permitted the prosecutor to ask such damaging questions, which clearly implied that the prosecution had evidence that the acts really did take place. Appellant was severely prejudiced and his rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the California Constitution, article 1, sections 15 and 17 were violated. Reversal of the death sentence is required.

2. Standard of review

A trial court's ruling regarding admission of evidence is reviewed for an abuse of

discretion. (*People v. Jablonski* (2006) 37 Cal.4th 774, 805, 38 Cal.Rptr.3d 98, 123.) Regarding the improper admission of allegedly impeaching evidence, reversal is required where "there is [a] reasonable possibility" that the evidence "could have influenced the jury." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1171, 74 Cal.Rptr.2d 121, 204.) Here, this standard for reversal has been satisfied.

3. Factual and procedural background

William Wright provided testimony as to appellant's good character. (RT33: 6061-6066, 6079.) The prosecutor indicated in a bench conference that he wanted to ask penalty phase witnesses whether they had heard that, "[o]ne of the reasons why Pauline...left was because Nathan had put a gun to her head and threatened to blow her brains out." (RT33: 6067. The prosecutor claimed the evidence of this alleged incident was "in the taped interview of Donna." (*Id.*) Defense counsel objected, stating, "[T]his is completely a surprise to the defendant, number one. Number two, you can't hear that tape..." The prosecutor stated the tape was not clear, but claimed it could be heard. (RT33: 6066-6070.)

The trial court listened to the tape (court exhibit no. 4), but did not make any statement regarding whether it could be understood. (RT33: 6072.) Defense counsel stated the prosecution "[has] never spoken to Pauline to verify this information." (RT33: 6076.) The prosecutor did not disagree. Defense counsel again objected and stated the claimed incident has "never been proven..." (RT33: 6077.) Again, the prosecutor did not disagree. Indeed, the trial court stated regarding the alleged incident, "he [the prosecutor]

can't prove it up," but allowed the prosecutor to question the witnesses "because that's the whole nature of character evidence." (RT33: 6078-6079.)

The prosecutor thereafter asked Wright:

> "Q. Now, had you heard that Nathan wanted to kill one of Pauline's boyfriends because the guy knew too much about him?
>
> A. No, didn't even know Pauline had a boyfriend.
>
> Q. You knew Pauline was her daughter; right?
>
> A. Absolutely.
>
> Q. Again, she was another one of the good kids; right?
>
> A. Yes.
>
> Q. And had you heard that Nathan threw Pauline against the wall?
>
> A. No.
>
> Q. Had you heard that after Nathan threw Pauline against the wall he cut the phone lines?
>
> A. No.
>
> Q. Had you heard that after Nathan threw her against the wall and cut the phone lines, Pauline ran out of the house when she was living with her Aunt Annie?
>
> A. Never heard of any of that. Sounds like a prevarication.
>
> Q. A what?
>
> A. It's called a lie.

Q. Oh.

A. Prevarication.

Q. We'll get to that. We'll get to that. I'm sorry. I never heard that word before. Had you ever heard -- had you heard that after Pauline ran out of the house that Nathan chased her down and confronted her?

A. Never heard of any of that.

Q. And pulled a gun on her?

A. I have never heard of any of that.

Q. Had you heard that he threatened to blow her brains out?

A. Nope. Absolutely have never heard him talk like that to his sister at all." (RT33: 6080-6081.)

As a result of the trial court's ruling, it was necessary for defense counsel to ask a similar question of defense witness Mary Alice Baldwin, appellant's older sister:

"Q. Did Pauline ever tell you that Nathan threw her against the wall or put a gun to her?

A. No, not at all. They were very close. They didn't -- like all kids, we all had little skirmishes, but that was it...

Q. Your sister Pauline, I think the D.A. has indicated that she somehow was a victim of Nathan's anger.

As far as you know, Nathan never was hostile towards Pauline?

A. No, no. He was very protective of her as most of my brothers were." (RT33: 6133.)

In conjunction with appellant's motion for new trial, Pauline testified that appellant

never threatened to kill her, never put a gun to her head, never slammed her against a wall, never pulled the telephone cord out of the wall, and never threatened to blow her brains out. She testified she never told anyone that appellant had so acted. (RT35: 6558-6560.)

4. Permitting the prosecutor to ask the unsupported inflammatory questions about Pauline constituted prejudicial error.

Where the defense presents character evidence, the prosecution may ask "have you heard"-type questions in an effort to impeach the witness. However, asking such a question is not proper where the prosecutor does not have a good faith belief that the inquired-about incident actually occurred. As stated in *People v. Wagner* (1975) 13 Cal.3d 612, 619, 119 Cal.Rptr.457, 460-461:

> "When a defense witness, other than the defendant himself, has testified to the reputation of the accused, the prosecution may inquire of the witness whether he has heard of acts or conduct by the defendant inconsistent with the witness' testimony. In asking such questions, the prosecutor must act in good faith and with the belief that the acts or conduct specified actually took place. The rationale allowing the prosecution to ask such questions (in a 'have you heard' form) is that they test the witness' knowledge of the defendant's reputation." (Citations omitted.)

(Accord, *People v. Payton* (1992) 3 Cal.4th 1050, 1066, 13 Cal.Rptr.2d 526, 536 ["so long as the People have a good faith belief that the acts or conduct about which they wish to inquire actually took place, they may so inquire."]; and see, *People v. Barnett* (1998) 17 Cal.4th 1044, 1170, 74 Cal.Rptr.2d 121, 203 ["...the prosecutor may inquire...so long as the prosecutor has a good faith belief that such acts or conduct actually took place."])

The Court in *People v. Ramos* (1997) 15 Cal.4th 1133, 1173-1174, 64 Cal.Rptr.2d 892,

920 reiterated the rule in *Payton, supra,* and noted that a good faith basis had been established because " the prosecutor had certified records substantiating" the impeaching evidence. (*Id.*)

Regarding impeachment of character witnesses, Federal law is the same: where "the fact inquired about would be injurious to defendant's character...the government [must have] a reasonable, good-faith basis for asking its question." (*United States v. Bruguier* (8th Cir.1998) 161 F.3d 1145, 1149; accord, *United States v. Monteleone* (8th Cir.1996) 77 F.3d 1086, 1090 ["the Government must demonstrate a good faith factual basis for the incidents raised during cross-examination of the witness."]; *United States v. Adair* (11th Cir.1992) 951 F.2d 316, 319 [same]; *United States v. Oshatz* (S.D.N.Y.1989) 704 F.Supp. 511, 514 ["the government can question a character witness about a specific instance of misconduct, provided it believes in good faith that the alleged bad act has a basis in fact..."]) In *Michelson v. United States* (1948) 335 U.S. 469, 480-481, 69 S.Ct. 213, 221, the trial court "...took pains to ascertain...that the target of the question was an actual event... He satisfied himself that counsel was not merely...asking a groundless question to waft an unwarranted innuendo into the jury box."

Here, the prosecutor, because he did not have a good faith belief that appellant actually threatened Pauline, was wafting unwarranted, highly prejudicial innuendoes into the jury box. He had never talked with Pauline or anyone else to verify that the incidents ever occurred. Pauline testified appellant never engaged in such conduct. There were no police reports or other document verifying that the incidents may have happened. The

prosecutor did not have any witness to the alleged events. The only claimed support for the prosecutor's supposed belief that the incidents occurred was an alleged statement by Donna Tucker on the tape of her statement to the police. But, defense counsel stated that the tape was "unintelligible." (RT22: 4141.) The prosecutor agreed that "...it's hard to understand ...they were having problems with the taping system." (RT22: 4142.) The trial court listened to this tape, but did not make any determination as to its intelligibility nor did it find that a good faith belief could be drawn therefrom. There was nothing upon which the prosecutor could base a good faith belief that appellant had ever threatened Pauline. Furthermore, the prosecutor never went to the alleged victim -- Pauline -- to see whether such acts had taken place.

The factually unsupported questions asked by the prosecutor were severely prejudicial to appellant. First, the questions implied that appellant had, indeed, committed the acts, which were exceedingly heartless and violent. Second, the "blow her brains out" question dovetailed neatly with the facts of the underlying case. Believing that appellant had a proclivity for shooting people in the head, the jury would never find that life without parole was the appropriate sentence. Third, the questions reinforced the image of appellant as an incorrigibly violent individual who did not deserve to remain among the living, even in prison. Fourth, the questions showed that appellant was violent long before the commission of the instant offenses; thus, it could be readily inferred that this pattern of dangerous, violent behavior would continue in the future unless death were imposed. Fifth, because the questions involved conduct with his sister, they implied that appellant

was an exceptionally callous individual. Sixth, the trial court told the jury that the factually unsupported inferences from the questions involving Pauline could be used to counter appellant's mitigating evidence. (CT10: 2546; RT35: 6334 ["Evidence was introduced...tending to show the defendant may have committed other crimes. This evidence, if believed, may not be considered by you as evidence of any aggravating factor, but may be considered by you if believed only in evaluating mitigating character evidence."]) The trial court thus approved the jury's use of innuendo and speculation to impose death.

The fact that the witnesses denied ever hearing about the supposed incidents does not reduce the incredible prejudice. As stated in a similar situation in *People v. Wagner, supra,* 13 Cal.3d at 619-620, 119 Cal.Rptr. at 461, where the prosecutor improperly questioned the defendant about specific acts:

> "The impropriety of the prosecutor's conduct in this case was not cured by the fact that his questions elicited negative answers. By their very nature the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question. The rule is well established that the prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.' [Citations.] It is reasonable to assume that, in spite of defendant's negative responses in the instant case, the jurors were led to believe that, in fact, defendant had engaged in extensive prior drug transactions."

Nor did the cautionary instruction telling the jurors that questions alone are not

evidence (CT 2250) to erase the prejudice. As *Wagner* points out, the very fact the prosecutor asked the questions told the jury he had information "which corroborated the truth of the matters in question." (*Id.*) Further, the implications suggested by the prosecutor's questions are so inflammatory and prejudicial that respondent cannot "insulate reversal by pointing to a limiting [or cautionary] instruction ..." (*Werner v. Upjohn Co., Inc.* (4th Cir.1980) 628 F.2d 848, 854; accord, *Francis v. Franklin* (1985) 471 U.S. 307, 324, n.9, 105 S.Ct. 1965, 1976, n.9 ["Cases may arise in which the risk of prejudice inhering in material put before the jury may be so great that even a limiting instruction will not adequately protect a criminal defendant's constitutional rights."]; *Jackson v. Denno* (1964) 378 U.S. 368, 388, n.15, 84 S.Ct. 1774, 1787, n.15 ["'The naive assumption that prejudicial effects can be overcome by instructions to the jury, ...all practicing lawyers know to be unmitigated fiction.'"]) And, as stated in *People v. Gibson* (1976) 56 Cal.App.3d 119, 130, 128 Cal.Rptr.302, 308:

> "It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals... We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner."

5. Conclusion

In *People v. Wagner, supra,* 13 Cal.3d at 621, 119 Cal.Rptr. at 462, the Court stated, "[t]he highly prejudicial implications arising from the questions...on cross-

examination could serve only...to present [the defendant] to the jury as a person of criminal tendencies." This observation is more than apt in the instant case. As in *Wagner,* reversal of the death sentence is required because "...it is reasonably probable that the verdict would have been in defendant's favor if the prosecution had not implied, through improper cross-examination, that the defendant had previously engaged in similar illegal acts." (*Id.; People v. Barnett, supra,* 17 Cal.4th at 1171, 74 Cal.Rptr.2d at 204.)

E. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO INSTRUCT THE JURY SUA SPONTE THAT APPELLANT'S YOUNG AGE COULD ONLY BE CONSIDERED AS A MITIGATING FACTOR.

1. Introduction

"The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." (*Roper v. Simmons* (2005) 543 U.S. 551, 574, 125 U.S. 1183, 1197.) Appellant was young, only 22 years old, when Navarro and Rodriguez were killed. Generally, a defendant's young age would be considered a powerful mitigating factor. But here, the prosecutor argued that appellant's age was an aggravating factor. (34RT 6237-6238.) This Court has held that, in closing argument, the prosecutor may not properly "suggest[ ] that age is to be considered aggravating." (*People v. Visciotti* (1992) 2 Cal.4th 1, 76, 5 Cal.Rptr.2d 495, 540.) To protect appellant's due process rights to a fair trial, the trial court, in the absence of any objection by counsel, was required to sua sponte instruct the jury that appellant's young age was not an aggravating factor and could only be considered as mitigating. But, it failed to do so; thus, the jury improperly and prejudicially

considered appellant's young age as a reason to impose death. As a result of the court's failure to correct the prosecutor's erroneous and prejudicial argument by an appropriate instruction, appellant's rights to due process, a fair trial, a reliable determination of penalty, against cruel and unusual punishment, and to fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the California Constitution, article 1, sections 7, 15, 16 and 17 were prejudicially violated. Reversal is required.

2. <u>The facts</u>

During closing argument, the prosecutor told the jury that appellant's young age was an aggravating factor:

> "Factor (1), the age of the defendant at the time of the crime.
>
> Now, Mr. Hernandez [defense counsel] may get up here and tell you that this is a mitigating factor. Sometimes people might think that this is a mitigating factor, but I think that based on the evidence you have before you, that *this actually would be an aggravating factor.*
>
> And why do I say that? We know that at the time of the murder Nathan Verdugo was 22 years old. He wasn't a kid anymore. He wasn't some 15-, 16-year-old going out and committing two brutal, senseless, double homicides.
>
> We know that he was mature. He was an adult. He was a great person according to his family and his friends and neighbors, which we'll get into.
>
> But the important thing here is that he made choices. He made a lot of choices on October 23rd of 1994. And he was old enough to know what he was doing.

You heard from his family members that he knew the difference between right and wrong, and as a result of this, he must be held fully accountable and responsible for his acts.

And it's time for him to live up to his responsibility. He can never -- he does not like to be cornered. You saw that on the witness stand. He will never admit he did anything wrong.

His own family wouldn't even admit that he was a violent person. You heard when I asked Mary Alice about the torching of the car. If that's not violent, what is it?

This close family. Mary Alice said how close they were.

Mr. Hernandez: I am going to object at this time, Your Honor, regarding the violence.

The Court: Overruled.

Mr. Duarte: And she did not know about this torching of a car? Everybody else knew about it. But, no, not Nathan Verdugo, not my little brother. He's not violent, not Nathan.

So (1), the age, would be an aggravating factor.

Again, it's for you to determine whether it is or not, but I submit to you that based on the evidence, it is an aggravating factor." (34RT 6237-6238; italics added.)

3. Due process and fundamental fairness requires a trial court to sua sponte instruct the jury regarding erroneous, prejudicial argument.

The United States Constitution, pursuant to the Fifth and Fourteenth Amendments, guarantees a criminal defendant due process of law. Regarding due process in general, the Court in *Chambers v. Florida, supra,* 309 U.S. at 236-237, 60 S.Ct. at 477 stated:

"[A]s assurance against ancient evils, our country, in

appellant, who was only 22. Also, although a 22-year-old is considered an adult, this does not mean that he or she is any less impulsive, easily influenced, or is more mature than someone considerably younger.

In *People v. Rodriguez* (1986) 42 Cal.3d 730, 789, 230 Cal.Rptr.667, 705, this Court held that "mere chronological age, a factor over which one can exercise no control, should not of itself be deemed an *aggravating* factor." Thus, under *Rodriguez,* and pursuant to its duty to ensure that appellant received a fair trial, the trial court was required to correct the prosecutor's "age is aggravating" argument by instructing the jury sua sponte that, in the instant case, appellant's age was a mitigating factor, not an aggravating one.

Appellant recognizes that, in *People v. Lucky* (1988) 45 Cal.3d 259, 302, 247 Cal.Rtpr.1, 28, this Court stated, "mere chronological age of itself should not be deemed a mitigating factor." However, in light of *Roper v. Simmons* (2005) 543 U.S. 551, 125 S.Ct. 1183, this holding should be reconsidered and rejected.

In *Roper v. Simmons, supra,* 551 U.S., at 575, 125 S.Ct. at 1198, the United States Supreme Court held that the Eighth Amendment prohibited the execution of an offender who was under 18 years of age at the time of his offense. In *Roper,* the court explained:

> "Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' It has

been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.' In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, '[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." (543 U.S. at 569-570, 125 S.Ct. at 1195-1196; citations omitted.)

