IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

DANIEL SANCHEZ COVARRUBIAS,

Defendant and Appellant.

/

Case No. S075136

(Monterey Superior Court No. SC942212(C))

AUTOMATIC APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF MONTEREY

HONORABLE ROBERT MOODY, JUDGE, PRESIDING

APPELLANT'S OPENING BRIEF - VOLUME I

Pages 1-502

THOMAS LUNDY
Attorney at Law
State Bar No. 57656
2777 Yulupa Avenue, PMB 179
Santa Rosa, CA 95405
Telephone: (707) 538-0175

Attorney for Defendant and Appellant
DANIEL SANCHEZ COVARRUBIAS
Under Appointment by the Supreme Court of California

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TO THE HONORABLE RONALD M. GEORGE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

STATEMENT OF THE CASE

A. The Judgment

This is an appeal by appellant Daniel Covarrubias from a Monterey County judgment of guilt for first degree murder with special circumstances, attempted murder, assault, robbery, burglary and conspiracy. Mr. Covarrubias also appeals from the judgment sentencing him to death.

B. Overview

The present case stands apart from the vast majority of capital cases which this Court has reviewed.

As the judge observed there was "an inexplicable disconnect" between Mr. Covarrubias' character and the crimes he was accused of committing. (72

RT 14218.)[1] Mr. Covarrubias had no prior felony convictions and no ingrained history of criminal violence. And, all the witnesses who knew Mr. Covarrubias consistently recounted his generosity and warmth. He loved his family – which included a wife and four young children – and worked hard to provide for them. In sum, it would have been totally out of character for Mr. Covarrubias to have knowingly participated in the charged crimes.

Nor did the prosecution prove that Mr. Covarrubias knowingly committed the charged crimes. Rather, Mr. Covarrubias' convictions and death sentence appear to be founded on vicarious liability which allowed the acts and intent of the perpetrators to be constructively imputed to Mr. Covarrubias. And, even if Mr. Covarrubias' lack of knowledge was the product of criminal negligence or implied malice, such a mental state was, as a matter of law, insufficient to trigger death eligibility under California law and the federal constitution.

Moreover, none of the principal perpetrators of the crimes received the death penalty – including Antonio Sanchez who – as conceded by the prosecutor – "really was the one that had the bone to pick here. He was the one that had it in for [the victim] Ramon Morales." (52 RT 10224:19-24.)

But the most unique feature of this case is that the most important disputed issue at the guilt/death eligibility trial – whether appellant had the intent to steal required to convict him of robbery felony murder and conspiracy to commit robbery – was never resolved by the jurors due to crucial omissions in the definition of robbery which governed the jurors' deliberations.

The circumstances regarding this crucial omission of the required

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[1] In attempting to address this obvious "disconnect" the prosecutor could only speculate that it was appellant's "nature" to commit such crimes.

elements of robbery were as follows:

The prosecution alleged that appellant knowingly and intentionally conspired with Antonio Sanchez, Joaquin Nuñez and Jose Luis Ramirez to rob and kill Ramon Morales. According to the prosecution, appellant and the others, two of whom were armed with rifles, entered Ramon Morales' residence for the purpose of robbing and killing whomever was present. These allegations were primarily dependent on the credibility of a single accomplice-witness, Jose Luis Ramirez, whose criminal exposure was reduced from special circumstance murder to less than a 12 years in exchange for his testimony against appellant.[2]

The story, as told by the defense, differed from the prosecution's. While appellant conceded that he entered the Morales residence with Antonio Sanchez and Joaquin Nuñez, appellant denied conspiring to rob and murder Morales. Instead, appellant believed the reason for going to Morales' residence was to obtain property belonging to Antonio Sanchez and not to rob, kill or otherwise harm the occupants of the residence.[3]

The defense also contended that knowing participation in a conspiracy to rob and kill was inconsistent with appellant's character. As mentioned above, appellant had no prior felony convictions, no history of violent criminal conduct and was not involved with gangs or illegal drugs. In a word, he was

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[2] Neither Antonio Sanchez nor Joaquin Nuñez – both of whom fled to Mexico – were ever brought to trial in California. They were later taken into custody in Mexico but not extradited to the United States. (71 RT 14012-16.) Appellant was forcibly abducted by bounty hunters from his home in Mexico and returned to Salinas to stand trial. (*Ibid.*)

[3] Appellant conceded that Antonio Sanchez and Joaquin Nuñez took weapons to Morales' residence but maintained that they were only a precaution due to a prior threat by Ramon Morales to kill Antonio Sanchez.

a "nice" guy.

In sum, this trial turned on the factual question of whether appellant intended to rob and murder as asserted by the prosecution or whether appellant intended to help Antonio Sanchez take his own property without harming anyone as contended by the defense.

For their part, the jurors apparently had little faith in the credibility of the key prosecution witness: Jose Luis Ramirez. The jurors unanimously rejected Ramirez' assertion that appellant used a knife on the occupant of the residence immediately after entering the Morales residence. And, the jurors also failed to find the special allegations that appellant (1) used a handgun and (2) conspired to commit murder. Thus, even the prosecutor was forced to acknowledge that appellant may have "believed that the guns were not going to be used" and that "Antonio was just going to get some of his items back . . . ."[4]

However, even those jurors who did accept appellant's explanation were permitted – in fact required – to convict him of robbery and the other robbery based charges including first degree felony murder. This is so because the definition of robbery which governed the jurors deliberations did not require a finding that appellant intended to steal, i.e., to permanently deprive the owner of the property taken. Instead the instructions only required the taking of property in the possession of another person with the intent to permanently deprive that person of the property. Thus, even if appellant only intended that property belonging to Antonio Sanchez be taken from the Morales residence, under the instructions he was still guilty of robbery and robbery-felony murder because Antonio Sanchez' property was taken from

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[4] 67 RT 13228-29.

another person with the intent to permanently deprive that person of the property.