Appellant was 22 years old at the time of the offense. Clearly, he acted in an immature, impulsive, irresponsible, morally reprehensible manner. Under *Roper,*

although appellant's relative youth would not preclude the position of the death penalty, it could only properly be considered as a factor in mitigation by the jury. The concerns expressed in *Roper,* leading the Court to conclude those under the age of 18 should not be put to death, mandate that those such as appellant who are still young, at the very least, have that youth treated as factor in mitigation and not used against them at the penalty phase. In light of the prosecutor's argument, the trial court was required to so instruct the jury.

Although this Court has recently addressed a somewhat similar issue in *People v. Brown* (2003) 31 Cal.4th 518, 3 Cal.Rptr.3d 145, that case is not controlling. In *Brown,* this Court held that the defendant was not entitled to the following instruction: "An individual under 18 is not subject to the death penalty. You may consider the fact that Mr. Brown was 19 at the time of his offense." (31 Cal.4th at 564-565, 3 Cal.Rptr.2d at 190-191.) This Court reasoned that the proffered instruction highlighted a single, mitigating aspect of the defendant's age -- that he had only recently become eligible for the ultimate penalty -- and was thus improperly argumentative. First, appellant maintains that it is not simply that he had only recently become eligible for the death penalty that was relevant; it was that this young age itself was a mitigating factor. Second, to the extent *Brown* is read as rejecting this reasoning as well, this holding must be reconsidered in light of *Roper.*

Appellant was prejudiced as a result of the prosecutor's argument, which "carries great weight" with the jury. (*People v. Pitts* (1992) 223 Cal.App.3d 606, 694, 273 Cal.Rptr.757, 809.) It prevented the jury from considering the significant mitigating

aspect of appellant's relatively young age and encouraged the jury to impose death because appellant was young and supposedly "should have known better." Had the trial court corrected the prosecutor and instructed the jury that, in this case, young age could only be considered a mitigating factor, a more favorable outcome surely would have resulted.

5. Conclusion

The failure of the trial court to sua sponte instruct that, as to appellant, his young age was mitigating was error, which deprived appellant of due process, a fundamentally fair penalty trial, and a reliable penalty determination, and requires that his death sentence be set aside. (U.S. Const., Fifth, Sixth, Eighth Amends.' Cal. Const., art.1, secs.7, 15, 16, 17.)

F. AS A MATTER OF LAW THE PROSECUTOR COMMITTED *GRIFFIN* ERROR WHICH PREJUDICED APPELLANT; REVERSAL OF THE DEATH SENTENCE IS NECESSARY.

1. Introduction

Appellant did not testify at the penalty phase. During closing argument, the prosecutor commented on appellant's decision not to testify: "He can't even face you, this defendant, who commits these two brutal, senseless murders." (RT34: 6246.) Based on this improper argument, appellant moved for a mistrial. The trial court denied the motion. (RT34: 6260-6266.) The prosecutor thereafter attempted to cure this constitutionally impermissible argument by telling the jury he "was not commenting at all on his not testifying in the penalty phase." (RT34: 6266.)

However, as a matter of law, the prosecutor *did* comment on appellant's decision to

remain silent at the penalty phase. This reference prejudicially contravened the Supreme Court's holding in *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229 and violated appellant's rights to due process, a fair trial, to remain silent, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16 and 17. Therefore, reversal is necessary.

2. The prosecutor committed *Griffin* error.

The United States Constitution, Fifth and Fourteenth Amendments and the California Constitution, art. I, sec.15, provide that a criminal defendant may not be forced to be a witness against himself. And, it is well-established that "[p]rosecutorial comment which draws attention to a defendant's exercise of his constitutional right not to testify, and which implies that the jury should draw inferences against defendant because of his failure to testify, violates defendant's constitutional right." (*People v. Murtishaw* (1981) 29 Cal.3d 733, 757, 175 Cal.Rptr.738, 651; accord, *Griffin v. California, supra,* 380 U.S. 609, 85 S.Ct. 1229; *Mitchell v. United States* (1999) 526 U.S. 314, 328-330, 119 S.Ct. 1307, 1314-1316; *Estelle v. Smith* (1981) 451 U.S. 454, 101 S.Ct. 1866 [*Griffin* applicable to penalty phase of capital case]; *People v. Ryner* (1985) 164 Cal.App.3d 1075, 1085, 211 Cal.Rptr.140, 146 ["...'*Griffin* forbids either direct or indirect comment upon the failure of the defendant to take the witness stand.'"])

Despite the prosecutor's assertion that he was not commenting on appellant's decision to remain silent, this is precisely what the prosecutor stated to the jury -- "He

can't even face you..." (RT34: 6246.) The prosecutor's argument was a transparent attempt to urge the jury to impose a death sentence by focusing the jury's attention on appellant's decision to stand on his constitutional right not to testify. The prosecutor wanted the jury to infer from his election not to take the stand and provide an explanation that appellant was unworthy of a life without possibility of parole sentence. The prosecutor wanted the jury to infer that a person deserving of life would not remain silent and hide behind his constitutional rights and that because appellant did not testify, he should receive death. However, the inferences the prosecutor tacitly urged the jury to draw violate the state and federal rights of a defendant not to be a witness against himself. There is a "reasonable likelihood that the jury misconstrued or misapplied the words in violation of the [United States Constitution]." (*People v. Clair* (1992) 2 Cal.4th 629, 633, 7 Cal.Rptr.2d 564, 584.) The jury surely saw through the facade of the prosecutor's attempt to correct himself and understood the prosecutor's "can't even face you" argument as a pointed reference to appellant's invocation of his constitutional rights.

The prosecutor's improper argument was prejudicial to appellant. It focused the jury's attention on appellant's decision to remain silent as a reason to impose a death sentence. But this is an irrelevant fact, and one that may not properly be relied on in deciding penalty. Appellant introduced mitigating evidence through testimony of William Wright, (RT33: 6060-6067, 6079-6093), Michael Verdugo (RT33: 6094-6122) and Mary Alice Baldwin. (RT33: 6131-6158 .) By urging the jury to consider appellant's silence, the prosecutor implicitly told the jury that the mitigating evidence was not worthy of

consideration because it had not been corroborated by appellant.

"A prosecutor's closing argument is an especially critical period of trial... Since it comes from an official representative of the People, it carries great weight..." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694, 273 Cal.Rptr.757, 809.) Thus, given the prosecutor's express "He can't even face you..." comment, the instruction given at the close of the trial (there was no curative instruction given as a result of appellant's objection) telling the jury that appellant's election not to testify should not "affect your verdict as to the penalty" (CT10: 2545; RT35: 6333) did nothing to alleviate the prejudice or to cause the jury to disregard the prosecutor's improper argument. (*People v. Gibson, supra,* 56 Cal.App.3d at 130, 128 Cal.Rptr. at 308 ["We live in a dream world if we believe that jurors are capable of hearing such prejudicial [argument] but not applying it in an improper manner."])

Appellant's mitigating evidence and any lingering doubt, balanced against the prosecution's aggravating evidence, was certainly sufficient to justify a sentence of life without possibility of parole. But, when the prosecutor's improper argument urging the jury to consider appellant's silence is factored into the equation, the scales of justice tip unfairly against him.

3. Conclusion

As a matter of law, this Court cannot say beyond a reasonable doubt that, in the absence of the prosecutor's *Griffin* error, a result more favorable to appellant would not have occurred. Therefore, reversal is required. (*Chapman v. California, supra,* 386 U.S.

18, 87 S.Ct. 824.)

G. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR OF CONSTITUTIONAL MAGNITUDE WHEN IT POSTPONED DEFENSE COUNSEL'S RESPONSE TO THE PROSECUTOR'S CLOSING GUILT PHASE ARGUMENT UNTIL THE NEXT DAY.

After the prosecutor concluded his closing argument at the penalty phase (RT34: 6225-6312), the proceedings were adjourned for the day without defense counsel saying one word on appellant's behalf. (RT34: 6312.) Thus, for an entire evening, the jurors had nothing but the prosecutor's damning diatribe against appellant resounding in their heads. As a matter of law, a trial court should not allow any jury to be excused for such a lengthy period without first providing defense counsel, at least in an abbreviated manner, the opportunity to provide the jurors an evenly balanced view of the case until they returned the next day for further argument. As a result, appellant's rights to due process, a fair trial, effective assistance of counsel, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth and Fourteenth Amendments were prejudicially violated. (*Strickland v. Washington* (1984) 466 U.S. 688, 104 S.Ct. 2052.) Appellant's rights under the California Constitution, article 1, sections 7, 15, 16, and 17 were also violated, thus violating his federal right to due process. (*Hicks v. Oklahoma* (1980) supra 447 U.S. 343, 346, 100 S. Ct. 2227, 2229.)

A defendant has the constitutional right under the Sixth and Fourteenth Amendments to present closing argument. (*Herring v. New York* (1975) 422 U.S. 853, 95 S. Ct.

2550; *People v. Green* (1893) 99 Cal. 564, 34 P.231.)[25] Closing argument is a critical phase of every criminal case. As explained in *Herring*:

> "It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. *And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.* See In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368.
>
> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." (422 U.S. at 862, 95 S.Ct. at 2555.)

In the instant case, the prosecutor argued forcefully regarding why appellant should be given the death penalty. The prosecutor sharpened and clarified the issues -- but from *his* viewpoint -- and, at the conclusion of the argument, stated, *inter alia*, "He is a predator. You have seen his animalistic, sadistic passions. He's a self-absorbed, cold blooded, ruthless hunter who caught his prey when they were most vulnerable...the people that Nathan Verdugo hunted were human beings..." (RT34: 6311.) The jurors thereafter went home for the night, with the prosecutor's "cold-blooded" accusation ringing in their

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[25] *Herring* involved a court trial and the trial court's preclusion of any argument.

ears. When they returned the next day, this argument was figuratively set in concrete. As recognized in C.E.B., 1 California Criminal Law Practice (7th ed., 2004) sec. 29.33, p.765, "What holds true for the jury's ability to remember witnesses' testimony also applies to their ability to recall counsel's argument: The more senses appealed to, the greater the likelihood that jurors will understand and remember counsel's interpretation of the evidence." Here, the prosecutor appealed to *all* the jurors' senses and was unfairly advantaged by the utter lack of *any* response by defense counsel for many hours.

No trial court should ever permit a jury to cogitate on the prosecutor's argument -- especially in a capital case -- for an entire evening without giving the defense the opportunity to retort in an effort to blunt the highly inflammatory nature of the prosecutor's argument. The highly prejudicial argument by the prosecutor certainly would be thought about by the jurors over the evening and would predispose the jury to impose death. Counsel should have been given the opportunity to argue at least briefly,[26] regarding why the prosecutor's version of the facts and penalty was not the only version that should be adopted by the jury. Defense counsel could have pointed out the mitigating evidence or lingering doubt and could have stressed to the jury the importance of keeping an open mind over the evening and to not prematurely take the prosecutor's argument to heart.

In *Herring v. New York, supra*, 422 U.S. at 864, 95 S. Ct. at 2556, the Court

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[26] The court adjourned at 3:37 p.m. (RT34: 6312.) Thus, there remained a short period of time for counsel to rebut the prosecutor's argument in a cursory manner before returning the next morning to conclude his closing argument.

stressed the advantages of argument to the trier of fact:

> "[T]here will be cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict. And there is no certain way for [the trier of fact] to identify accurately which cases these will be, until [it] has heard the closing summation of counsel.
>
> The present case is illustrative. This three-day trial was interrupted by an interval of more than two days--a period during which the judge's memory may well have dimmed, however conscientious a note-taker he may have been. At the conclusion of the evidence on the trial's final day, the appellant's lawyer might usefully have pointed to the direct conflict in the trial testimony of the only two prosecution witnesses concerning how and when the appellant was found on the evening of the alleged offense. He might also have stressed the many inconsistencies, elicited on cross-examination, between the trial testimony of the complaining witness and his earlier sworn statements. He might reasonably have argued that the testimony of the appellant's employer was entitled to greater credibility than that of the complaining witness, who, according to the appellant, had threatened to 'fix' him because of personal differences in the past. There is no way to know whether these or any other appropriate arguments in summation might have affected the ultimate judgment in this case. The credibility assessment was solely for the trier of fact. But before that determination was made, the appellant, through counsel, had a right to be heard in summation of the evidence from the point of view most favorable to him."

Here, appellant's trial counsel could readily have made a similar but abbreviated argument in the time remaining on Thursday afternoon. The failure of the trial court to commence the defense argument fixed the prosecutor's version in the jurors' minds and made it extremely difficult, if not impossible, for counsel to later effectively argue that appellant should be given life without the possibility of parole. As a result, appellant's

constitutional rights were violated. This Court cannot say beyond a reasonable doubt that a result more favorable to appellant would not have occurred if counsel had timely responded to the prosecutor's argument before the evening recess. (*Chapman v. California, supra,* 386 U.S. 18, 87 S.Ct. 824.) In any event, it is reasonably probable a result more favorable to appellant would have occurred had prompt argument been made. (*People v. Watson* (1956) 46 Cal.2d 818, 299 P.2d 243.) Therefore, reversal is required.

IX. ARGUMENT: POST TRIAL PROCEEDINGS

A. THE TRIAL COURT PREJUDICIALLY ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS WHEN IT DENIED HIS MOTION FOR NEW TRIAL; REVERSAL IS REQUIRED.

1. Introduction

Donna Tucker was a pivotal prosecution witness. She provided particularly damning testimony against appellant. After trial, defense counsel discovered evidence in the form of letters from Tucker which seriously undermined her credibility. These letters discussed Tucker's "crush" on Detective Markel, and her interest in the reward offered for appellant's arrest. Defense counsel also learned for the first time that the prosecution had paid for Tucker's relocation. Tucker also had psychiatric problems that may have affected her testimony. Thus, appellant filed a motion for new trial. In the motion for new trial, appellant relied on Penal Code section 1181, subdivisions 5 and 8, and relevant case authority, including *Brady v. Maryland, supra,* 373 U.S. 83, 83 S.Ct. 1194. (CT10, 11: 2753-2766, 2773, 2785-2793, 2829-2837, 2852-2867, 2868-2879, 2880-2895, 2897-2902.)

The motion also raised the issues that the trial court prejudicially "refused to allow the defendant to explain the reason why he fabricated the glasses" and that *Brady* error was committed by the prosecution's failure to disclose that it had relocated Donna Tucker. (CT10: 2728-2739.) After a lengthy evidentiary hearing and argument (RT39: 7181-7234), the trial court denied the motion. (CT111: 2904; RT39: 7234-7240.) The trial court's ruling was wrong and constituted a prejudicial abuse of discretion. As a result, appellant's rights to due process, a fair trial, confront the witnesses against him a Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16, and 17 were violated. Reversal is required.

2. The facts

Donna Tucker made over 20 telephone calls to the detectives, had face-to-face meetings with them, and sent them several faxes. (RT22: 4133-4139, 4173-4196, 4264-4266, 4269-4270, 4278.) She also wrote a number of letters to her sister-in-law, Pauline Verdugo, appellant's younger sister. These letters expressed Tucker's attraction to Detective Charles Markel and his interest in her. The letters stated, *inter alia*:

> "But my dreams are about this sweet cop. I'll be seeing him soon, but only to prepare for trial. I know he still likes me a lot too, but gotta wait til after the trial to ask me out. But he watches me from a distance sometimes. That's when I get out my best short skirt or nice dress. Then he lets out a whistle that I can recognize! Ha! Hooked him! I can't wait to start going out with him. He's so damned adorable & sweet.
>
> Sounds like you're having fun with your friends. I'm so glad. Got a swimsuit yet? I can't go swimming for 2-1/2 weeks or so. But I'll find a real good bikini to really reel in

Chuck then! Ha!" (CT 26-54);

"I'm still nuts about C., but he can't come up to me -- if he's even still interested -- until after the trial. He's the male version of me. I really believe he'd be perfect for me. We'll see." (CT 2655); and,

"So guess who was across the way looking at me from another balcony? Chuck! Hey! Still likes me! Guess I made the right choice. Besides I'm still nuts about that cutie. Although, I want my full privacy back. But when I've talked to him about it before, he acts like it's not happening. And he worries so damn much. If I'm upset or sick or angry, he checks on me from a distance. Boy! What a strange way to have to live, waiting until this trial is done. It's kinda weird, kinda annoying, kinda nice & sometimes is kinda like a hug. So strange! Why the hell did I fall for someone during all this mess, when I had decided no one is gonna get close to me?" (CT10: 2656-2657.)

One of the letters mentioned Tucker's fervent hope of being relocated:

"Last week the D.A. & police started the relocation paperwork for me. I hope it's a 2-bdrm. place, with all my junk! And so there's room for you to stay when you want to. And I need to get back to working again and start my new life. It's time to take care of me now. But you are on the top of my priority list and always will be." (CT10 2667-2668.)[27]

On January 16, 1996, seven months before trial started, pursuant to the prosecution's ex parte motion (3 Sup. CT II, 552-557), the trial court signed an ex parte order granting $1,318 in funds for Donna's relocation. (CT1: 242; Sup. CT II, 558.) This evidence was never disclosed to the defense prior to trial. It was only "after the trial" that

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[27] For purposes of the new trial hearing, regarding the letters, the trial court stated "...I will accept for the sake of argument that they were newly discovered." (RT39: 7236.)

the prosecutor told defense counsel that Tucker "was relocated at county expense." At the hearing on the motion for new trial, Tucker testified for the first time that she asked to be relocated. She was relocated in February 1996. (RT37: 6885.)

At the hearing on the motion for new trial, Tucker testified she met Detective Markel in December 1994. (RT37: 6874.) During this time, she was having marital difficulties. (RT37: 6877-6878.) Although she testified there was no improper relationship between her and Detective Markel, she conceded that she had written letters to Pauline regarding just such a relationship. She testified it was her "assumption" that she had "hooked" him and she "would liked to have." She had "personal" feelings for Markel. (RT37: 6879-6883, 6886, 6889-6981, 6898-6905.) Nevertheless, she claimed there was never anything "going on" between her and Detective Markel. (RT37: 6916.)

Regarding the reward, Tucker testified that she told Pauline the money had been promised to her (Tucker) and that the money had been set aside. Tucker was going to use the reward money to take care of Pauline. (RT37: 6707-6711, 6893-6894, 6917.) Tucker did not think that Alice should get any of the reward money. Tucker felt she was entitled to the money. (RT37: 6907-6913.) At the time of the new trial motion, Tucker had not received any reward. (RT37: 6916-6917.) She testified she had not been promised the reward. (RT 6893.)

Pauline acknowledged that she had received letters from Tucker. (RT35: 6452, 6453-6455, 6481.) She first heard about the instant case "through Donna's letters." (RT35: 6485-6486, 6489, 6499, 6503-6504.) Pauline testified that Tucker, in her letters,

"mentioned... Detective Markel. Constantly. At least every other letter..." "Donna is infatuated with Markel and would do anything in her power to be with him." (RT35: 6505-6506, 6554-6555.) Tucker's "whole intention was to be with that police officer." (RT35: 6527.) Tucker was "confused about...her marriage situation..." (RT35: 6510.) Pauline believed Tucker lied at appellant's trial. (RT35: 6530-6531.)

Detective Markel testified that he had a "detective/witness type of relationship" with Tucker. He had nothing but a professional relationship with her. He agreed that he may have mentioned his personal life to her during "small talk." (RT36: 6587-6588, 6611-6613, 6615.) Markel felt that Tucker had a crush on him. (RT36: 6594.)

Detective Markel did not indicate to Detective Stephens that his relationship with Tucker was anything other than professional. (RT36: 6652.) Detective Markel testified that Tucker was providing the police with relevant, useful information about the case. (RT36: 6589-6592, 6599.)

Detective Markel told Tucker about the reward money prior to trial. He told her "...she could be eligible for it." He testified he never promised her the reward and that she said she was "not the least bit interested in it." (RT36: 6595-6598, 6602-6609.)

Detective Kwock testified, there was a reward and there was no claims." Tucker told Kwock she was aware of the reward. (RT36: 6620-6622.) She discussed the reward with the district attorney after the trial, but was not promised she would receive it. (RT36: 6629-6630, 6634-6635.) Tucker told Kwock that she "had some feelings" for Detective Markel and that she had a crush on him. (RT38: 6968-6971.) Detective Stephens

provided similar testimony about the reward. (RT36: 6639-6651.) He also testified no claim had yet been made for the reward. (RT38: 7000-7006.)

Deputy District Attorney Kevin McCormick testified he made a relocation request for Tucker because she "might come to harm, including being potentially killed, as a result of testifying against [appellant]." McCormick never told the defense about the request and is unsure whether he told the prosecutor who actually tried the case. (RT35L 6533-6544.) Donna never told McCormick that she was infatuated with Detective Markel. (RT35: 6544.), [28]

Detective Teague testified he saw Detective Markel and Tucker talking to each other in conjunction with the case. (RT37, 38: 6936-6937, 6994-6995.) It did not appear to Teague that Tucker was "smitten" with Markel. (RT37: 6939.) Teague never promised any reward money to anyone. (RT38: 6998.)

Mary Alice Baldwin testified that, while the police were investigating the case, Tucker and her husband "were talking divorce...[S]he was going to leave Michael..." (RT38: 7078-7080, 7095-7098.) Tucker said she was "falling" for Detective Markel, had a crush on him, and wanted a relationship with him. She also mentioned the reward money, that the police would protect her, and that she was going to go away. Tucker said she was "going to accept" the reward. (RT38: 7082-7087.)

In the motion for new trial, appellant also argued that the evidence regarding the

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[28] Tucker also thought that district attorney, Kevin McCormick, was "very handsome by the way." (CT10: 2679.)

investigation into whether Teague and Markel had been fabricating evidence provided a reasonable, non-incriminatory reason for the creation of Defense Exhibit B, the eyeglasses. (See, sec. VII. A., *supra.)* But, the trial court excluded the evidence. Appellant argued that this exclusion was prejudicial error which warranted a new trial. (RT39: 7192-7201.)

A final issue raised as a ground for a new trial was the exclusion of evidence that Donna Tucker had serious psychiatric problems. (See, sec.VII, C., *supra.*) These problems, of which the jury was unaware, would have adversely affected Tucker's credibility.

3. Standard of review

The denial of a motion for new trial is reviewed for an abuse of discretion. (*People v. Coffman* (2004) 34 Cal.4th 1, 128, 17 Cal.Rptr.3d 710, 823.) "The trial court's factual findings...will be upheld if supported by substantial evidence." (*People v. Drake* (1992) 6 Cal.App.4th 92, 97, 7 Cal.Rptr.2d 790, 792.)

4. The trial court abused its discretion when it denied appellant's motion for a new trial.

a. The law

Due process encompasses the basic right to "a fair trial in a fair tribunal." (*Bracy v. Gramley* (1997) 520 U.S. 899, 904, 117 S.Ct. 1793, 1797; accord, *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266, 137 Cal.Rptr.476, 483 ["A fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of liberty without due process of law."]) Indeed, fair play is the essence of due process. (*Galvan v.*

Press (1954) 347 U.S. 522, 530, 74 S.Ct. 737, 742.)

A critical aspect of due process is the right to confront and cross-examine adverse witnesses. As stated in *Maryland v. Craig* (1990) 497 U.S. 836, 845-846, 110 S.Ct. 3157, 3163-3164:

> "[T]he right guaranteed by the Confrontation Clause includes not only a 'personal examination' ..., but also '(1) insures that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth," [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.'
>
> The combined effect of these elements of confrontation--physical presence, oath, cross-examination, and observation of demeanor by the trier of fact--serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. ...
>
> We have recognized, for example, that face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person." (Citations omitted.)

(Accord, *Chambers v. Mississippi* (1973) 410 U.S. 284, 294-295, 93 S.Ct. 1038, 1045-1046.)

Further "[a] defendant has a fundamental right to present evidence in his own behalf." (*People v. Taylor* (1980) 112 Cal.App.3d 348, 365, 169 Cal.Rptr.290, 300; accord, *Washington v. Texas, supra,* 388 U.S. at 19, 87 S.Ct. at 1923 ["...the right to

present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."])

It is well-settled that a motion for new trial "'should undoubtedly be granted where the showing is such as to make it apparent to the trial court that the defendant has...not had a fair trial on the merits...'" (*People v. Drake, supra,* 6 Cal.App.4th at 98, 7 Cal.Rptr.2d 790, 793, citing *People v. Love* (1959) 51 Cal.2d 751, 757-758, 336 P.2d 169; accord, *People v. Martinez* (1984) 36 Cal.3d 816, 826, 205 Cal.Rptr.852, 857 ["If consideration of the newly discovered evidence is essential to a fair trial and a just verdict, the court should be able to grant a new trial..."]; *United States v. Dickey* (10th Cir.1984) 736 F.2d 571, 595 [new trial should be granted where error "...so prejudicial as to deprive any appellant of his sixth amendment right to a fair trial."]) The newly discovered evidence must "be such as to render a different result probable on a retrial of the cause." (*People v. Martinez, supra,* 36 Cal.3d at 821, 205 Cal.Rptr.at 854.)

Regarding a *Brady* violation, i.e., the prosecution's failure to disclose the relocation of Tucker:

> "To merit relief on this ground, the evidence a prosecutor failed to disclose must have been both favorable to the defendant and material on either guilt or punishment. Evidence would have been *favorable* if it would have helped the defendant or hurt the prosecution, as by impeaching one of its witnesses. Evidence would have been *material* only if there is a reasonable probability that, had it been disclosed to the defense, the result would have been different. The requisite *reasonable probability* is a probability sufficient to undermine confidence in the outcome on the part of the reviewing court."

(*People v. Dickey* (2005) 35 Cal.4th 884, 907-908, 28 Cal.Rptr.2d 647, 664.)

Here, a fair trial required that the jury consider Tucker's amorous interest in Detective Markel, his interest in her or her delusion that he was interested in her and that they would have a romantic relationship after trial, her desire and need for the reward money , and her desire to relocate and the prosecution's assistance in meeting this desire by paying for the relocation. These important, material facts pertained to the crucial issue of her credibility, and their non-disclosure contributed serious *Brady* error. The jury was also entitled to hear appellant's explanation for fabrication of the eyeglasses. Were a jury to hear these favorable, material facts on retrial, it is probable that a different verdict would result.

b. Evidence regarding Donna Tucker is such as to render a <u>different result probable on retrial</u>.

i. <u>Newly discovered evidence</u>

As Detective Teague testified, Tucker was an important witness against appellant. (RT37: 6929-6930.) She testified that appellant made incriminating statements to her about his supposed involvement in the murders. There was a claim that the suspect's car had louvers on its rear window. In conformity with the prosecution's theory of the case, Tucker testified that appellant's car had louvers -- a claim she made for the first time at trial. She testified he knew how to work on cars , which suggested that he was able to fix his CRX in an effort to conceal the damage caused by the collision with the victims' car. Tucker gave dramatic testimony about kneeling down and begging appellant to turn

himself in. She painted herself as the good and pure one in the family. Appellant had the right to have the jury evaluate the evidence taking into account all factors tending to cast doubt on her veracity. Her intense interest in Detective Markel readily gives rise to the powerful inference that she would say what the police wanted her to say in order to curry favor with her potential paramour. The fact that a witness might receive a significant amount of money -- the reward -- upon a defendant's conviction provides a strong motive to lie. And, the fact that the prosecution relocated Tucker was certainly material and favorable evidence: the evidence readily could be seen as a quid pro quo for tailoring her testimony in accordance with the prosecution's version of the case.

ii. Psychiatric problems

At the hearing on the new trial motion, defense counsel also argued that the exclusion of the evidence regarding Tucker's psychiatric problems and stay at a mental hospital warranted a new trial. He argued that this evidence would have affected the jury's evaluation of her credibility, especially when considered in relation to "[t]he fact that she says that she was in love with the detective or had fantasized that he was watching her from afar." (RT39: 7183-7186.) Had the jury known of Tucker's fantasy or delusions with regard to the detective, coupled with her hospitalization for psychiatric problems, a different result would have been probable.

iii. The evidence as to Tucker warranted a new trial.

Clearly, Tucker had a powerful self-interest in testifying against appellant. This self-interest is reflective of significant bias; thus, appellant's constitutional rights

mandated that the jury consider this bias. As stated in *United States v. Abel* (1984) 469 U.S. 45, 52, 105 S.Ct. 465, 469:

> "Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. The 'common law of evidence' allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to 'take the answer of the witness' with respect to less favored forms of impeachment."

(Accord, *United States v. Thompson* (7th Cir.2004) 359 F.3d 470, 475.)

In denying the motion for new trial, the trial court found Tucker's and the officers' testimony credible. (RT 7234.) The trial court agreed that the evidence of Donna's crush, the reward, and relocation was "impeachment evidence," but did not "find the probative value that significant...or [the evidence] that impeaching, especially when it is coupled with the damning statements of the defendant throughout." The trial court stated it did not "think" that the evidence "would have been likely to have resulted in the different verdict." (RT39: 7234-7237.)

Contrary to the trial court's ruling, however, had the jury heard this evidence, it is probable that a different verdict would have resulted, and if there were a new trial, the new jury would certainly reach a different verdict. Tucker was a crucial prosecution witness. Had the jury been presented with the considerable evidence of her bias and self-interest, it

readily could have found that she was not being truthful. Had this occurred, the case against appellant would have been significantly weaker. Appellant denied that he was the perpetrator. Neither fireman could positively identify appellant as the shooter. They said the shooter was about 5', 9" to 5', 10", significantly shorter than appellant, who is about 6', 4". Two men, Paul Escoto and Ray Muro had a motive to commit the crimes, i.e., to avenge the assault on their friend, Mike Arevalo. Muro was about the same height as the shooter. (RT8: 1457.) Fireman Quintana testified the shooter was wearing a copper-colored shirt and black pants. These were *not* the clothes appellant was wearing. Fireman Jones testified that the shooter wore a blue shirt and white pants; although appellant was wearing similar clothes that night, so was one of the victims. Escoto was also wearing white shorts. (RT9: 1563-1564.) The murder weapon was never found. There was no direct proof that appellant's car ever collided with the victim's car. Clearly, there were enough doubts in the case that, when coupled with Tucker's psychiatric problems and incentive to lie or to tailor her testimony, it is reasonably likely a result more favorable to appellant regarding guilt would have occurred had the jury considered the evidence.

c. The trial court's refusal to allow appellant to explain why the eyeglasses were fabricated warranted a new trial.

Appellant's motion for new trial was also based on the claim that "the court refused to allow the defendant to explain the reason why he fabricated the glasses." (CT10: 2733.) It was the prosecution's theory that appellant caused the eyeglasses (Defense Ex. B) to be fabricated in an attempt to argue that he was not the perpetrator because the glasses found

at the scene were not appellant's and that his glasses (i.e., the fabricated ones) had been at the family home. Appellant would have testified that the eyeglasses were fabricated because he believed the detectives were fabricating evidence against him. Appellant argued that a different result would have occurred had appellant's proffered testimony been admitted.

"Efforts of the defendant to...fabricate evidence...may be given in evidence as tending to prove a consciousness of guilt." (*People v. Blau* (1956) 140 Cal.App.2d 193, 213-214, 294 P.2d 1047, 1059.) Here, the jury was so instructed: "If you find that a defendant...attempted to or did fabricate evidence to be produced at the trial, that conduct may be considered by you as a circumstance tending to show consciousness of guilt." (RT29: 5593.) To counter the exceedingly prejudicial inference from the eyeglasses fabrication evidence, appellant should have been allowed to present evidence about his non-inculpatory reasons for the fabrication. As counsel argued (RT39: 7192-7202), appellant was aware the detectives were under investigation for fabricating evidence, and was afraid they were fabricating evidence against him. Appellant would have testified he had the glasses fabricated in an effort to counter the evidence supposedly being fabricated against him. This reason was based on an undisputed fact -- the detectives *were* being investigated. Even though the detectives were eventually cleared (RT2, 18, 20, 23: 384-394, 3565, 3813-3817, 4347; and see RT33: 6122-6123), the jury should have been made aware that they had been under investigation and that this was why the eyeglasses were fabricated.

Fabrication of evidence by the defense certainly shows a consciousness of guilt. But, if such fabrication is undertaken not to cover up one's guilt, but to counter what was believed to be false prosecution evidence, the prejudicial inference disappears. And, had the jury known that there was a factual basis for appellant's belief he was being framed, his credibility regarding other aspects of the case would have been bolstered. Further, the prosecution *was* withholding evidence from the defense that it was obligated to disclose, thus lending further credence to appellant's belief that the prosecution was up to something.

Appellant had the right to present as part of his defense his reasons for having the glasses fabricated. (*Washington v. Texas, supra,* 388 U.S. at 19, 87 S.Ct. at 1923 ["the right to present a defense."]) If this evidence had been presented, it is probable a more favorable outcome would have resulted; thus, the motion for new trial should have been granted.

d. A different penalty phase result would likely occur at retrial.