In sum, the guilt, special circumstance and penalty verdicts should be reversed because appellant's convictions and death sentence are founded on a disputed factual allegation that the prosecution was never required to prove.

C. The Guilt Trial

In November 1994 Ramon Morales and two other persons were shot to death in their Salinas residence. Also, an infant received non-fatal injuries during the shootings. The prosecutor contended that four persons – Antonio Sanchez, Joaquin Nuñez, Jose Luis Ramirez and appellant – conspired to burglarize the residence for the purpose of robbing and murdering Ramon Morales and anyone else who was present. On November 28, 1994, all four alleged perpetrators were charged with three counts of first degree murder with special circumstances as well as additional counts of robbery, burglary and conspiracy. They were also charged with assault and attempted murder as to the infant-victim.[5]

However, appellant was the only one of the four to be tried for these crimes.[6] Neither Antonio Sanchez nor Joaquin Nuñez were brought to trial; they were in custody in Mexico and had not been extradited. (71 RT 14008; 14012-16.) And, Jose Luis Ramirez received a plea-bargained sentence of 11 years, 8 months in exchange for his testimony against appellant. (40 RT 7802-

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[5] See 1 CT 68-70 (municipal court) [complaint] [Note: first number refers to Clerk's Transcript volume].

[6] See 5 CT 1119-1138 [Information].

04; 7813-14; 42 RT 8233-38; Exhibit 52.)[7]

Proceedings were commenced against appellant in 1996 after he was abducted at gun point by bounty hunters from his home in Mexico. (71 RT 14012-16.)

Judge Robert Moody – a municipal court judge on temporary assignment to superior court – presided over the proceedings. (4 CT 756-57.)

In February 1997, prior to jury selection, the judge ordered appellant to wear a REACT stun belt which was designed to deliver 50,000 volts of electricity for 8-10 seconds if activated. The intent of the device was to impose "total psychological supremacy" over appellant (Supplemental Clerk's Transcript [hereinafter "SCT"] 838) and to "maintain [] an invisible leash between the mind of [appellant] and the officer capable of activating [the belt] . . . ." (3 SCT 845.)

"[J]ust knowing the belt contain[ed] a jolt of 50,000 volts of unleashed electricity . . ." would have had a "unique" psychological impact on appellant. (3 SCT 839.)[8] Appellant was compelled to wear the stun belt, over objection,

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[7] The prosecution also alleged that a fifth person, Lorenzo Nuñez, was involved in the alleged conspiracy although he was not present at the time of the shootings. (See 1 CT 14-26.) Nuñez was tried and convicted of three counts of murder, attempted murder, assault with a firearm, residential burglary, conspiracy, residential robbery, unlawful assault weapon activity, and grand theft of a firearm in a separate trial. However, Nuñez' sentence was later vacated (*Nuñez v. Garcia* (2001 N.D. Cal.) 2001 U.S. Dist. LEXIS 12637) and the Monterey County District Attorney's office declined to retry the case. (Monterey Superior Court No. 942212(A).)

[8] The REACT stun belt literature described its effect as follows:

> "The most unique feature of the belt is the psychological impact rendered on the wearer. Just knowing the belt contains a jolt of
>
> (continued...)

throughout his jury trial. (2 SCT 318.) Appellant renewed his objection to the stun belt in August 1998 but the judge refused to reconsider the order requiring appellant to wear the belt. (27 RT 5211-12.)

On March 3, 1997 the judge – with the agreement of the prosecutor – granted the defense motion for a continuing order that all defense objections are made on all applicable state and federal grounds. (11 RT 2007; 2025; 27 RT 5202 [order reaffirmed on August 10, 1998]; see also 3 CT 675-76 [written motion].)

In June of 1998 Judge Moody, Judge Phillips and Judge Price engaged in plea discussions with appellant's attorney and the district attorney. Judges Price and Phillips both "felt strongly" that a life without parole sentence would be a "fair and prudent disposition of this case." (2 SCT 316.) Judge Moody agreed with this assessment. (22 RT 4202-04.) However, the district attorney continued to demand a death sentence.[9]

During jury selection, which commenced in August of 1998,[10] the judge

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[8](...continued)

> 50,000 volts of unleashed electricity at officer discretion, prompts the most violent inmate into becoming a complying customer." (3 SCT 839.)

The belt literature also stated: "Distraction! That is why the Belt works so well." (3 SCT 843.)

[9] On June 25, 1998, Judge Moody ruled that, because the prosecution was not willing to accept the plea agreement, the court had no authority to accept the plea agreement. (24 RT 4602-17; 4 CT 806.)

[10] Jury selection originally commenced in March, 1997, and continued for three days. (10 RT 1816; 3 CT 698.) However, on March 6, 1997, the Sixth District Court of Appeal agreed to hear the defense writ petition on sequestered voir dire and all proceedings were stayed pending the Court of (continued...)

excused several prospective jurors for cause based solely on their written responses to questions about the death penalty on the juror questionnaires and denied the defense an opportunity to orally voir dire the jurors. (RT 6201-15; 6601; 6606-11.)

At trial the prosecution relied on robbery-based theories of liability as to all ten counts. (See Claim 10 § E(2), pp.150-51, incorporated herein [robbery based theories of liability to all ten counts and felony murder special circumstances].) Appellant defended against these theories – which primarily depended on the testimony of accomplice Jose Luis Ramirez – by attacking the credibility of Ramirez and affirmatively contending that appellant had no intent to rob or kill the victims. (See Claim 10 § B(2), pp.141-46, incorporated herein [defense evidence negating alleged intent to steal the property of another].) In particular, appellant maintained that he only intended to help Antonio Sanchez take his own property which was in the Morales residence. (4 SCT 1036-39.)