A more favorable outcome as to the penalty phase also likely would have resulted even though the error occurred in the guilt phase. (See *People v. Holt* (1997) 15 Cal.4th 619, 693, 63 Cal.Rptr.2d 782, 830 [tacitly recognizing that "the cumulative import of guilt phase errors" may be "prejudicial in the penalty phase."]; *Cargle v. Mullin* (10th Cir.2003) 317 F.3d 1196, 1208 ["This commonsense notion that sentencing proceedings may be affected by errors in the preceding guilt phase is not novel...This court has...assessed guilt

phase errors...for prejudicial impact on subsequent capital sentencing proceedings."].) Evidence of Donna's self-interest and bias would have given rise to a lingering doubt as to guilt upon which a finding of life without possibility of parole easily could have been based. A new trial should have been granted to enable appellant "...to demonstrate that the witness was motivated by self-interest, an obvious form of bias, rather than truth." (*United States v. Henderson* (7th Cir.2003) 337 F.3d 914, 918.) And, had the jury known that appellant had a justifiable reason for fabricating the glasses, it would have had a more favorable impression of him as an individual. He would not have been perceived as a schemer but as someone defending himself against prosecutorial excesses.

5. Conclusion

As a matter of law, the trial court prejudicially abused its discretion when it denied appellant's motion for new trial. This ruling violated appellant's rights to due process, a fair trial, confront the witnesses against him, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16, and 17. Reversal is required.

B. THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT REFUSED TO ALLOW HIM TO DISCHARGE HIS RETAINED COUNSEL; REVERSAL IS REQUIRED.

1. Introduction

Appellant had retained Mr. Hernandez to represent him. However, their attorney-client relationship had broken down. Therefore, during the motion for new trial, appellant

sought to discharge Mr. Hernandez and obtain new counsel. (36RT 6738-6746.) The trial court refused to allow appellant to discharge Mr. Hernandez and forced him to proceed with an attorney he did not want and with whom he had a conflict of interest. This ruling was wrong and violated appellant's rights to counsel, due process, effective assistance of counsel, a reliable determination of guilt and penalty, and a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments and the analogous provisions of the California Constitution. Reversal is required.

2. The facts

On Friday, November 20, 1998, during the new trial motion hearing, appellant moved to discharge his retained counsel, Mr. Hernandez. Appellant informed the trial court that he had "a conflict of interest" with counsel. Counsel did not disagree. (36RT 6738, 6745.) Appellant was not discharging counsel for purposes of delay, but because of problems with counsel. Defense counsel had not contacted appellant and appellant could not contact counsel. (36RT 6745-6748; 11CT 2784.) The trial court implicitly denied appellant's motion.

3. Standard of review

"[R]eversal is automatic when a defendant has been deprived of his right to discharge retained counsel and defend with counsel of his choice...[A] criminal defendant need not demonstrate prejudice resulting from a violation of that right." (*People v. Lara* (2001) 86 Cal.App.4th 139, 154, 103 Cal.Rptr.2d 201-213.)

4. Appellant was wrongfully denied his constitutional right to counsel of his choice.

Under the Sixth Amendment, a nonindigent defendant in a criminal case has the right to be represented by counsel of his choice. (*United States v. Gonzalez-Lopez* (2006) _____ U.S. _____, _____, 126 S.Ct. 2557, 2561 ["an element of this [Sixth Amendment] right is the right of a defendant who does not require appointed counsel to choose who will represent him."]; *United States v. Harris* (7th Cir.2005) 394 F.3d 543, 552 ["the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment."]; *Linton v. Perini* (6th Cir.1981) 656 F.2d 207, 208 ["The right to choose one's own counsel is an essential component of the Sixth Amendment."]) And, as stated by the Court in *People v. Lara, supra,* 86 Cal.App.4th at 152, 103 Cal.Rptr.2d at 211:

> "A criminal defendant also has the due process right to appear and defend with retained counsel of his or her choice. 'While we have recognized competing values of substantial importance to trial courts, including the speedy determination of criminal charges, the state should keep to a "necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources [citation]. A criminal defendant's right to decide how to defend himself should be respected unless it will result in "significant prejudice" to the defendant or in a "disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." In other words, we demand of trial courts a "resourceful diligence directed toward the protection of [the right to counsel] to the fullest extent consistent with effective judicial administration."'
>
> In contrast to situations involving appointed counsel, a defendant may discharge his retained counsel of choice at any time with or without cause. 'The right of a nonindigent

> criminal defendant to discharge his retained attorney, with or without cause, has long been recognized in this state [citations], and is governed by Code of Civil Procedure section 284, subdivision 2 [citations]. The right to discharge retained counsel is based on '"necessity in view both of the delicate and confidential nature of the relation between [attorney and client], and of the evil engendered by friction or distrust."' In order to ensure effective assistance of counsel, a nonindigent defendant is accorded the right to discharge his retained attorney: the attorney-client relationship ...involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty." Thus, we conclude that the right to counsel of choice reflects not only a defendant's choice of a particular attorney, but also his decision to discharge an attorney whom he hired but no longer wishes to retain.'"

(Accord, *People v. Ortiz* (1990) 51 Cal.3d 975, 982-983, 275 Cal.Rptr.191, 195-196.)

Of course, "[t]he right to discharge retained counsel is not absolute...[T]he trial court retain[s] discretion to deny such a motion if the discharge (1) would cause '"significant"' prejudice to the defendant, e.g., by forcing him to trial without adequate representation, or (2) was untimely and would result in a '"disruption of the orderly processes of justice unreasonable under the circumstances of the particular case."'" (*Lara, supra,* 86 Cal.App.4th at 153, 103 Cal.Rptr.2d at 211-212; accord, *People v. Munoz* (2006) 138 Cal.App.4th 860, 866, 41 Cal.Rptr.3d 842, 846.) A defendant's fundamental right to defend with counsel of his choice must be "balance[d]...against the disruption, if any, flowing from the substitution." (*Id.*) Here, the trial court failed to properly balance these competing interests.

In denying appellant's motion, the trial court implicitly ruled it was untimely. However, untimeliness alone is not sufficient to deny a counsel substitution motion. The motion must be untimely *and* result in unreasonable disruption. Here, the guilt and penalty verdicts had been rendered. With defense counsel's assistance, new counsel could readily have been brought up to speed on the issues being litigated in connection with the motion for new trial. Further, defense counsel stated that, because of a "veiled threat" from appellant's father, counsel could not continue to properly represent appellant. (36RT 6738-6765; 37RT 6830-6834.) There is no evidence of any unreasonable disruption, which would have occurred had appellant's motion been granted.

The trial court apparently believed that the discharge motion had been made for delay purposes. However, this was the first on-record discharge-of-counsel motion appellant made. Appellant did not have a habit of making discharge requests; thus, no inference of a delaying purpose could properly be drawn from this lone request. From the comments of appellant and Mr. Hernandez, it appears that the discharge request was based on a breakdown in the attorney-client relationship.

Appellant's motion to discharge retained counsel, even if, *arguendo,* made late in the game, would not have caused any *unreasonable* disruption had it been granted. And, there is no evidence the motion was made for purposes of delay. The trial court abused its discretion when it refused to permit appellant to proceed to trial with counsel of his choice.

5. Conclusion

By improperly denying appellant's motion to discharge retained counsel, the trial

court violated appellant's constitutional rights to counsel, due process, effective assistance of counsel, a reliable determination of guilt and penalty, and a fair trial. Reversal is required.

X. ARGUMENT: OTHER ISSUES

A. PENAL CODE SECTIONS 190.3 AND 190.2 VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND PARALLEL PROVISIONS OF THE CALIFORNIA CONSTITUTION.[29]

1. United States Supreme Court cases preclude vagueness in capital sentencing statutes and hold that aggravating factors must meet Eighth and Fourteenth Amendment vagueness requirements.

As the Supreme Court has held, the constitutional infirmity arising from use of a vague aggravating factor in a penalty phase weighing scheme, or with employing a vague capital sentencing system, is that such vagueness:

> "...creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance ...[and] creates the possibility not only of randomness but also of bias in favor of the death penalty..." (*Stringer v. Black* (1992) 503 U.S. 222, 235-236, 112 S.Ct. 1130, 1139.)

(Accord, *Tuilaepa v. California* (1994) 512 U.S. 967, 974, 114 S.Ct. 2630, 2636 ["a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentences process..."])

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[29] Appellant recognizes that this Court has rejected this argument on other occasions. See, e.g., *People v. Osband* (1996) 13 Cal. 4th 622, 702, 55 Cal.Rptr.2d 26, 78. However, he requests this Court to reconsider these issues.

In order to minimize this risk of arbitrary and capricious application of the death penalty, the Supreme Court has long held that a state's aggravating factors must "channel the sentencer's discretion..." by "...clear and objective standards ..." that provide "specific and detailed guidance...," so as to "make rationally reviewable the process for imposing a sentence of death." (*Lewis v. Jeffers* (1990) 497 U.S. 764, 773, 110 S.Ct. 3092, quoting *Godfrey v. Georgia* (1980) 446 U.S. 420, 428, 100 S.Ct. 1759, 1765.) This channeling requirement applies regardless of whether the jury or the trial court determines the penalty because both are governed by the same statutes.

Thus, a capital sentencing scheme may not allot the sentencer complete discretion in deciding whether a defendant should be sentenced to death based merely on the facts of a particular case. (*Furman v. Georgia* (1972) 408 U.S. 238, 239-240, 255-257, 309-310, 314, 92 S.Ct. 2726, 2727, 2735, 2762, 2764.) The trier of fact must be "given guidance about the crime...that the State, representing organized society, deems particularly relevant to the sentencing decision." (*Gregg v. Georgia* (1976) 428 U.S. 153, 196, emphasis supplied [plur. opn., Stewart, Powell and Stevens, JJ.].) *Furman* and *Gregg* require that "the State must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case..." justify the sentence. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305, 107 S. Ct. 1756; emphasis supplied.)

As noted in *Lewis v. Jeffers, supra*, 497 U.S. at 774, 110 S.Ct. at 3099 quoting *Gregg v. Georgia, supra,* 428 U.S. at 189 (internal quotation marks omitted):

> "...[W]here discretion is afforded a sentencing body on a matter

> so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

It follows that a sentencing statute which, as here, merely directs the sentencer to look at vague categories, without attempting any further limitation or guidance, is unconstitutionally vague. (See, e.g., *Maynard v. Cartwright* (1988) 486 U.S. 356, 363, 108 S.Ct. 1853, 1859; *Godfrey v. Georgia, supra*, 446 U.S. at 429-433, 100 S.Ct. at 1765-1767.)

The United States Supreme Court recently applied such an analysis to the penalty phase aggravating factors in a capital case. In *Stringer v. Black, supra*, 503 U.S. 222, 112 S.Ct. 1130, the United States Supreme Court held that, in "weighing states" like California, the Eighth Amendment's prohibition against unconstitutionally vague aggravating factors is applicable not only to aggravating factors designed to narrow the class of death eligible defendants, but also to aggravating factors that are weighed by the jury in making its penalty decision:

> "[I]f a state uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion...
>
> ...Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise

> be by relying upon the existence of an illusory circumstance." (*Stringer v. Black, supra*, 503 U.S. at 235, 112 S. Ct. at 1139; emphasis added.)

Similarly, under the Eighth Amendment, "...a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty." (*Richmond v. Lewis* (1992) 506 U.S. 40, 46, 113 S.Ct. 528, 534.)

Even though the United States Supreme Court has upheld factors (a), (b), and (i) of section 190.3 (*Tuilaepa v. California, supra*, 512 U.S. 967, 114 S.Ct. 2630), the crucial issue is the interaction between *all* factors during the deliberations of the triers of fact. While each discrete factor, standing alone, may appear constitutional, the combined effect of all factors renders the scheme unconstitutional. As stated by Justice Blackmun in his dissent in *Tuilaepa*:

> "[T]he Court isolates one part of a complex scheme and says that, assuming that all the other parts are doing their job, this one passes constitutional muster. But the crucial question, and one the Court will need to face, is how the parts are working together to determine with rationality and fairness who is exposed to the death penalty and who receives it." (512 U.S. at 995, 114 S.Ct. at 2647.)[30]

Further, *Tuilaepa*'s holding that factors (a), (b), and (i) were proper because they are not "propositional" (512 U.S. at 974-975, 114 S.Ct. 2636), even if arguably correct, is *not* applicable to the remaining factors, all of which (except possibly factor (k)) call for a

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[30] *Tuilaepa* did not decide whether section 190.3 as a whole violates the Eighth Amendment. Nor did it consider factors (c), (d), (e), (f), (g), (h), (j) or (k). Thus, it is inapposite regarding these issues. (*San Diego Gas & Elect. Co. v. Superior Court*, (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 754 ["Cases are not authority, of course, for issues not raised and resolved."])

"propositional" answer, e.g., a "yes" or "no" answer to the statutory question "Whether or not..." the factor is present. Depending on the answer, the factor is either aggravating or mitigating. Thus, under *Tuilaepa*, all factors except (a), (b) and (i) are "propositional," and thus violative of the Eighth Amendment.

Appellant submits that the Eighth Amendment's vagueness limitations and the other constitutional guarantees described above apply to the entirety of section 190.3. Section 190.3 leaves the jury unguided in its penalty deliberations, in violation of Appellant's rights to due process, a fair trial, a reliable determination of penalty and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments. Further, the denial of appellant's state-created rights constitutes a denial of due process under the federal constitution. (*Hicks v. Oklahoma, supra*, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229.) Thus, reversal is required.

2. Factor (a) of Penal Code section 190.3, which directed the jury to separately weigh the "circumstances of the crime" as a factor in aggravation, violated the Eighth and Fourteenth Amendments.[31]

Penal Code section 190.3, subdivision (a) states that the sentencer may consider as a factor:

> "The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to section 190.1."

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[31] Appellant acknowledges that this court has previously rejected similar contentions (see, e.g., *People v. Wader* (1993) 5 Cal.4th 610, 663-64, 20 Cal.Rptr.2d 788, 818-819) but respectfully requests that the issue be reconsidered.

Factor (a), the aggravating factor that allowed the jury to impose death based on the "circumstances of the crime," made the penalty-determination process here look dangerously similar to the standardless scheme invalidated in *Furman v. Georgia, supra,* 408 U.S. 238, 96 S.Ct. 2726. Factor (a) failed to identify any aspect of the underlying offense which might aggravate punishment. This factor did nothing to limit the discretion of the jury; instead, it inherently invited the jury to *personally* determine why *it* was most offended by the crime, and to use that perception as a basis for imposing the death penalty, without reference to any objective standard.

Here, the general proscription against use of vague categories in rendering a death judgment, without limitation or guidance, as articulated in *Maynard v.Cartwright, supra,* as well as the specific proscription against use of vague penalty phase aggravating factors in a penalty phase weighing process, as stated in *Stringer v. Black, supra,* were both contravened by factor (a), which is standardless, subjective as to the sentencer, arbitrary, and weighted heavily toward death.[32] A sentencer may not impose a death sentence merely by looking at the circumstances of the crime with no guiding principles whatsoever. Yet factor (a) implicitly allows such standardless, unguided discretion.

This portion of section 190.3 also violated the Eighth Amendment's reliability

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[32] The same arguments also apply to factor (a)'s "existence of any special circumstances found to be true" language, which failed to distinguish this case from any other capital prosecution. First, the use of such a factor is inherently death-biased because one or more special circumstances is present in every penalty phase proceeding. Second, the sentencer was given no guidance or standards by which to evaluate the special circumstances as aggravating factors in this case, i.e., the jury was asked to evaluate the special circumstances in a standardless vacuum.

requirements,[33] state and federal constitutional guarantees of due process, the requirement that a sentencer be given clear and objective standards so that it may have proper guidance in its capital sentencing determination, the requirement that the sentencer not engage in arbitrary or capricious decision-making, the requirement that said process be designed so as to be rationally reviewable, and the prohibitions against cruel and/or unusual punishments under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In *Tuilaepa v. California, supra*, 512 U.S. at 975, 114 S. Ct. at 2637, the Court found that factor (a) was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence." Relying on *Tuilaepa*, this Court has ruled that factors (a), (b) and (i) are constitutional. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 187-190, 51 Cal.Rptr.2d 770, 831-833.) Appellant submits these cases are wrongly decided, result in fundamental, unconstitutional unfairness and, thus, should not be followed by this Court. (*Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 593, n.7, 150 Cal.Rptr.435, 441, n.7 ["'[I]n criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the

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[33] Factor (a) is also unconstitutionally vague under the less rigorous due process clause standards, which require that state statutes give clear notice of the conduct prohibited so that the parties can prepare to meet the charge. (See, e.g., *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 543, 59 S. Ct. 618.) When a state statute contains terms not "susceptible of objective measurement," with no reference to a "specific or definite act," it is unconstitutionally vague under the due process clause. (See, e.g., *Cramp v. Board of Public Instruction* (1961) 368 U.S. 278, 286, 82 S. Ct. 275.) Here, the phrase "circumstances of the crime" gives no notice as to what "specific or definite acts" to rebut in order to forestall a death sentence. Indeed, the phrase is so broad and incapable of definition that it is impossible to rebut this aggravating factor.

accused.'"]; *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 679, 312 P.2d 680, 685 ["...decisions should not be followed to the extent that error may be perpetuated and that wrong may result."])