However, the robbery instruction failed to require a juror determination of appellant's defense because it omitted two essential elements: (1) intent to steal (i.e., to permanently deprive the owner of the property), and (2) the taking of property belonging to another person. (6 CT 1307-08.) Moreover, there was

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[10](...continued)
Appeal decision. (17 RT 3202; 3 CT 711.)

On May 7, 1998, the Court of Appeal issued its peremptory writ of mandate. (3 CT 779.) This writ ordered the trial court to "exercise your discretion to decide whether it is practicable in petitioner's case to conduct voir dire in the presence of other jurors." (3 CT 779.) Jury selection began anew in August of 1998. (RT 5401-02.)

no instruction on claim of right as a basis for negating intent to steal.[11]

During deliberations the jurors sent out written notes requesting: a readback of the testimony of Jose Ramirez, Bertha Sanchez and Amy Trejo (5 CT 1196);[12] a list of the overt acts in the conspiracy count (6 CT 1200);[13] to see "the wall" (a portion of the wall from the Morales residence) and the mannequins (clothed in the victims' bloody clothing) which were used as demonstration exhibits (6 CT 1198),[14] and clarification of the instructions.[15]

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[11] The defense did not request a claim of right instruction. (But see Claim 12, pp. 195-205, incorporated herein [the judge had a sua sponte duty to instruct on claim of right].)

[12] On September 2, 1998, the court received a note from the jury requesting a readback of the testimony of several guilt phase witnesses. (54 RT 10601-03; 6 CT 1196 [note]; 4 CT 957 [minute order].) The judge ordered that the requested testimony would be read to the jury in the deliberation room with only the jurors and reporter present. (54 RT 10602.)

[13] On September 3, 1998, the court received a note from the jury requesting that they be given a written listing of the six overt acts charged with respect to the conspiracy. (55 RT 10801-02; 6 CT 1200 [note]; 4 CT 960 [minute order].) Over the objection of the defense, the jury was provided with a list of the overt acts which included the arson overt act the judge had omitted in the oral instructions. (55 RT 10801-02; 6 CT 1328-30.)

[14] In response to this request, the judge contacted counsel and allowed the jury to enter the courtroom to view the wall and mannequins because they were too big to send into the jury room. (55 RT 10804.)

[15] On September 8, 1998, the judge noted the receipt of two questions from the jury. The first asked, "If property is taken from the place before a person arrives, is it robbery or burglary or both?" The second stated, "We need definition and clarification of 'a principal was or was not armed with a firearm, to wit, a .38 caliber handgun and .30/.30 rifle'." (56 RT 11001-11003; 6 CT 1201 and 1202 [notes]; 962-64 [minute order].) The judge responded by rereading the burglary and robbery instructions and giving an additional "off-

(continued...)

The jurors also sent out a number of inquiries which were not answered on the record.[16]

After over 18 hours[17] of deliberation over four days (4 CT 956-63; 53

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[15](...continued)
the-cuff" explanation of robbery and burglary. (56 RT 11003-07.) The defense objected to the "off-the-cuff" explanation. (56 RT 11007; 4 CT 962-64.) The judge also explained that the arming enhancement could be found if any of the principals were armed with either the .38 caliber handgun or the .30/.30 rifle. (56 RT 11006.)

The jury also submitted two notes requesting clarification of conspiracy. (56 RT 11009-11; 6 CT 1204 [note]; 1216 [note]; 4 CT 963 [minute order].) The judge responded to one of the juror questions but not the other and the defense objected. (56 RT 11013-17.) Later that day, the jury returned its verdicts regarding the guilt allegations. (56 RT 11018-48; 4 CT 963-66.)

[16] See 6 CT 1209 (not dated) ["Can we get more copies of the jury instructions? (Maybe 2 or 3)"]; 6 CT 1211 (9/21/98) [Requesting "...6 copies of the instructions"]; CT 1214 (not dated) ["Can we look at the argument?"]; 6 CT 1217 (not dated) ["Could we have the exhibits raised. So they may be more easily viewed by jurors? (Maybe moved more to judge's right)"; 6 CT 1220 (possibly 8/19/98) ["If witness Delia [Longoria]... is to be recalled could we have an interpreter assist her during her testimony. I felt she couldn't understand the questions put to her by defense counsel"]: 6 CT 1221 (8/25/98) ["Question for prosecution: 1) What about the coroner's report? Will we get it? 2) How many times each body shot, where and by what caliber/type of bullet? 3) Who owned the white bus in the driveway @ crime scene?" 4) why is trial being held so long after the crime? 5) where is Morales' daughter today? 6) where is Antonio? 7) Where is Joaquin?"]; 6 CT 1215 (possibly 8/26/98) ["Prosecutor: Please clarify what the "taser" is. Do you mean the projectile version or the non-projectile version?"]; 6 CT 1222 (not dated) ["Where is Dan C's wife? Why has she not testified on his behalf?"].

[17] The clerk's minutes show the starting time of deliberations for each day. Assuming the jurors stopped deliberations at 5:00 p.m. each day and had breaks totaling approximately 2 hours for each full day, the hours of deliberation were as follows:

(continued...)

RT 10475-11048), the jurors, on September 8, 1998, found appellant guilty of first degree murder (3 counts); attempted murder (1 count); assault with a deadly weapon (1 count); first degree robbery (3 counts); first degree burglary (1 count); and conspiracy to commit robbery and burglary (1 count). (4 CT 967-997.) The jurors also found the arming enhancement and the three special circumstance allegations to be true: multiple murder, robbery felony murder and burglary felony murder. (4 CT 968; 972; 976; 979.)[18]

However, the jurors could not agree on the conspiracy to commit murder allegation. (4 CT 997; 56 RT 11046.)[19]

As to all Counts, the jurors unanimously found the use of a knife allegation untrue (4 CT 969-70; 973-74; 977-78; 981; 983; 985; 988; 991; 994), and could not agree on a verdict as to the special allegation that appellant used a firearm. (56 RT 11019; 11021; 11026; 11032; 11036; 11047-48; 4 CT

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[17](...continued)

9/1/98 [commenced 3:45 pm]– 1 hour 15 minutes (4 CT 956-57)
9/2/98 [commenced 9:00 pm]– 6 hours (4 CT 958-59)
9/3/98 [commenced 9:00 pm]– 6 hours (4 CT 961-62)
9/8/98 [commenced 9:00 pm/ returned verdict 4:00 pm]– 5 hours (4 CT 962-63)

Total – 18 hours 15 minutes

[18] The jurors also found the following enhancements as to Counts 1-9:

(1) That a principal was armed with a .38 handgun and a .30/.30 rifle per Penal Code § 12022(a)(1) and
(2) That a principal was armed with an assault rifle (AR-15) per Penal Code § 12022(a)(2). (4 CT 969; 973; 977; 980-81; 984-85; 987-88; 990-91; 993-94.) No firearm enhancements were alleged as to Count 10, conspiracy. (4 CT 996-97.)

[19] The numerical breakdown was 11 to 1. (56 RT 11046.)

970; 974; 978; 981; 983; 985-86; 988-89; 991-92; 994-95.)[20]

D. The Penalty Trial

At the penalty trial the prosecution was permitted to present – without any cautionary instructions – extensive victim impact testimony. The judge also permitted the jurors to view, over defense objection, an emotionally charged audio-video montage during the prosecution's closing argument. (See Claim 59, pp.537-52, herein.) During their second day of penalty deliberations, the jurors asked for additional sets of the written instructions. (6 CT 1211.) Shortly before returning the death verdict the jurors sent out a note asking, "If we can't come to an agreement on a penalty, is it a mistrial or default to life in prison [without] parole, or does judge make decision?" (6 CT 1212; RT 13601-02.) The judge responded by admonishing the jurors not to consider the consequences of any failure to reach a verdict. (RT 13603-06.)[21] The jury returned its verdict of death on September 22, 1998. (5 CT 1067.)

E. Sentencing

1. Mexican Consulate Evidence

On October 15, 1998, the matter came on calendar for sentencing. At this proceeding, the defense advised the court that a representative of the Mexican Consulate would be making a presentation regarding the applicability

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[20] The numerical breakdown was 11 to 1 as to the use of a firearm allegation in Counts 1 and 2. (56 RT 11022; 11047-48.)

[21] The jurors also sent out the following notes during the penalty deliberations: The judge mentioned a juror note concerning whether the jurors' admonishment was still in effect, but this note does not appear in the Court Transcript (9/15/98, 61 RT 12001); CT 1211 (9/21/98) [Requesting "...6 copies of the instructions"]; CT 1212 (9/22/98) ["If we can't come to an agreement on a penalty, is it a mistrial or defaults to life in prison w/o parole, or does judge make decision"].

of a 1994 Executive Agreement signed by the United States and Mexico. (71 RT 14003-08.) The representative of the Mexican Consulate argued that the imposition of the death penalty on appellant would be "unfair" because the criminal abduction of appellant from Mexico to the United States by bounty hunters exposed appellant to the death penalty while the other persons involved in the crime who were in Mexico did not receive the death penalty. (71 RT 14012-16.) Moreover, the two others involved who were in custody in Mexico [Antonio Sanchez and Joaquin Nuñez] could not testify at appellant's trial in the United States but could have testified had he been tried in Mexico. (71 RT 14012-16.) The court put the matter over so the prosecution could address the issue. (71 RT 14016-17; 5 CT 1120.)

On October 27, 1998, the prosecution argued that the court should only review the evidence presented to the jury and should limit its ruling to an assessment of the aggravating and mitigating circumstances. The defense argued that the evidence presented by the Mexican Consulate should also be considered. The defense filed documents from the Mexican Consulate which were made part of the record. (72 RT 14201-04.)

The court concluded that it would only consider the evidence presented to the jury during trial and stated that it was not up to him to attempt to pass on aspects of international law. (72 RT 14204-07.)

2. "Troubling Aspects" Of The Case

Before imposing the death penalty the judge commented on certain "troubling aspects" of the case. The judge observed that appellant did not fit "the pattern" of a death row inmate: he has "*considerably more humanity to him than most of the others.*" (72 RT 14219.) The judge was also troubled by the "disconnect between the evidence of the defendant's character and the enormity and monstrosity of the crimes he committed." (72 RT 14217-18.)

Nevertheless, the judge sentenced appellant to death. (72 RT 14219-22; 5 CT 1064.)

GUILT PHASE: STATEMENT OF FACTS

A. Overview

1. Summary Of The Central Factual Issues

On November 16, 1994 Ramon Morales, his wife Martha Morales and her brother Fernando Martinez were shot to death in their residence at 1022 East Market Street in Salinas. The Morales' infant daughter was also shot, but survived.