Further, as Justice Blackmun stated in his dissent in *Tuilaepa*, the use of "...the 'circumstances of the crime' [factor (a)] as an aggravating factor to embrace the entire spectrum of facts present in virtually every homicide...[is] something this Court condemned in *Godfrey v. Georgia*..." (512 U.S. at 988, 114 S.Ct. at 2643.) Further, because factor (a) "...lacks clarity and objectivity, it poses an unacceptable risk that a sentencer will succumb either to overt or subtle racial impulses or appeals ...The California sentencing scheme does little to minimize this risk." (512 U.S. at 992, 114 S. Ct. at 2645.) Clearly, factor (a) encompasses *every* fact which could possibly exist in *any* homicide; thus, it is vague and overly broad.

A vague factor such as factor (a) fails to "...provide[] a principled way to distinguish the case in which the death penalty was imposed from the many cases in which it was not..." and fails to "...differentiate a death penalty case in an objective, even-handed, and substantially rational way from the many murder cases in which the death penalty may not be imposed." *(State v. Middlebrooks* (Tenn. 1992) 840 S.W. 2d 317, 343.) Thus, it is <u>not</u> "a proper narrowing device." (*Id.*) (Accord, *Richmond v. Lewis, supra,* 506 U.S. at 46, 113 S.Ct. at 534 ["...a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty.]; (*Wade v. Calderon* (9th Cir.1994) 29 F.3d 1312.)

Factor (a) does nothing to limit or guide the sentencer's discretion, creates a category so constitutionally vague as to be meaningless, is death-biased and encourages arbitrary, capricious, unreliable and unreviewable decision making, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at p. 192; *Godfrey v. Georgia, supra,* 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-237; *Zant v. Stephens* (1983) 462 U.S. 862, 865, 103 S.Ct. 2733, 2736.)

3. A unitary list of aggravating and mitigating factors which does not specify which factors were aggravating and which were mitigating, which does not limit aggravation to the factors specified, and which fails to properly define aggravation and mitigation, violates the Fifth, Sixth, Eighth and Fourteenth Amendments.

a. Section 190.3's unitary list violates the Fifth, Sixth, Eighth and Fourteenth Amendments.

Penal Code section 190.3 fails to tell the sentencer which factors are aggravating or mitigating, and fails to give any definition or explanation of aggravation which might have served as a narrowing principle in the application of the factors. These errors resulted in unconstitutionally arbitrary and inconsistent sentencing, in several distinct respects.

Permitting the sentencer to use mitigating evidence in aggravation impermissibly allows the imposition of the death sentence in an arbitrary[34] and unprincipled manner, violating the Eighth and Fourteenth Amendments. (See *Gregg v. Georgia, supra*, 428 U.S.

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[34] With no guidance afforded to the sentencer as to how the state deems mental disturbance, victim participation, rage, etc. to be "particularly relevant to the sentencing decision" (*Gregg v. Georgia, supra*, 428 U.S. at 196), identically situated defendants will be sentenced differently depending purely upon the subjective predilections of the sentencer involved.

at 192; *Zant v. Stephens supra*, 462 U.S. at 865.) In addition to this constitutional deficiency, the use of a unitary list also improperly allowed the sentencer to consider the *absence* of statutory mitigating factors as aggravating factors.

The unitary list codified in Penal Code section 190.3 is unconstitutionally vague and therefore gives the sentencer no guidance whatsoever in determining sentence. It permitted and encouraged the prosecutor to manipulate and exploit the putatively mitigating factors to suit his own ends as exemplified by his arguments characterizing mitigating evidence -- appellant's young age -- as aggravating evidence. (RT 6237-6238, 6239-6240, 6246.) It thus reduced the penalty decision process to a standardless, confused, subjective, arbitrary and unreviewable determination in violation of appellant's rights to fair trial, impartial sentencer, reliable determination of penalty, due process and fundamental fairness under the United States Constitution's Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia, supra*, 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.)

b. Section 190.3 allowed the jury to engage in an undefined, open-ended consideration of nonstatutory aggravating factors.

Section 190.3 is unconstitutionally vague because it fails to limit the sentencer to consideration of specified factors in aggravation. Additionally, it fails to guide the sentencer and permits the prosecutor to argue non-statutory matters as evidence in

aggravation.[35] (See, e.g., RT 6299, where the prosecutor argued that appellant should die because "[h]e is still part of society"; this is not a factor listed in section 190.3.) Section 190.3 therefore allows the penalty decision process to proceed in an arbitrary, capricious, death-biased and unreviewable manner, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia, supra*, 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.)

The failure of California's capital sentencing statute to properly guide the sentencer with respect to how it is to consider the various factors is vividly illustrated by factor (i) relating to the matter of defendant's age. Appellant was 22 years old at the time of the incident. The United States Supreme Court has held, per the Eighth and Fourteenth Amendments, that "one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age..." (*Stanford v. Kentucky* (1989) 492 U.S. 361, 375, n.5, 109 S.Ct. 2969, 2978, n.5.) Thus, even the highest court in the land regards "age" as a *factor in mitigation*. Yet in cases where the defendant is not exceptionally youthful, the factor will be used -- as here -- in aggravation under an "he's old enough to know better" theory.

This Court, by contrast, has held that age is a metonym for any age-related matter

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[35] Reviewing courts often find it useful to refer to history and to the current practices of other states in determining whether a state has framed its statutes consistent with the requirements of due process. (*Schad v. Arizona, supra,* 501 U.S. at 631-633, 111 S.Ct. at 2497.)

and may be used either in aggravation or mitigation, because age alone is not a factor over which a defendant may exercise control (*People v. Lucky* (1985) 45 Cal.3d 259, 302).[36] It recently reiterated the proposition that:

> "...the standard instructions [are] adequate despite their failure to identify the aggravating or mitigating character of the various sentencing factors, because such matters "should be self-evident to any reasonable person within the context of each particular case." (*People v. Medina* (1990) 51 Cal.3d 870, 909, quoting *People v. Jackson* (1980) 28 Cal.3d 264, 316.)

Surely the reasoning in *Medina* raises both substantive and procedural due process concerns. Not only does it condone the standardless procedure characterized by ambiguous, undefined terms that, in the Court's view, "should be self-evident... within the context of each case," but it allows a state's most severe sanction to be meted out in an arbitrary, capricious fashion by a sentencer lacking adequate guidance regarding the proper considerations that should be made in determining sentence.

The failure to limit consideration of age to mitigation only invites the sentencer to impose death based on a constitutionally vague factor in a constitutionally arbitrary, unreviewable manner and skews the sentencing process in favor of execution, in violation

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[36] This court has held that age can mitigate or aggravate in the same case, depending on the sentencer's personal perspective. (*People v. Edwards, supra*, 54 Cal.3d at 839.) In some cases, the sentencer might find the defendant's youth indicative of his lack of judgment, and therefore consider it in mitigation. Other sentencers might consider it aggravating, standing alone, or in view of the expense for imprisoning a young person for a life without parole term. Appellant respectfully requests this court reconsider *Edwards* and *Lucky*, because this level of ambiguity demonstrates factor (i) is unconstitutionally vague and arbitrary, under the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at p.192; *Zant v. Stephens, supra*, 462 U.S. at p.865; *Stringer v. Black, supra*, 503 U.S. at 234-236.)

of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Stringer v. Black supra*, 503 U.S. 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.)

c. Section 190.3, subdivision (d) does not define mental illness as a mitigating factor and its "extreme" modifier is unconstitutional. The vagueness of section 190.3 violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Section 190.3 provides that only an "extreme mental or emotional disturbance," per factor (d), or capacity questions involving impairment due to mental disease, defect or intoxication, per factor (h), can be taken into account by the sentencer. As presented, these factors could be considered either aggravating or mitigating. Factor (k) provides that "any other" extenuating circumstance can also be considered. The combination of these factors has three constitutional deficiencies.

First, this Court has previously defined factor (d) as a purely mitigating factor. (*People v. Davenport* (1985) 41 Cal.3d 247, 277-278, 221 Cal.Rptr.794, 813.)[37] The threshold problem is that absent an explicit limitation of factor (d) to mitigation, a sentencer is likely to consider it in aggravation. Mental or emotional instability -- which it appears appellant was certainly suffering from -- is not a factor which the sentencer will automatically or intuitively understand as mitigating in nature; a sentencer is more likely to

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[37] This characterization no doubt arose due to the "belief, long held by this society, that defendants who commit criminal acts that are attributable to...emotional and mental problems, may be less culpable than defendants who have no such excuse." (*California v. Brown* (1987) 479 U.S. 538, 545 [O'Connor, J., conc.].)

conclude that it is indicative of defendant's future dangerousness and is therefore aggravating.[38] This aspect, standing alone, violates the Eighth Amendment.

The language of factors (d) and (h) injected unconstitutional arbitrariness into the penalty decision, using constitutionally vague terminology which impermissibly invites random choices and biases the process toward death. (*Stringer v. Black, supra*, 503 U.S. 234-236.) Such terminology creates an unacceptable risk that there will be no principled distinction between those cases in which the death penalty is imposed and those in which it is not. (*Maynard v. Cartwright, supra*, 486 U.S. at pp.361-362.) A sentence based on such vague considerations is unreviewable, and thus unconstitutional, in violation of the Eighth and Fourteenth Amendments. (*Godfrey v. Georgia, supra*, 446 U.S. at p.428.)

The second problem, assuming the jury understood factor (d) to be mitigating, is its specification that only "extreme" mental illness may be considered. This language has all the constitutional infirmities discussed above,[39] plus others all its own.

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[38] For an example of such attitudes by a judge, see *Miller v. State* (Fla.1979) 373 So.2d 882, 883-885 (Trial judge sentenced defendant to death based on defendant's incurable mental illness rendering defendant a future danger, even after recognizing such disturbances are mitigating); as to public attitudes, see Note, (1979) 12 John Marshall J. Prac. & Proc. 351, 365.

[39] Aggravating factors that include constitutionally vague terms like "extreme" must also meet constitutional vagueness standards. "Extreme" does not provide sufficient guidance to avoid arbitrary and capricious sentencing, provides no principled basis for distinguishing between a death sentence and life without parole, and is death-biased; sentences based on such terms are also unreviewable, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Stringer v. Black, supra*, 503 U.S. 234-236; *Maynard v. Cartwright, supra,* 486 U.S. at 361-362; *Godfrey v. Georgia, supra,* 446 U.S. at 428; see, e.g., *State v. David* (La. 1985) 468 So. 2d 1126, 1129-1130 [holding vague an aggravating factor which allowed the jury to impose death based upon a "significant"

A sentencing entity may not refuse to consider, or be precluded from considering, any relevant mitigating evidence. (*Mills v. Maryland* (1988) 486 U.S. 367, 374, 108 S.Ct. 1860; *Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954 [plur. opn., Burger, C.J.].) The "extreme" adjective preceding "mental or emotional disturbance" creates a barrier to the sentencer's full consideration and assignment of mitigating weight to Appellant's evidence, in violation of these authorities.

This court recognized this limitation in *People v. Ghent* (1987) 43 Cal.3d 739, p.776, 239 Cal.Rptr.82, 106, but held that this constitutional defect was cured by factor (k). (See *People v. Kelly* (1990) 51 Cal. 3d 931, 968-969.) However, a reasonable sentencer could have understood these factors to unconstitutionally limit one another, i.e., that the factor (k) language referred only to any evidence "other" than those areas explicitly discussed earlier in the same instruction, i.e., mental or emotional disturbances. (See *Francis v. Franklin* (1985) 471 U.S. 307, 315-316, 105 S.Ct. 1965.)[40] This undue limitation of the sentencer's ability to consider all relevant mitigating evidence resulted in the imposition of death in violation of the Eighth and Fourteenth Amendments. (*Lockett v. Ohio, supra*, 438 U.S. at

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history of criminal conduct]; *Arnold v. State* (1976) 224 S.E. 2d 386, 391-392 [holding vague an aggravating factor which allowed the jury to impose death based upon a "substantial" history of assaultive convictions].)

[40] Such an interpretation is required by standard rules of statutory construction, e.g., the provisions that: specific rules take precedence over general rules, both as a matter of legal interpretation and common understanding (*Rose v. California* (1942) 19 Cal.2d 713, 723-724; *People v. Breyer* (1934) 139 Cal.App.547, 550) and *expressio unius est exclusio alterius,* the "[e]xpression of one thing is the exclusion of another." (*Black's Law Dictionary* (West Rev. 4th Ed. 1968) p.692; *In Re Lance W.* (1985) 37 Cal.3d 873, 888.)

604.)[41]

The third problem with factor (d) is that the use of the word "extreme" as a modifier invites the sentencer to engage in the sort of subjective, vague, arbitrary, unreviewable determination that has consistently been found constitutionally unacceptable, viz., subjective determinations of what level of mental illness is adequate for consideration. (E.g., *Maynard v. Cartwright, supra*, 486 U.S. at 363-364 ["especially"];[42] *Shell v. Mississippi* (1990) 498 U.S. 1, 4, 111 S.Ct. 313 ["especially"]; *Moore v. Clarke* (8th Cir.1990) 904 F.2d 1226, 1232-1233 ["exceptional"], *cert. den.*, (1992) 504 U.S. 930, 112 S.Ct. 1995.)[43] This effectively ensures that the sentencer, regardless of the mitigating nature of the evidence, will devalue or reject altogether any mitigating mental illness that does not meet their subjective definition of "extreme." Also, what may be "extreme" to one sentencer may be only mild to another, thus further illustrating the vague and arbitrary nature of factor (d).

Factors (d) and (h), individually and considered together, are prejudicially violative

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[41] Alternatively, at a minimum, there is a legitimate basis for finding ambiguity concerning the factors actually considered by the sentencer. (*California v. Brown, supra*, 479 U.S. at 546 [O'Connor, J., conc.].)

[42] Notably, the unconstitutionally vague "especially" is a synonym for "extremely" (Random House Thesaurus, College Edition (1984) p. 257), the adverbial form of "extreme." (Webster's New World Dictionary, Second College Edition (Simon & Schuster 1980), p. 498.)

[43] This constitutional flaw is also found in factor (g)'s "... *extreme* duress or...*substantial* domination..." (Emphasis supplied.) The use of such modifiers in various instructions is unconstitutional, because it conveys to a reasonable sentencer that only the most extreme examples of various potential mitigating factors are to be considered in mitigation.

of appellant's rights to fair trial, to a reliable determination of sentence, to due process, and to fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia, supra,* 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.)

d. The factors listed in section 190.3 are unconstitutionally vague, arbitrary and result in unreliable sentences, in violation of the Eighth and Fourteenth Amendments.

In addition to the factors discussed above, all the remaining factors in section 190.3 fail to pass constitutional scrutiny, both facially and as applied, when measured against the Eighth and Fourteenth Amendments' prohibitions against vagueness and arbitrariness. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia, supra,* 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-236). This is particularly true in view of the heightened level of due process and reliability required in capital cases pursuant to the Eighth and Fourteenth Amendments. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414; *Beck v. Alabama, supra,* 447 U.S. at 637-638 and n.13.)

Both on its face and in the context of appellant's case, section 190.3's factors provided the jury the same unguided, limitless, unreviewable discretion which is constitutionally inadequate. (*Furman v. Georgia, supra*, 408 U.S. at 295 ["...wholly unguided by standards governing that (death) decision..."] (Brennan, J., conc.); ["...capriciously selected random handful upon whom the sentence of death has in fact been imposed.".] (Stewart, J., conc.) *Id.*, at 309-310.)

This conclusion is reinforced by *Stringer v. Black, supra*, 503 at U.S. 234-236, where

the United States Supreme Court held that, in a weighing state (such as California), which requires the sentencer to weigh aggravation against mitigation, vague aggravating factors create a risk of randomness in sentencing decision-making and create a bias in favor of death. (Accord, *Tuilaepa v. California, supra*, 512 U.S. at 973, 114 S.Ct. at 2635 ["The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision."]) The factors listed in section 190.3 fail to guide or limit the sentencer's discretion, create a pro-death bias, create the impermissible risk that vaguely-defined factors would result in the arbitrary selection of appellant for execution, and afford no meaningful basis on which this Court may review the sentence, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Section 190.3's failure to provide proper guidance also violates appellant's rights under state law, thereby implicating his federal right to due process. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346, 100 S. Ct. at 2229.)

e. Section 190.3's failure to require that individual aggravating factors be proven beyond a reasonable doubt, that any determination that aggravation outweighed mitigation be proven beyond a reasonable doubt, and that death be proven the appropriate penalty beyond a reasonable doubt, violated the Eighth and Fourteenth Amendments.

The failure to require proof of aggravating circumstances beyond a reasonable doubt violates a defendant's rights to due process and a reliable determination of penalty under the Eighth and Fourteenth Amendments. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348; *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428; *Blakely v. Washington*

(2004) 542 U.S. 296, 124 S.Ct. 2531.) A defendant's state-created rights are also violated, thus violating his federal right to due process. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346, 100 S.Ct. at 222.) This failure leaves the sentencer with no abstract yardstick by which to measure aggravation or mitigation, and no scale on which to weigh and balance the two. The standards provided by section 190.3 are so vague as to be nearly meaningless, as evidenced by the fact that both the prosecution largely and the defense almost entirely bypassed any discussion of those standards in closing argument.[44]

The closing argument of the prosecutor was focused not so much on whether individual factors in aggravation had been shown, or what weight was to be attributed to those factors, individually or cumulatively, but on a standardless determination that appellant deserved death because a horrible crime had been committed. This lack of guided discretion is analogous to one of the constitutional errors condemned in *Beck v. Alabama,*

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[44] In *State v. Wood* (Utah 1982) 648 P.2d 71, the Utah Supreme Court reviewed a capital conviction where the trial court had found that a single aggravating factor outweighed three mitigating factors. The Utah Supreme Court held that proof beyond a reasonable doubt was required, and set forth the following standard for future capital case juries: "After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and *you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.*" (*Id.*, at p. 83; emphasis supplied.)

The Utah Supreme Court explained that this standard means that the sentencer must "...have no reasonable doubt as to...the conclusion that the death penalty is justified and appropriate after considering all the circumstances." (*Id.*, at p. 84.)

supra, (1980) 447 U.S. 625, 643 n.19, 100 S. Ct. 2382, 2392, n.19.[45] The jury here had no adequate guidelines or standards by which to measure or weigh the evidence presented by either side. Thus, each side was faced with an amorphous, subjective, individual decision-making process that failed to comport with constitutional demands.[46]

Section 190.3's factors and the related CALJIC instructions were unconstitutionally vague, failed to direct or limit the jury's discretion, encouraged the jury to act in a constitutionally arbitrary, capricious, unreviewable manner and skewed the sentencing process in favor of execution, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra,* 428 U.S. at 192; *Godfrey v. Georgia, supra*, 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462

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[45] In *Beck*, the Alabama capital statutes provided for the jury to hear guilt phase evidence and render a verdict "...either convicting the defendant of the capital crime, in which case it is required to impose the death penalty, or acquitting him..." (*Beck v. Alabama, supra*, 447 U.S. at 629.) Therefore, although that Alabama procedure is different than California's, the unconstitutional dilemma posed to the *Beck* jury and the constitutional problem for the trial court here were similar: "...the Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to *whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision...*" (*Id.*, 447 U.S. at 640, emphasis supplied.)

[46] Even assuming, *arguendo*, that the beyond a reasonable doubt standard was not required to establish the existence of any aggravating circumstance relied upon to impose a death sentence, or that death was the appropriate sentence, or that the aggravating circumstances outweighed mitigating circumstances, section 190.3 nevertheless violates the Fifth, Sixth, Eighth and Fourteenth Amendments by failing to specify any burden of proof or burden of persuasion at all.

U.S. at 865; see, *State v. Wood, supra,* (Utah 1982) 648 P. 2d 71, 83.)[47]

Criminal cases merit the highest standard of proof known to the law, i.e., proof beyond a reasonable doubt:

> "...the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. The stringency of the beyond a reasonable doubt standard bespeaks the weight and gravity of the...interest affected,..., society's interest in avoiding erroneous convictions, and a judgment that those interests together require that society impose almost the entire risk of error upon itself. ...In cases involving individual rights, whether criminal or civil, the standard of proof at a minimum reflects the value society places on individual liberty." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755-756, 102 S.Ct. 1388], quoting *Addington v. Texas* (1979) 441 U.S. 418, 423, 415, 99 S.Ct. 1804; internal quotation marks and brackets omitted.)

The imposition of a death sentence represents the ultimate imposition on individual liberty. Therefore, the Fourteenth Amendment's general concepts of due process and equal protection, and the Eighth and Fourteenth Amendment's heightened level of due process and reliability in capital cases (*Ford v. Wainwright, supra,* 477 U.S. at 414, 106 S. Ct. at 2595; *Beck v. Alabama, supra*, 447 U.S. at 637-638 and n.13), as well as the California Constitution, mandate the use of the beyond a reasonable doubt standard in all decisions by capital case sentencers. A similar conclusion obtains under the California Constitution as well.

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[47] Appellant is aware that this court has rejected similar contentions (*People v. Rodriguez,* (1986) 42 Cal. 3d 730, 777-779; *People v. Allen* (1986) 42 Cal. 3d 1222, 1285), but respectfully requests that the issue be reconsidered.

f. The failure to require that the jury base any death sentence on written findings regarding individual aggravating factors violated the Fifth, Sixth, Eighth and Fourteenth Amendments.[48]

The California death penalty statute does not require the sentencer to base its decision on any written findings. As a result, appellant's constitutional rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated by the failure to require that the jury present written findings on its decision regarding the applicable aggravating factors relied on in determining the appropriate sentence. This failure also violates appellant's rights under state law, thereby violating his federal right to due process. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346, 100 S. Ct. at 2229.)

Section 190.3 fails to direct or limit the sentencer's discretion, encourages it to act in a constitutionally arbitrary, capricious, unreviewable manner and skews the sentencing process in favor of execution, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia, supra*, 446 U.S. at 428-429; *Stringer v. Black, supra,* 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.) This is particularly so as to Appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, reliability in the determination that death is appropriate, and meaningful appellate review. (*California v. Brown, supra*, 479 U.S. at 543; *Gregg v.*

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[48] Appellant is aware that this court has previously rejected similar contentions (e.g., *People v. Allen, supra*, 42 Cal.3d at 1285), but respectfully requests that the issue be reconsidered.

Georgia, supra, 418 U.S. at 195.)

The jury was not required to expressly find which factors in aggravation had been proven or why the aggravating factors allegedly outweighed the mitigating factors. In the absence of guided discretion, it could have made its decision to impose death using any of the improper considerations described above or any number of other factors unrelated to section 190.3. Absent a requirement of written findings, the propriety of the judgment here cannot be reviewed in a constitutional manner. Lack of such a requirement creates a constitutionally impermissible risk that the sentencer will rely on factors constituting improper aggravation, or discount proper mitigation, thereby resulting in an unreliable sentence. Written findings would obviate this prejudicial problem.

g. The provisions of California's death penalty statute fail to provide for comparative appellate review to prevent arbitrary, discriminatory or disproportionate imposition of the death penalty, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

Some states that sanction capital punishment require comparative, or "inter-case," appellate sentence review. Georgia, for example, requires that the state Supreme Court determine whether "...the sentence of death is excessive or disproportionate to the penalty imposed in similar cases." (Ga. Stat. Ann. section 27-2537(c).) This provision was approved by the United States Supreme Court, which reasoned that it guards "...further against a situation comparable to that presented in *Furman v. Georgia, supra*]..." (*Gregg v. Georgia, supra*, 428 U.S. at 198.) Toward the same end, Florida has judicially "...adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida*

(1976) 428 U.S. 242, 259, 96 S.Ct. 2960.)

Section 190.3 does not require that either the jury, trial court, or this Court undertake inter-case proportionality review -- a comparison between this and other capital cases regarding the relative proportionality of sentence imposed. (See *People v. Fierro* (1991) 1 Cal. 4th 173, 253.) The California sentencing scheme therefore fails to guard "...against [the] situation comparable to that...in *Furman*..." (*Gregg v. Georgia, supra*, 428 U.S. at 198) i.e., unbridled discretion, arbitrariness, and caprice.

Furman raised the question of whether, within a category of crimes for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. The California capital case review system contains the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192, citing *Furman v. Georgia, supra*, 408 U.W. at 313 (White, J., conc.).)

The California capital punishment scheme also violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia supra*, 446 U.S. at 428-429; *Stringer v. Black, supra,* 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865. Additionally, the Eighth and Fourteenth Amendments require a heightened level of due process and reliability in capital cases. (*Ford v. Wainwright, supra*, 477 U.S. at 414; *Beck v. Alabama, supra*, 447 U.S. at 637-638 and n.13.) Finally, the California scheme violates appellant's

right to equal protection, under the Fourteenth Amendment, because such review is afforded non-condemned inmates, per section 1170, subdivision (f).[49]

Even assuming, *arguendo*, that appellant has no constitutional right to inter-case review, appellant is entitled to equal treatment vis-a-vis other similarly situated inmates convicted of crimes occurring at the same time as those of which he has been convicted, i.e., the benefit of a determination of whether his "...sentence is disparate in comparison with the sentences in similar cases." (*Ibid.*)

h. California's failure to provide penalty phase safeguards violates the Eighth and Fourteenth Amendments.[50]

The United States Supreme Court has repeatedly recognized that the death penalty is qualitatively different in nature from any other punishment. Therefore, capital case sentencing systems may not create a substantial risk that a death judgment and execution will be inflicted in an arbitrary and capricious manner. (*Gregg v. Georgia, supra*, 428 U.S. at 189; *Godfrey v. Georgia, supra*, 446 U.S. at 431.) *Furman* and *Gregg* require that "...the State must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case..." justify the sentence. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305, 107 S.Ct. 1756, 1774.) Accordingly,

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[49] Appellant is aware that this court has previously rejected similar contentions (*People v. Marshall* (1990) 50 Cal.3d 907, 945, 269 Cal.Rptr.269, 289; *People v. Allen, supra*, 42 Cal.3d at 1285, 232 Cal.Rptr. at 889), but respectfully requests that the issue be reconsidered.

[50] Appellant recognizes that this court has rejected similar arguments previously (e.g., *People v. Sully* (1991) 53 Cal.3d 1995, 1251-1252), but respectfully asks that it reconsider the points at issue, both facially and as applied in this case.

penalty phase aggravating factors in "weighing states," such as California, may not be unconstitutionally vague. (*Stringer v. Black, supra,* 503 U.S. at 234-236.)

The safeguards such as written findings as to the aggravating factors found by the sentencer, proof beyond a reasonable doubt of the aggravating factors, unanimity on the aggravating factors (when there is a jury), a finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt, a finding that death is the appropriate punishment beyond a reasonable doubt, a procedure to enable the reviewing court to meaningfully evaluate the sentencer's decision, and definition of which specified relevant factors are aggravating and which are mitigating, greatly lessen the chance of an arbitrary or capricious death judgment. These safeguards reflect attempts to eliminate the use of unconstitutionally vague penalty phase factors, eliminate death-biased proceedings, eliminate arbitrary and capricious death judgments and executions, and to make death judgments meaningfully reviewable on appeal. California's system singularly fails to employ any of these safeguards, or to employ alternative but comparable measures. Therefore, California's capital case system is unconstitutional on its face and, as applied, in violation of appellant's rights to a fair trial, a reliable determination of sentence, due process and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments.

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i. The California statutory scheme fails to perform the constitutionally required function of narrowing the population of death-eligible defendants, in violation of the Eighth and Fourteenth Amendments.

i. Introduction

To avoid constitutionally arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions:

> "...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, supra*, 462 U.S. at 877.)

(Accord, *Tuilaepa v. California, supra*, 512 U.S. at 972, 114 S.Ct. at 2635 ["...the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder."]) California's capital statute fails to comport with these requirements.

ii. Section 190.2's numerous special circumstances are so broad as to include nearly every first degree murder and therefore fail to perform the constitutionality required narrowing function, in violation of the Eighth and Fourteenth Amendments.

The special circumstances included in section 190.2 are not only numerous but also so broad in definition as to encompass nearly every first degree murder. Section 190.2's all-embracing special circumstances were therefore created with an intent directly contrary to the "...constitutionally necessary function at the stage of legislative definition: [that] they circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens, supra,* 462 U.S. at 878.) In *People v. Bacigalupo* (1993) 6 Cal.4th 457, 465, 24 Cal.Rptr.2d 808,

812, this Court addressed the "narrowing" aspect of capital sentencing in general:

> "'Narrowing' pertains to a state's 'legislative definition' of the circumstances that place a defendant within the class of persons eligible for the death penalty. To comport with the requirements of the Eighth Amendment, the legislative definition of a state's capital punishment scheme that serves the requisite 'narrowing' function must 'circumscribe the class of persons eligible for the death penalty.' Additionally, it must afford some objective basis for distinguishing a case in which the death penalty has been imposed from the many cases in which it has not. A legislative definition lacking 'some narrowing principle' to limit the class of persons eligible for the death penalty and having no objective basis for appellate review is deemed to be impermissibly vague under the Eighth Amendment." (Citations omitted.)

(Accord, *Godfrey v. Georgia, supra,* (1980) 446 U.S. 420, 428, 433, 100 S. Ct. 1759, 1764, 1767.)

In *Godfrey v. Georgia, supra*, the United States Supreme Court reviewed a Georgia capital murder statute which sanctioned the death penalty for a murder found to have been "...outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." (*Godfrey v. Georgia, supra*, 446 U.S. at 422.) Despite Georgia's argument that it had applied a "narrowing construction" to that statute (*Id.*, at 429-430), the plurality opinion held:

> "In the case before us the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" (*Id.*, at 428-429.)

Section 190.2 seemingly circumvents the *Godfrey* problem because it does not contain one special circumstance embracing "almost every murder," like the Georgia statute; nevertheless, section 190.2 has many individual special circumstances, which together embrace almost every murder. Such a scheme is contrary to the pertinent principle of *Godfrey* and the Eighth Amendment:

> "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" (*Furman v. Georgia, supra*, 408 U.S. at 313 [conc. opn., White, J.]; accord, *Godfrey v. Georgia, supra*, 446 U.S. at 427 [plur. opn.]; (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

Viewed in its proper light, section 190.2 conflicts with this Eighth Amendment principle by purposefully encompassing almost every murderer. Moreover, multiple murder, the special circumstance found in this case, is, unfortunately, a common or "routine" form of murder occurring in California, yet has been defined as a potential capital crime, along with other much less common forms of murder.

In *People v. Morales* (1989) 48 Cal. 3d 527, 557-558, this Court noted that even the rare lying-in-wait special circumstance might be susceptible to an Eighth Amendment failure to narrow challenge if lying-in-wait were defined simply as a concealment of the perpetrator's purpose. In affirming Morales' conviction, this Court fashioned a three part definition for the lying-in-wait special circumstance which it held "...presents a factual matrix sufficiently distinct from 'ordinary' premeditated murder to justify treating it as a

special circumstance." (*Ibid.*) Justice Mosk dissented, finding the court's definition to be "so broad as to embrace virtually all intentional killings...," and opining that it "...does not provide a meaningful basis for distinguishing between murderers who may be subjected to the death penalty and those who may not." (*Id.*, at 575.)

Justice Mosk's latter criticism is also applicable to the multiple murder circumstance here, and the comprehensive listing contained in section 190.2 generally. Under *Godfrey*, it is constitutionally impermissible for a statute making a defendant death-eligible to have so broad and indiscriminate a sweep, selecting as it does on the basis of the common aspects attending many murders. Serious as these factors are, they are not those which society views as inherently being among the most "...grievous...affronts to humanity...," as required by the Eighth Amendment. (*Zant v. Stephens, supra*, 642 U.S. at 877, n.15, citing *Gregg v. Georgia, supra*, 418 U.S. at 184.) Moreover, a statute which specifically contemplates encompassing every murderer fails to account for different degrees of culpability involved in different types of murder, increasing the likelihood that juries will arbitrarily sentence defendants to death without proper regard for the defendant or the act, all in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

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iii. Section 190.2, subdivisions (a), (3), the special circumstance of multiple murder, fails to perform the constitutionally required narrowing function, by making a common form of felony murder death-eligible, in violation of the Eighth and Fourteenth Amendments.[51]

California's statutory scheme violates the Eighth and Fourteenth Amendments, in that it attaches overly-broad eligibility for the death penalty to multiple murder offenses, and fails to..."genuinely narrow the class of persons eligible for the death penalty and...reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens, supra*, 462 U.S. at 878.)[52]

Additionally, California's statutory scheme is particularly death-biased in felony murder cases because after a first degree murder conviction and special circumstance finding based on multiple murder, the sentencer is required to double-count or weigh the

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[51] Appellant recognizes that this court rejected a similar argument in *People v. Marshall, supra*, 50 Cal.3d at 945-946. Appellant respectfully asks that this court reconsider the argument.