Monterey County charges were filed against Antonio Sanchez, Joaquin Nuñez, Jose Luis Ramirez and appellant. (1 CT 68-70; 5 CT 1119-1138.)[22] However, appellant was the only one brought to trial.[23]

At appellant's trial, the prosecution alleged that appellant and the three others conspired to enter the Morales' home and to rob and kill Ramon Morales and anybody else in the residence. The allegation that appellant joined in the plan to rob and murder the victims was primarily[24] based on the testimony of Jose Luis Ramirez that:

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[22] See Statement Of Case, § C, p. 6, fn. 7, herein [re: separate charges filed against Lorenzo Nuñez who was not present during the shootings].

[23] Antonio Sanchez and Joaquin Nuñez were taken into custody by Mexican authorities but not extradited for trial in the United States. (71 RT 14012-16.)

Jose Luis Ramirez was allowed to plead guilty to 3 counts of robbery and a burglary charge, and received a sentence of 11 years, 8 months in exchange for testifying against appellant. (40 RT 7802-04; 7813-14; 42 RT 8233-8238.) If Ramirez had not been able to testify against appellant he would have received a life sentence. (42 RT 8238; Exhibit 52.)

[24] Besides the testimony of Jose Luis Ramirez the prosecution relied on physical evidence including: the ransacking of the house, appellant's fingerprints on two boxes of ammunition and a "Huggies" box, Jose Luis Ramirez' fingerprints on a tackle box, and the fact that other witnesses saw Jose Luis Ramirez after the shootings with three items he said were taken from the Morales residence.

(1) Antonio Sanchez and victim Ramon Morales had a running dispute which included threats against each other's lives.

(2) Prior to the shootings Antonio Sanchez, Jose Luis Ramirez, Joaquin Nuñez and appellant obtained the rifles used in the shootings, committed arson to obtain money for ammunition,[25] test-fired the rifles, drove to the victims' residence in appellant's car (with appellant driving) and entered with Antonio Sanchez and Joaquin Nuñez carrying the rifles and appellant carrying a knife.

(3) Before going to Ramon Morales' house, Antonio Sanchez and appellant discussed the alleged plan to rob and kill Ramon Morales.

(4) Immediately after they entered appellant held a knife to the occupant's throat.

(5) After entering the residence Antonio Sanchez told Jose Luis Ramirez to take anything he could.

(6) Appellant took two handguns from a box in the kitchen of the residence and gave one to Antonio Sanchez.

Appellant did not dispute the allegations that he drove himself and the three others to the Morales residence, entered with the others and handled certain items in the residence. Nor did he dispute that he was present when the victims were shot. However, appellant maintained that his only intent was to help Antonio Sanchez obtain his (Antonio's) own things from the Morales residence and that he did not intend to rob, kill or otherwise harm the victims. Appellant also disputed the allegation that he used a knife and a .38 handgun.

Accordingly, the evidence raised four central factual issues for the

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[25] The arson was alleged as an overt act vis-a-vis the conspiracy charge. However, there was no evidence that appellant participated in the arson other than his association with Antonio Sanchez. (See Guilt Phase: Statement Of Facts § B(6), pp. 24, incorporated herein.)

jurors to resolve:

1. Did appellant use a knife to assault one of the victims?

2. Did appellant shoot the victims with a .38 handgun?

3. Did appellant act with a premeditated and deliberate intent to kill?

4. Did appellant act with the intent necessary for robbery and burglary and the robbery-based theories of liability as to the murder, attempted murder and conspiracy charges?

The jury did not accept the prosecution's theories as to first three issues. The jurors unanimously found that the use of a knife allegation was not true and they failed to reach a verdict on the use of a .38 handgun and conspiracy to commit murder allegations.

On the other hand, the jury did find appellant guilty of robbery, burglary and conspiracy to commit robbery and burglary. Also, the jurors found the robbery and burglary felony murder special circumstance allegations to be true. Thus, it is apparent that the jurors resolved the fourth issue – intent to commit robbery and burglary – in favor of the prosecution to all ten counts on those predicate offenses. And, it is also apparent the jurors relied on the above findings to convict appellant of first-degree murder. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 24-5 ["The robbery-murder special-circumstance finding also dictated a finding of first degree felony murder under section 189 and the corresponding felony-murder instruction . . ."]; see also *People v. Sanders* (1990) 51 Cal.3d 471, 509-10 [same].)

In sum, the key factual issue in this trial was whether appellant acted with the intent necessary to warrant conviction of burglary and robbery and the associated special circumstances. The evidence relevant to this issue is discussed below.

2. Summary Of Evidence Regarding Intent To Steal

The prosecution contended that appellant had the necessary knowledge and intent for robbery and burglary based primarily on the testimony of the accomplice-witness, Jose Luis Ramirez, regarding an alleged discussion between appellant and Antonio Sanchez of a plan to rob and murder the victims. Also, Jose Luis Ramirez testified that after entering the residence, Antonio Sanchez told Jose Luis to take what he could.[26]

The prosecution also relied on the testimony of Jose Luis Ramirez to argue that appellant personally committed robbery by taking two handguns from a box in the kitchen of the residence.

In sum, the primary evidence of appellant's alleged intent to steal came from Jose Luis Ramirez.[27]

The defense, however, attacked the credibility of Ramirez on numerous grounds.[28] Additionally, in a video statement offered by the prosecution,

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[26] Jose Luis Ramirez maintained that he was helping his uncle, Antonio Sanchez, steal Ramon Morales' things because that was what Antonio Sanchez wanted. Jose Luis Ramirez testified that he searched the house looking for things to "steal" and that he made three trips from the house to the car taking items such as a VCR and stereo equipment. He also took a necklace from the bed stand, and a jar of "Tres Flores" [three flowers] hair oil–which was the brand Jose Luis used. Jose Luis Ramirez took these items, as well as a .32 handgun (that Antonio Sanchez gave him from inside the house) with him when he fled.