[52] Additionally, because the substantive felony murder offenses (section 189) the multiple murder special circumstance (section 190.2) and the circumstances of the offense (section 190.3, subd. (a)) used in the actual decision to impose death, are all duplicative, a death judgment which, as here, is based on such factors also violates the Fifth Amendment's prohibition against double jeopardy, applicable to the states through the Fourteenth Amendment (see *Benton v. Maryland* (1969) 395 U.S. 784, 793-794, 89 S.Ct. 2056), as well as article I, section 15 of the California Constitution. (*Contra*, *People v. Gates* (1987) 43 Cal. 3d 1168, 1188-1190.) Indeed, this "triple use" of facts in a capital case felony murder also violates the Eighth Amendment's prohibition against cruel and unusual punishments, the Fourteenth Amendment's due process clause, and the enhanced capital case due process protections of both. (*Contra*, *People v. Marshall, supra,* 50 Cal. 3d at 945-946, citing *Lowenfield v. Phelps* (1988) 484 U.S. 231, 241-246, 108 S. Ct. 546, 552-555.)

same felony murder "crime circumstances" (Pen. C. sec. 190.3, subd. (a)) and the same multiple murder special circumstance as factors in aggravation (see, Pen. C. sec. 190.3, subd. (a)) contrary to the Eighth and Fourteenth Amendments. (*Stringer v. Black, supra,* 503 U. S. at 234-236.)

Narrowing criteria must apply to multiple murder offenses as well as to other death-eligible statutory provisions, and death eligibility must be limited to the most reprehensible murderers. The criteria applied to multiple murder in California fail to provide this narrowing function; instead, they sweep in a broad, arbitrary fashion. This is demonstrated by the anomalous fact that, while any multiple-murderer may be executed, the same is not true of all "traditional" -- and often far more reprehensible -- first degree murderers, a result which is "highly incongruous." (*State v. Cherry* (N.C.1979) 257 S.E. 2d 551, 567.) California's multiple murder special circumstance therefore fails to provide the constitutionally required meaningful or rational basis for distinguishing capital from non-capital murder. (*Zant v. Stephens, supra*, 462 U.S. at 878 and n.15; *Furman v. Georgia, supra,* 408 U.S. at 248, n.11 [Douglas, J., conc.], 294 [Brennan, J., conc.], 309-310 [Stewart, J., Conc.], 313 [White, J. conc.].)

iv. Section 190.3, subdivision (a)'s specification of special circumstances as factors in aggravation grants the penalty phase sentencer unbridled discretion, weighted in favor of death, in violation of the Eighth and Fourteenth Amendments.

In addition to the above-described constitutional deficiencies, the statutory provision that a multiple murder special circumstance finding may be used at the penalty phase as a

factor in aggravation is another Eighth and Fourteenth Amendment[53] violation.

In California, the sentencer weighs in aggravation of sentence any special circumstance which was found true at the guilt phase. (Section 190.3, subd. (a).) A defendant convicted of two murders in one proceeding is therefore automatically subject to a multiple murder special circumstance (section 190.2, subd. (a)(3) and a penalty phase murder aggravating factor (section 190.3, subd. (a)) by the simple nature of the charge.

By contrast, a defendant accused of a single premeditated killing is not automatically subjected to a statutorily mandated special circumstance. Even though a single pre-meditated murder involving deliberation, malice, and an intent to kill may be far more serious than a multiple murder,[54] premeditated murder alone does not automatically give rise to both a special circumstance and an aggravating factor. This disparity between a heinous premeditated murder of a single individual and multiple murder is both "highly incongruous" (*State v. Cherry, supra,* 257 S.Ed.2d at p.567; see *State v. Middlebrooks*, 840 S.W. 2d at 345), and a violation of the due process clauses of the Fifth and Fourteenth Amendments, as well as the Fourteenth Amendment's equal protection clause.

California attempts to comply with the Eighth Amendment's narrowing requirement by means of guilt phase findings of special circumstances accompanying guilt phase

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[53] As described, post, the Fourteenth Amendment violation offends both the due process clause and the equal protection clause.

[61] A defendant's intent and therefore moral guilt, *Enmund v. Florida* (1982) 458, 485 U.S. 782, 800, 102 S.Ct. 3368, 3378), are critical to a determination of death penalty suitability. (*Id.*, at pp.800-801.)

findings of first-degree murder. (Sec. 190.2, subd.(a).) Where the homicide is multiple murder, however, the narrowing fails to pass constitutional muster because no narrowing takes place: the special circumstances found under section 190.2, subd.(a)(3) duplicates the elements of the crimes themselves. (*Furman v. Georgia, supra*, 408 U.S. at 313 [White, J., conc.,]; accord, *Godfrey v. Georgia, supra,* 446 U.S. at 427 [plur. opn.].) The error is then exacerbated by having the sentencer consider the special circumstance finding as a penalty phase aggravating factor (sec. 190.3, subd.(a)), creating a death-biased process that violates the Eighth and Fourteenth Amendments. (*Stringer v. Black, supra*, 503 U.S. at 234-236; *Tuilaepa v. California, supra*, 512 U.S. at 973, 114 S.Ct. at 2635.)

v. Sections 190-190.5 afford the prosecutor complete discretion to determine whether a penalty hearing will be held, in violation of the Eighth and Fourteenth Amendments.

Sections 190-190.5 afford the individual prosecutor complete discretion to determine whether a penalty hearing will be held, in violation of the Eighth and Fourteenth Amendments. In *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, Justice Broussard dissented on this ground, noting that it creates a substantial risk of county-by-county arbitrariness. There are no statewide standards to guide the prosecutor's discretion.

Under the California statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while others with similar, if not identical, charges in different counties will not. These arbitrary outcomes occur either at the charging stage, prior to trial by plea to a non-capital charge, after the guilt phase, and during or after the

penalty phase. This disparate range of options, coupled with the absence of any standards to guide the prosecutor's discretion, permits reliance on constitutionally irrelevant and impermissible considerations, including, *inter alia*, race, sexual orientation, personal dislike of the defendant, and/or economic status. Additionally, the prosecutor is free to seek death in virtually every first degree murder case on either a lying-in-wait theory (*People v. Morales, supra*, 48 Cal.3d 527) or a felony murder theory.

The statutory scheme therefore allows arbitrary and wanton prosecutorial discretion throughout the capital case process, in charging, prosecuting, submitting the case to the jury and opposing the automatic motion to modify the sentence. This compounds the effects of the vagueness and arbitrariness in the statutory scheme, described *ante*. Much like the arbitrary and wanton jury discretion condemned in *Woodson v. North Carolina* (1976) 428 U.S. 280, 96 S.Ct. 2978 this unlimited discretion is contrary to the principled decision-making required by *Furman v. Georgia, supra*, 408 U.S. 238.

In appellant's case, the prosecutor decided to charge multiple murder, giving rise to the duplicative multiple-murder special circumstance and aggravator that ultimately resulted in a death sentence. In his penalty phase argument regarding the circumstances of the crime as a factor warranting the death penalty, the prosecutor exploited the unconstitutionally vague statutory factors by arguing the special circumstances themselves justified death. The jury therefore arrived at its death judgment by a tainted process involving unguided consideration of improper factors improperly argued by the prosecutor. Therefore, under the Eighth and Fourteenth Amendments, and the principles articulated in

Furman, *Tuilaepa*, and *Stringer*, reversal of the death judgment here is mandated.

j. These errors prejudiced appellant and mandate reversal.

Section 190.3 violated the Fifth, Sixth, Eighth and Fourteenth Amendments, as described above. It also violated appellant's analogous state-created rights, thereby violating his right to due process. (*Hicks v. Oklahoma, supra*, 497 U.S. at 346, 100 S.Ct. at 2229.) These errors are each prejudicial and mandate reversal individually and cumulatively.

As to all the unconstitutionally vague provisions of section 190.3, reversal is automatic, because the use of a vague aggravating factor in the weighing process created randomness and a bias in favor of execution. (*Tuilaepa v. California, supra*, 512 U.S. at 973, 114 S.Ct. at 2675; *Stringer v. Black, supra*, 503 U.S. at 234-236.)

As to all other errors, *ante*, reversal is mandated, as respondent cannot demonstrate that they individually or collectively had no effect on the penalty verdict in this exceedingly close case. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399, 107 S.Ct. 1821.)

B. THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT APPELLANT'S CONVICTIONS AND PENALTY BE SET ASIDE.

1. Introduction

Appellant was denied his right to a fair trial by an independent tribunal, and his right to the minimum guarantees for the defense under customary international law as informed

by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration). While appellant's rights under state and federal constitutions have been violated, these violations are also violations of international law.

2. Background

The two principle sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank with federal statutes.[55] Customary international law is equated with federal common law.[56] International law must be considered and administered in United States courts whenever questions of right depending on it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700, 44 L.Ed. 320, 20 S.Ct. 290.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Murray v. The Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 102, 118, 2 L.Ed.208.) When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains...." (*Weinberger v. Rossi* (1982) 456 U.S. 25, 33, 71 L.Ed.2d 715, 102 S.Ct. 1510.) The United States Constitution also

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[55] Article VI, sec. 1, clause 2 of the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[56] Restatement Third of the Foreign Relations Law of the United States (1987), p.145, 1058. See also *Eyde v. Robertson* (1884) 112 U.S. 580.

authorizes Congress to "define and punish...offenses against the law of nations," thus recognizing the existence and force of international law. (U.S. Const. Article I, section 8.) Courts within the United States have responded to this mandate by looking to international legal obligations, both customary international law and conventional treaties, in interpreting domestic law. (*Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243, 252, 80 L.Ed.2d 273, 104 S.Ct. 1776.[57]

International human rights law has its historical underpinnings in the doctrine of humanitarian intervention, which was an exception to the general rule that international law governed regulations between nations and did not govern rights of individuals within those

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[57] See also *Oyama v. California* (1948) 332 U.S. 633, 92 L.Ec.249, 68 S.Ct. 269, which involved a California Alien Land Law that prevented an alien ineligible for citizenship from obtaining land and created a presumption of intent to avoid escheat when such an alien pays for land and then transfers it to a U.S. citizen. The court held that the law violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion stating that the UN Charter was a federal law that outlawed racial discrimination, noted "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Laws] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned." (*Id.* At 673.) See also *Namba v. McCourt* (1949) 185 Or. 579, 204 P.2d 569, 570 invalidating an Oregon Alien Land Law, "The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed... When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55, subd. C, and see Article 56): 'Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' (59 Stat.1031, 1046.)" (*Id.* at 604.)

nations.[58] The humanitarian intervention doctrine recognized intervention by states into a nation committing brutal maltreatment of its nationals, and as such was the first expression of a limit on the freedoms of action states enjoyed with respect to their own nationals.[59]

This expression was further in 1920 by the Covenant of the League of Nations. The Covenant contained a provision relating to "fair and human conditions of labor for men, women and children." The League of Nations was also instrumental in developing an international system for the protection of minorities.[60] Additionally, early in the development of international law, countries recognized the obligation to treat foreign nationals in a manner that conformed with minimum standards of justice. As the law of responsibility for injury to aliens began to refer to violations of "fundamental human rights," what had been seen as the rights of a nation eventually began to reflect the individual human rights of nationals as well.[61]

It soon became an established principle of international law that a country, by committing a certain subject-matter to a treaty, internationalized that subject-matter, even if the subject-matter dealt with individual rights of nationals, such that each party could no

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[58] See generally, Sohn and Buergenthal, International Protection of Human Rights (1973) p. 137.

[59] Buergenthal, International Human Rights (1988) p.3.

[60] *Id.*, pp. 7-9.

[61] Restatement Third of the Foreign Relations law of the United States (1987) Not to Part VII, vol. 2 at 1058.

longer assert that such subject-matter fell exclusively within domestic jurisdictions.[62]

3. Treaty Development

The monstrous violations of human rights during World War II furthered the internationalization of human rights protections. The first modern international human rights provisions are seen in the United Nations Charter, which entered into force on October 24, 1945. The UN Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.[63] By adhering to its multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the United Nations drafted and adopted both the Universal Declaration of Human Rights[64] and the Convention on the Prevention and Punishment of the Crime of

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[62] Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco (1923) P.C.I.J., Ser. B, No. 4.

[63] Article 1 (3) of the UN Charter, June 26, 1945, 59 Stat.1031, T.S. 993, entered into force October 24, 1945.

In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> "The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere -- without regard to race, language or religion -- we cannot have permanent peace and security in the world."
>
> Robertson, Human Rights in Europe, (1985) 22, n.22 (quoting President Truman).

[64] Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res.217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization (hereinafter Universal Declaration).

Genocide.[65] The Universal Declaration is part of the International Bill of Human Rights,[66] which also includes the International Covenant on Civil and Political Rights,[67] the Optional Protocol to the ICCPR,[68] the International Covenant on Economic, Social and Cultural Rights,[69] and the human rights provisions of the UN Charter. These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations. Additionally, the United Nations has sought to enforce the obligations of member states through the Commission on Human Rights, an organ of the United Nations consisting of forty-three member states, which reviews allegations of human rights violations.

The Organization of American States, which consists of thirty-two member states, was established to promote and protect human rights. The OAS Charter, a multilateral treaty which serves as the Constitution of the OAS, entered into force in 1951. It was

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[65] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1951 (hereinafter Genocide Convention). Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. See generally, Buergenthal, International Human Rights, *supra,* p.48.

[66] See generally Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills." (1991) 40 Emory L.J. 731.

[67] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976 (hereinafter ICCPR).

[68] Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, entered into force March 23, 1976.

[69] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, entered into force January 3, 1976.

amended by the Protocol of Buenos Aires which came into effect in 1970. Article 5(j) of the OAS Charter provides, "[t]he American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex."[70] In 1948, the Ninth International Conference of American States proclaimed the American Declaration of the Rights and Duties of Man, a resolution adopted by the OAS, and thus, its member states. The American Declaration is today the normative instrument that embodies the authoritative interpretation of the fundamental rights of individuals in this hemisphere.[71]

The OAS also established the Inter-American Commission on Human Rights, a formal organ of the OAS which is charged with observing and protecting human rights in its member states. Article 1(2)(b) of the Commission Statute defines human rights as the rights set forth in the American Declaration, in relation to member States of the OAS who, like the United States, are not party to the American Convention on Human Rights. In practice, the OAS conducts country studies, on-site investigations, and has the power to receive and act on individual petitions which charge OAS member states with violations of any rights set out in the American Declaration.[72] Because the Inter-American Commission,

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[70] OAS Charter, 119 U.N.T.S.3, entered into force December 13, 1951, amended 721 U.N.T.S. 324, entered into force February 27, 1970.

[71] Buergenthal, International Human Rights, *supra,* pp.127-131.

[72] Buergenthal, International Human Rights, *supra.*

Appellant notes that this appeal is a stet in exhausting his administrative remedies in order to bring his claim in front of the Inter-American Commission on the basis that the violations appellant has suffered are violations of the American Declaration of the Rights and Duties of Man.

which relies on the American Declaration, is recognized as an OAS Charter organ charged with protecting human rights, the necessary implication is to reinforce the normative effect of the American Declaration.[73]

The United States has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As an important player in the drafting of the United Nations Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[74] Though the 1950s was a period of isolationist, the United States renewed its commitment in the late 1960s and throughout the 1970s by becoming a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[75]

Recently, the United States stepped up its commitment to international human rights by ratifying three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant on Civil and Political Rights; Ex-President Bush deposited the instruments of ratification on June 8, 1992. The International

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[73] Buergenthal, International Human Rights, *supra.*

[74] Sohn and Buergenthal, International Protection of Human Rights (1973) pp.506-9.

[75] Buergenthal, International Human Rights, *supra,* p.230.

Convention Against All Forms of Racial Discrimination,[76] and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment[77] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[78]

United States courts generally do not give retroactive ratification to a treaty; the specific provisions of a treaty are therefore enforceable from the date of ratification onward.[79] However, Article 18 of the Vienna Convention on the Laws of Treaties provides that a signatory to a treaty must refrain from acts which would defeat the object and purpose of the treaty until the signatory either makes its intention clear not to become a party, or ratifies the treaty.[80] Though the United States courts have not strictly applied

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[76] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force January 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. _____ U.N.T.S. ____ (1994).