[27] The prosecution also relied on the fact that appellant's fingerprints were found on several items of property in the Morales residence. However, this fact was also consistent with appellant's claim that he was looking for property that belonged to Antonio Sanchez.

[28] First, Jose Luis Ramirez had received a favorable plea bargain in exchange for his testimony. Second, Ramirez admitted that he had deliberately lied to (continued...)

appellant denied that he acted with intent to steal. Appellant stated that he only intended to help Antonio Sanchez get some things which Sanchez had left at the Morales residence. Appellant also denied any intent to help Jose Luis Ramirez loot the house.

The defense also relied on evidence of appellant's non-violent character – especially when intoxicated – to argue that appellant did not know about the alleged plan to rob and kill. Furthermore, appellant did not know Ramon Morales and had no motive to kill or rob him.

Appellant's contention that he only intended to take certain items belonging to Antonio Sanchez was further corroborated by the fact that numerous items of value were not taken, including $378 in cash.

B. Events Prior To The Entry Of The Morales Residence

1. Prior Friendship Between Antonio Sanchez and Ramon Morales

Antonio Sanchez and Ramon Morales had been "good friends." (42 RT 8208.) They lived in the same house until August, 1994. (40 RT 7808-09; 41 RT 8052-53; 43 RT 8448-52; 44 RT 8641-45.) They were friendly with each other and would drink together socially on a regular basis. (44 RT 8643-44.)

In August or September, 1994 Antonio and Ramon stopped living together because the house they were living in was too crowded. (43 RT 8452; 8646.) Ramon, Martha, their infant daughter and Martha's brother, Fernando,

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[28](...continued)
the police about how he saw appellant take the handguns. Third, Ramirez made numerous contradictory statements about the events prior to the alleged assailants' entry. Fourth, Ramirez made contradictory statements about whether appellant had a handgun and used a knife. Fifth, Ramirez made a post-crime statement inconsistent with his testimony that there was a plan to rob and kill the victims. Sixth, Ramirez was intoxicated when he allegedly saw and heard the matters about which he testified.

moved to the converted garage at 1022 East Market in Salinas where the shootings occurred. (39 RT 7663-64 [Longoria].)[29] Antonio lived with his sister for a while and then went to Mexicali for about a month before returning with appellant in November of 1994. (44 RT 8620-24; 8662.)[30]

2. Dispute Between Antonio And Ramon

Antonio and Ramon were still on good terms when they stopped living together in August or September, 1994. (44 RT 8646 [Arturo]; 8705 [Amy Trejo].) However, at some point thereafter, a dispute occurred between the two.

According to Jose Luis Ramirez, the dispute related to drug dealing. (42 RT 8208.)[31] On the other hand, Arturo Perez, who lived with Antonio and Ramon for approximately six months, had never seen or heard any evidence of drug dealing or other illegal activity. (44 RT 8620; 8640-45.) According to Perez, Antonio worked in the fields[32] and as an automobile mechanic; Ramon bought and sold cars for a living. (44 RT 8641; 8651.) Perez testified that the dispute between Sanchez and Morales was about payment for repairing an automobile. (44 RT 8621-22; 8643-45.)[33]

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[29] Lorenzo Nuñez also lived in the East Market residence. (39 RT 7672; 7694; 44 RT 8623.)

[30] After he returned from Mexicali, Antonio lived with his niece Amita. (44 RT 8704.)

[31] Appellant was not involved with drugs. (41 RT 8063.)

[32] The prosecution presented payroll records showing that Ramon worked in the fields. (46 RT 9088-91.)

[33] Amy Trejo testified that the dispute was about money from something that happened when Antonio Sanchez and Ramon Morales were living together. (continued...)

According to Jose Luis Ramirez, Antonio and Ramon had each threatened to kill the other. (42 RT 8207-08.) Amy Trejo heard Antonio say that he wanted to kill Ramon but she didn't take it seriously. (44 RT 8721.)[34] Jose Luis Ramirez apparently didn't take the threats seriously either.[35]

Appellant knew that Ramon had threatened Antonio. (4 SCT 1037; Exhibit 85A.) However, appellant did not believe that Antonio intended to kill or rob Ramon when they went to the Morales residence on November 16, 1994. (*Ibid.*) He believed Antonio simply intended to get some property Antonio had left at Ramon's residence and did not know or believe that Antonio Sanchez intended to harm anyone. (*Ibid.*)

3. Evidence That Ramon Morales And Antonio Sanchez – But Not Appellant – Were Involved With Drugs

Jose Luis Ramirez testified that Antonio Sanchez and Ramon Morales sold drugs and stole cars together. (41 RT 8051-52; 8061-62; 42 RT 8208.)

Other evidence of Ramon Morales' drug dealing included discovery of a "triple-beam" scale in a chicken coop outside his residence. (46 RT 9078.) Also, Ramon carried a pistol (41 RT 8062-63; 39 RT 7684; 39 RT 7704; 38 RT 7410); other firearms were in a locked box in his residence (46 RT 9073); additional guns were found in a box in the bedroom and in the chicken coop

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[33](...continued)
(44 RT 8703-8705.)

[34] See also footnote 35, below.

[35] He told Antonio Sanchez on the phone after the murders that "I didn't think you were going to do that." (42 RT 8248-49.) If Jose Luis Ramirez had thought that anything serious was going to happen to the Morales he would have warned them before he and the others entered the residence. (42 RT 8242; 8250.)

behind the Morales residence (50 RT 9870-72 [defense]); and Ramon used an alias when renting the converted garage. (39 RT 7664-65.) A small amount of hashish was found in the bedroom of the Morales residence. (46 RT 9077.)[36]

However, appellant was not involved in the sale or distribution of drugs. (41 RT 8063.)

4. Appellant's Transportation Of Antonio Sanchez And Joaquin Nuñez To Salinas

In October of 1994, Antonio Sanchez went to Mexico where he stayed for about a month. (44 RT 8620-24; 8662.) Thereafter, appellant – who was a cousin of Antonio Sanchez and Joaquin Nuñez (40 RT 7805-08; 43 RT 8411-12; 8427) – drove them to Salinas from Mexico, arriving around November 11, 1994. (43 RT 8410-13.) It was not unusual for appellant to transport family members back and forth across the Mexican border.[37]

Appellant planned to return to Mexico after a few days. However, because appellant's sister, Bertha Sanchez, had plans to go to Mexico on November 17, appellant decided to wait until then and go with Bertha. (43 RT 8413-14.)

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[36] Cockfighting paraphernalia and roosters were also found in the chicken coop, as well as a triple beam scale which is used to "measure out the amount of narcotics you are going to sell." (46 RT 9078.) However, the scale could have been used to weigh food for the roosters. (46 RT 9078-79; 9085-87.)

[37] Jose Luis Ramirez testified that appellant was a "coyote" who brought people who did not have papers from Mexico into the United States. (41 RT 8055; 8071-72.) DA investigator Richard Moore ordered driver licenses from the DMV for appellant. One of the licenses had the name Arturo Saucedo and the other the name Daniel Covarrubias. (48 RT 9470-75.) [In argument to the jury defense counsel stated that appellant was a coyote. (52 RT 10269 [guilt]; 59 RT 11634 [penalty].).] However, according to appellant, he only engaged in coyote activities for his friends and family. (See 64 RT 12625 [penalty].)

5. The Rifles Used In The Shootings

The day before the killings, Lorenzo Nuñez, who lived with the Morales (39 RT 7694), came over to Bertha Sanchez' residence, where appellant was staying. (43 RT 8415-16.) While appellant was in another room making a phone call, Lorenzo took out two rifles (43 RT 8415-16; 8431) from under the sofa. (43 RT 8416; 8433.) In his video statement appellant said that Lorenzo gave him the rifles to sell in Mexico to raise money to bring Lorenzo's wife and daughter to Salinas. (4 SCT 1036.) Bertha was very upset when she saw the rifles and she told appellant to take them out of the house, so appellant took them to his car. (43 RT 8418; 8432.)[38] Bertha could not identify the demonstration rifles (an AR-15 and a .30/.30) shown to her by the prosecutor as "similar" to the rifles she saw in her house because she didn't "know anything about weapons." (43 RT 8417.)

According to Jose Luis Ramirez, on the day of the shootings there were two rifles in the trunk of appellant's car: an AR-15 automatic and a .30/.30 lever action. (40 RT 7859-62.) Jose Luis Ramirez thought that Antonio Sanchez was the one who put the rifles in appellant's car. (40 RT 7847.) Amy Trejo saw Antonio Sanchez move a box of guns from Antonio's trunk to the appellant's trunk. (44 RT 8694-95.) She wasn't sure what kind of guns were in the box. (44 RT 8707-08.)

On the afternoon of the killings, Antonio Sanchez and Joaquin Nuñez each displayed a rifle at Amy Arrendondo's residence. (43 RT 8462-63.) Antonio Sanchez, Joaquin Nuñez and Jose Luis Ramirez were also the ones who purchased ammunition for the rifles and who test fired the rifles. (See Guilt Phase: Statement Of Facts § B(7) and (10), pp. 25-27 below,

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[38] See also p. 45, herein [Defense Evidence § 3].

incorporated herein.) Antonio Sanchez carried the AR-15 and Joaquin Nuñez the .30/.30 when they entered the Morales residence. (41 RT 8008-09; 8019-20.)

Jose Luis Ramirez never saw appellant handle either of the rifles. (41 RT 8011; 42 RT 8205.)

Appellant did not have a firearm when they entered the Morales residence. (41 RT 8011.)[39]

6. Burning Of Avalos' Truck; Obtaining $100 From The Trailer Park

In the early morning hours of November 16, 1994, Juan Martinez Avalos' produce truck was set on fire. He did not know who burned his truck, but he had parted on bad terms with his produce business partner, Angel Martinez. (43 RT 8486-91.) Avalos reported the fire to the police. (RT 8492.)[40]

Jose Luis Ramirez told DA Investigator Richard Moore that Antonio Sanchez picked up a $100 bill from a trailer park in North Salinas in payment for burning a vehicle on November 15, 1994 and so testified. (43 RT 8495-96.)[41] Jose Luis Ramirez said the $100 was paid by a lady in one of the trailers

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[39] Delia Longoria testified that she saw appellant leave the residence carrying a rifle. (39 RT 7710.) However, Longoria, who was highly traumatized at the time of the observation, could only see a part of the rifle above the fence. (39 RT 7696-97.) Longoria also appeared to have trouble understanding the questions which were asked in English without an interpreter. (See 6 CT 1220 [juror note stating that Longoria "couldn't understand the questions put to her by defense counsel"].)

[40] In the police report his name was stated as Martinez. (43 RT 8498.)

[41] However, Moore's testimony that Jose Luis Ramirez said the $100 was for burning a truck was admitted only for the purpose of explaining Moore's (continued...)

for a debt owed to Antonio Sanchez.[42] Jose Luis Ramirez was not permitted to testify that the debt was payment for burning a vehicle. (40 RT 7831-35.)

After interrogating Jose Luis Ramirez, and in response to Jose Luis Ramirez' statement about the burning of the vehicle, Moore reviewed the report about the burning of Avalos' truck. (43 RT 8498.) He had Jose Luis Ramirez show him the trailer where Antonio Sanchez obtained the $100. (40 RT 7832.) Moore also contacted Avalos, who stated that his truck had been burned that night, and showed Moore the trailer where the people lived whom he suspected were responsible for the burning. This was the same trailer (# 35) where Jose Luis Ramirez said Antonio had obtained the $100. (43 RT 8499-8500.)