More than 100 countries are parties to the Race Convention.

[77] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res.39/46, 39 UN GAOR Supp. (No. 51) at 197, entered into force on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong., 2d Sess., 136 Cong. Rev. 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 20, 1994. ____ U.N.T.S. ____ (1994).

[78] Buergenthal, International Human Rights, *supra,* p.4.

[79] Newman and Weissbrodt, International Human Rights: Law, Policy and Process, (1990) p.579.

[80] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), entered into force January 27, 1980 (hereinafter Vienna Convention). The Vienna

Article 18, they have looked to signed, unratified treaties as evidence of customary international law.[81]

4. Customary International Law

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation.[82] The United States, through signing and ratifying the ICCPR, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS

Convention was signed by the United States on April 24, 1970. Though it has not yet been ratified by the United States, the Department of State, in submitting the Convention to the Senate, stated that the convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec.Doc.L., 92d Cong., 1sat Sess. (1971) at 1. Also, the Restatement Third of the Foreign Relations Law of the United States cites the Vienna Convention extensively.

[81] See for example *Inupiat Community of the Arctic Slope v. United States* (9th Cir.1984) 746 F.2d 570 (citing the International Covenant on Civil and Political Rights); *Crow v. Gullet* (8th Cir.1983) 706 F.2d 774 (citing the International Covenant on Civil and Political Rights); *Filartiga v. Pena-Irala* (2nd Cir.1980) 630 F.2d 876 (citing the International Covenant on Civil and Political Rights).

See also Charme, The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma (1992) 25 Geo.Wash.J.Int'l.L & Econ.71. Ms. Charme argues that Article 18 codified the existing interim (pre-treaties, judicial and arbitral decisions, diplomatic statements, and the conduct of the International Law Commission compel, in the aggregate, the conclusion that Article 18 constitutes the codification of the interim obligation. These instances indicate as well that this norm continues as a rule of customary international law. Thus all states, with the exception of those with a recognized persistent objection, are bound to respect the obligation of Article 18."

[82] Restatement Third of the Foreign Relations Law of the United States, sec.102. This practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which the customary law rule is observed.

Charter and the American Declaration, recognizes the force of customary international human rights law. The substantive clauses of these treaties articulate customary international law and thus bind our government. When the United States has signed or ratified treaty, it cannot ignore this codification of customary international law and has no basis for refusing to extend the protection of human rights beyond the terms of the U.S. Constitution.[83]

Customary international law is "part of our law." (*The Paquete Habana, supra,* at 700.) According to 22 U.S.C. sec.2304 (a)(1), "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.[84] Moreover, the International Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes.[85] These sources confirm the validity of custom as a source of international law.

The provisions of the Universal Declaration are accepted by United States courts as customary international law. In *Filartiga v. Pena-Irala* (2d Cir.1980) 630 F.2d 876, the court held that the right to be free from torture "has become part of customary international

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[83] Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills," (1991) 40 Emory L.J. 731 at 737.

[84] 22 U.S.C. sec.2304 (a)(1).

[85] Statute of the International Court of Justice, art. 38, 1947 I.C.J. Acts & Docs. 46. This statute is generally considered to be an authoritative list of the sources of international law.

law as evidenced and defined by the Universal Declaration of Human Rights...." (*Id.*) at 882. The United States, as a member state of the OAS, has international obligations under the OAS Charter and the American Declaration. The American Declaration, which has become incorporated by reference within the OAS Charter by the 1970 Protocol of Buenos Aires, contains a comprehensive list of recognized human rights which includes the right to life, liberty and security of person, the right to equality before the law, and the right to due process of the law.[86] Although the American Declaration is not a treaty, the United States voted its approval of this normative instrument and as a member of the OAS, is bound to recognize its authority over human rights issues.[87]

The United States has acknowledged the force of international human rights law on other countries. Indeed, in 1991 and 1992 Congress passed legislation that would have ended China's Most Favored Nation trade status with the United States unless China improved its record on human rights. Thought Ex-President Bush vetoed this legislation,[88] in May 1993 Ex-President Clinton tied renewal of China's most favored nation status to

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[86] American Declaration of the Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American Commission of Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser.L/VII.50, doc.6 (1980).

[87] Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Ser.L/V/II.52, doc.17, para.48 (1987).

[88] See Michael Wines, Bush, This Time in Election Year, Vetoes Trade Curbs Against China, N.Y. Times, September 29, 1992, at Al.

progress on specific human rights issues in compliance with the Universal Declaration.[89]

The International Convention on Civil and Political Rights, to which the United States is bound, incorporates the protections of the Universal Declaration. Where other nations are criticized and sanctioned for consistent violations of internationally recognized human rights, the United States may not say: "Your government is bound by certain clauses of the Covenant though we in the United States are not bound."[90]

5. Due process violations

The factual and legal issues presented in the brief demonstrate that appellant was denied his rights to due process and a fair and impartial trial in violation of customary international law as evidenced by Articles 6 and 14 of the International Covenant on Civil

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[89] President Clinton's executive order of May 28, 1993 required the Secretary of State to recommend to the President by June 3, 1994 whether to extend China's "MFN" status for another year. The order imposed several conditions upon the extension including a showing by China of adherence to the Universal Declaration of Human Rights, an acceptable accounting of those imprisoned or detained for non-violent expression of political and religious beliefs, humane treatment of prisoners including access to Chinese prisons by international humanitarian and human rights organizations, and promoting freedom of emigration, and compliance with the U.S. memorandum of understanding on prison labor. See Orentlicher and Gelatt, Public Law, Private Actors: The Impact of Human Rights on Business Investors in China (1993) 14 Nw. J. Int'l L.&Bus.66, 79. Though President Clinton decided on May 26, 1994 to sever human rights conditions from China's MFN status, it cannot be ignored that the principal practice of the United States for several years was to use "MFN" status to influence China's compliance with recognized international human rights. See Kent, China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989-1994 (1995) 17 H.R. Quarterly, 1.

[90] Newman, United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures (1993) 42 DePaul L. Rev.1241, 1242. Newman discusses the United States' resistance to treatment of human rights treaties as U.S. law.

and Political Rights[91] ("ICCPR") as well as Articles 1 and 26 of the American Declaration.

The United States deposited its instruments of ratification of the ICCPR on June 8, 1992 with five reservations, five understandings, four declarations, and one proviso.[92] Article 19(c) of the Vienna Convention on the Law of Treaties declares that a party to a treaty may not formulate a reservation that is "incompatible with the object and purpose of the treaty."[93] The Restatement Third of the Foreign Relations Law of the United States echoes this provision.[94]

The ICCPR imposes an immediate obligation to "respect and ensure" the rights it proclaims and to take whatever other measures are necessary to give effect to those rights. United States courts, however, will generally enforce treaties only if they are self-executing or have been implemented by legislation.[95] The United States declared that the articles of

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[91] The substantive provisions of the Universal Declaration have been incorporated into the ICCPR, so these are incorporated by reference in the discussion above. Moreover, as was noted above, the Universal Declaration is accepted as customary international law.

[92] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep.No.23, 102d Cong., 2d Sess.

[93] Vienna Convention, *supra,* 1155 U.N.T.S. 331, entered into force January 27, 1980.

[94] Restatement Third of the Foreign Relations Law of the United States, (1987) sec.313.cmt.b. With respect to reservations, the Restatement lists "the requirement...that a reservation must be compatible with the object and purpose of the agreement."

[95] Newman and Weissbrodt, International Human Rights: Law, Policy and Process, (1990) p.257. See also *Sei Fujii v. California* (1952) 38 Cal.2d 718, 242 P.2d 617, where the California Supreme Court held that Articles 55(c) and 56 of the UN Charter are not self-executing.

the ICCPR are not self-executing.[96] In 1992, the Bush Administration, in explanation of proposed reservations, understandings, and declarations to the ICCPR, stated: "For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated.[97]

But under the Constitution, a treaty stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. (*Asakura v. Seattle* (1924) 265 U.S. 332, 341, 68 L.Ed. 1041, 44 S.CT. 515.)[98] Moreover, treaties designed to protect individual rights should be construed as self-executing. (*United States v. Noriega* (1992) 808 F.Supp.791.) In *Noriega,* the court noted, "It is inconsistent with both the language of the [Geneve III] treaty and with our professed support of its purpose to find that the rights established herein

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[96] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep.No.23, 102d Cong., 2d Sess.

[97] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep.No.23, 102d Cong., 2d sess. at 19.

[98] Some legal scholars argue that the distinction between self-executing and non-self-executing treaties is patently inconsistent with express language in Article 6, sec.2 of the United States Constitution and that all treaties shall be the supreme law of the land. See generally Jordan L. Paust, Self-Executing Treaties (1988) 82 Am. J. Int'l L.760.

cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs -- not to create some morphous, unenforceable code of honor among the signatory nations. 'It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.... Even if Geneva III is not self-executing, the United States is still obligated to honor its international commitment.'" (*Id.* at 798.)

Though reservations by the United States provide that the treaties may not be self-executing, the ICCPR is still a forceful source of customary international law and as such is binding upon the United States.

Article 14 provides, "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 6 declares that "[n]o one shall be arbitrarily deprived of his life... [The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court."[99] Likewise, these protections are found in the American Declaration: Article 1 protects the right to life, liberty and security of person; Article 2 guarantees equality before the law; and Article 26 protects the right of due process of law.[100]

In cases where the UN Human Rights Committee has found that a State party violated Article 14 of the ICCPR, in that a defendant had been denied a fair trial and appeal,

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[99] International Covenant on Civil and Political Rights, *supra,* 999 U.N.T.S. 717.

[100] American Declaration of the Rights and Duties of Man, *supra.*

the Committee has held that the imposition of the sentence of death also was a violation of Article 6 of the ICCPR.[101] The Committee further observed, "the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review of conviction and sentence by a higher tribunal.[102]

Further, Article 4(2) of the ICCPR makes clear that no derogation from Article 6 ("no one shall be arbitrarily deprived of his life") is allowed.[103] An Advisory Opinion issued by the Inter-American Court on Human Rights concerning the Guatemalan death penalty reservation to the American Convention on Human Rights noted "[i]t would follow therefore that a reservation which was designed to enable the State to suspend any of the nonderogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it."[104] Implicit in the court's opinion linking nonderogability and incompatibility is the view that the compatibility

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[101] Report of the Human Rights Committee, p.72, 49 UN GAOR Supp. (No.40) p.72, UN Doc. A/49/40 (1994).

[102] *Id.*

[103] International Covenant on Civil and Political Rights, *supra,* 999 U.N.T.S. 717.

[104] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of September 8, 1983, Inter-Amer. Ct.H.R., ser. A: Judgments and Opinions, No.3 (1983) reprinted in 23 I.L.M.320, 341 (1984).

requirement has greater importance in human rights treaties, where reciprocity provides no protection for the individual against a reserving state.[105]

6. Conclusion

The due process violations that appellant suffered throughout his trial and sentencing phases are prohibited by customary international law. The United States is bound by customary international law, as informed by such instruments as the ICCPR and the Race Convention. The purpose of these treaties is to bind nations to an international commitment to further protections of human rights. The United States must honor its role in the international community be recognizing the human rights standards in our own country to which we hold other countries accountable. As a result of the violations of international law which occurred in this case, reversal is required.

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[105] Edward F. Sherman, Jr. The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation (1994) 29 Tex.Int'l L.J.69. In a separate opinion concerning two Barbadian death penalty reservations, the court further noted that the object and purpose of modern human rights treaties is the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jusisdiction." Advisory Opinion No.OC-2/82 of September 24, 1982, Inter-Am.Ct.H.R., ser. A: Judgments and Opinions, No.2, para.29 (1982) reprinted in 22 I.L.M.37, 47 (1983). These opinions are an indicator of emerging general principles of treaty law, and strengthen the argument that the United States death penalty reservation is impermissible because it is incompatible.

C. THE CUMULATIVE PREJUDICIAL EFFECT OF ALL THE ERRORS IN THE INSTANT CASE VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, AN IMPARTIAL JURY, A RELIABLE DETERMINATION OF GUILT AND PENALTY, AND FUNDAMENTAL FAIRNESS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AS WELL AS THE CALIFORNIA CONSTITUTION.

As shown in the preceding sections of this brief, numerous extremely prejudicial errors were committed in the instant case. Even if, *arguendo,* none alone may justify reversal, when considered cumulatively, or in any combination, these errors denied appellant his constitutional rights to a fair trial, confrontation of witnesses, an impartial jury, due process, to present a defense, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and the analogous provisions of the California Constitution. Reversal of the verdict of guilty as well as penalty of death are therefore required.

In *People v. Hill, supra,* 17 Cal.4th at 844-847, 72 Cal.Rptr.2d at 681, 682, this Court discussed why the cumulative effect of all the trial errors prejudiced the defendant, violated his constitutional rights, and required reversal:

> "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. ...
>
> Defendant's trial, as seen, was far from perfect. In the circumstances of this case, the sheer number of instances of prosecutorial misconduct and other legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone. ...
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> Although we might conclude any single instance of misconduct was harmless standing alone, we cannot ignore the overall prejudice to defendant's fair trial rights...[I]t became increasingly difficult for the jury to remain impartial. 'It has been truly said: "You can't unring the bell."' (*People v. Wein* (1958) 50 Cal.2d 383, 423 (dis. opn. of Carter, J.) Here, the jury heard not just a bell, but a constant clang of erroneous law and fact.
>
> ***
>
> The sheer number of the instances of prosecutorial misconduct, together with the other trial errors, is profoundly troubling. Considered together, we conclude they created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors. Considering the cumulative impact of [the prosecutor's] misconduct, at both the guilt and penalty phases of the trial, together with...the other errors throughout the trial, ...we...conclude defendant was deprived of that which the state was constitutionally required to provide and he was entitled to receive: a fair trial. Defendant is thus entitled to a reversal of the judgment and a retrial free of these defects."

(Accord, *United States v. Rivera* (10th Cir.1990) 900 F.2d 1462, 1469 ["The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error."]; *United States v. Necolchea* (9th Cir.1993) 986 F.2d 1273, 1282-1283, citing *Rivera, supra*; *Walker v. Engle* (6th Cir.1983) 703 F.2d 1959, 963 ["Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair."]; *United States v. Hernandez* (6th Cir.2000) 227 F.3d 686, 697 [same, citing *Walker, supra.*)

Here, the trial court committed instructional error, denied appellant his right to adduce evidence regarding a crucial witness's credibility, erroneously excluded defense

evidence, denied appellant second counsel, allowed the introduction of inflammatory victim impact evidence, and denied the motion for new trial. The prosecutor committed prejudicial misconduct. There was prejudicial *Brady* error.

As explained in *Hill, supra,* the "aggregate prejudicial effect of [these] errors was greater than the sum of the prejudice of each error standing alone." (7 Cal.4th at 845, 72 Cal.Rptr.2d at 681.) Thus, appellant was denied his constitutional rights to a fair trial, due process, effective assistance of counsel, to present a defense, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the California Constitution, art. 1, secs.15, 16, 17. This Court cannot say that beyond a reasonable doubt, that a result more favorable to appellant would not have occurred in the absence of the errors. (*Chapman v. California, supra,* 386 U.S. 18, 87 S.Ct. 824; *United States v. Rivera, supra,* 900 F.2d at 1470, n.6 ["If any of the errors being aggregated are constitutional in nature, ...Chapman should be used..."]) Therefore, reversal of the guilt and penalty judgments is required.

XI. CONCLUSION

For the reasons stated above, both the verdict of capital murder and the sentence of death must be reversed and a new trial ordered.

Dated: 5 October 2006

Respectfully submitted,
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CERTIFICATE OF WORD COUNT

In reliance on the word count of the computer program used to generate this brief, I, John F. Schuck, hereby certify that this Opening Brief contains 76,916 words.

I declare under penalty of perjury that the above is true and correct.

Dated: October 5, 2006

John F. Schuck

PROOF OF SERVICE

I, John Schuck, declare:

I am a citizen of the United States and a resident of the County of Santa Clara; I am over the age of eighteen years and am not a party to the within action; my business address is 4083 Transport Street, Suite B, Palo Alto, California 94303.

On 6 October 2006, I served the within:

APPELLANT'S OPENING BRIEF

on the following interested persons in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palo Alto, California addressed as follows:

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Executed at Palo Alto, California on 6 October 2006.

John F. Schuck