Other than his association with Antonio Sanchez, there was no evidence that appellant was involved in the arson.

7. Purchase Of Ammunition At JKD

According to Jose Luis Ramirez, on the afternoon of November 16, 1994, appellant drove Antonio Sanchez, Joaquin Nuñez and Jose Luis Ramirez to the JKD Shooting Sports store on North Main Street in Salinas after receiving the $100 bill at the trailer park. Antonio Sanchez purchased ammunition and a clip for an AR-15 assault rifle and possibly .30/.30 ammunition. (40 RT 7838-39; 42 RT 8281-83.) Antonio paid for the

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[41](...continued)
investigation and was not to be considered as to whether there actually was an arson. (43 RT 8495-96.)

[42] Jose Luis Ramirez testified that appellant got out of the car while they were at the trailer park and looked at a rifle that was hanging in a pickup truck parked there. According to Jose Luis Ramirez, appellant said he was going to steal the rifle if the person in the trailer didn't pay Antonio Sanchez the money owed to him. (40 RT 7833-34.)

ammunition with a $100 bill. (40 RT 7840-41; 42 RT 8275.) Appellant waited in the car while the three others were in the store. (40 RT 7837.)

James Fletcher, who worked at JKD Shooting Sports, remembered three young Hispanic men who purchased ammunition for an AR-15 and another kind of rifle. (42 RT 8260-62.) Appellant was not one of the three men who purchased the ammunition. (42 RT 8276.)

Based on the register receipt, Fletcher was certain that the transaction took place early in the morning on November 15, not in the afternoon on November 16, 1994. (42 RT 8273-74.) Fletcher testified that ". . . I can say with absolute, unequivocal, bet-my-life-on-it certainty that [November 15] is the correct date." (42 RT 8273-74.)

8. Drinking Throughout The Afternoon And Evening

Appellant and the others purchased beer and drank throughout the afternoon and evening at various locations. (40 RT 7836; 7841-43; 43 RT 8458-61 [at Aunt Amy's]; 40 RT 7843-44 [at Amita's]; 7851-53 [at Bertha's].)

9. Prosecution Evidence Of Appellant's Intoxication On November 16, 1994

Jose Luis Ramirez testified that during the day of November 16, 1994 they bought two 24-can cases of beer, or four twelve packs which the four of them drank – each drinking about the same amount. (41 RT 8066-67; see also Guilt Phase: Statement Of Facts § G(2), pp. 150-51, incorporated herein.)[43]

Amy Arredondo testified that appellant and the others were drinking beer at her house around 5:00-5:30 p.m. (43 RT 8458-61.) Appellant was intoxicated when they left. (43 RT 8462.)

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[43] Appellant was slightly built. (See 5 CT 1101 [FBI report of 7/25/95 indicating that appellant was five feet, six inches tall and weighed 125 pounds].)

Bertha Sanchez testified that during the afternoon of November 16, 1994 she saw appellant drive up outside of her house as she was leaving to do laundry. (43 RT 8419-20.) Antonio Sanchez, Jose Luis Ramirez and Joaquin Nuñez were with him. (43 RT 8420.) When she returned at 7:30 or 8:00 they were still there. (43 RT 8421.) She was mad at them because they were outside drinking. She told appellant to leave. (43 RT 8421; 8429.) Bertha had seen appellant drinking on many occasions and that evening she believed he was drunk. She would not have felt safe riding in a car that appellant was driving. (43 RT 8429-30.)

When intoxicated, appellant was "very happy, a dancer." (43 RT 8429; 8447.)[44] There was no evidence that appellant was a violent person. (See e.g, 44 RT 8711 [appellant was "nice" and got along with everyone else].)

10. Test Firing Of The Rifles

According to Jose Luis Ramirez, after leaving Bertha's house, the men drove to "the mountains" to test fire the guns. (44 RT 8755-56.) Antonio Sanchez and Joaquin Nuñez loaded the rifles and fired them out the car windows while appellant was driving. (40 RT 7859-63.)

Robert Falcon lived on Old Stage Road in the country outside of Salinas. (48 RT 9485.) On November 16, 1994, Falcon heard shots being fired in the area and reported this to the police. (42 RT 8257; 48 RT 9486.)[45]

11. Events After The Test Firing

Jose Luis Ramirez testified that after test-firing the rifles, Antonio said

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[44] The prosecution evidence of intoxication was corroborated by the testimony of defense witness Jorge Acosta. (See Guilt Phase: Statement Of Facts § G(2), pp. 150-51, incorporated herein.)

[45] Richard Moore testified that Falcon made the report at 8:03. (48 RT 9486.) Falcon testified he thought it was "around 9:00." (42 RT 8257.)

that they were going to kill Ramon Morales' brother, Guillermo. (40 RT 7863-64.) However, before going to Guillermo's residence, they went to the house of one of Jose Luis Ramirez' friends because appellant had asked for a smaller

weapon. (40 RT 7864.)[46] The friend wasn't home so they drove to Guillermo's house. (40 RT 7865.) Jose Luis Ramirez testified that appellant said that he would go to Guillermo's door because no one would recognize him. (40 RT 7865.) Appellant went to the front door but then returned shortly because no one answered the door. (40 RT 7867.) They then went to "Frank's house" because Antonio wanted to kill him also. Frank also owed Antonio money. (40 RT 7867.) They drove to the motel where Frank was staying, but no one got out of the vehicle there. (41 RT 8004.)

12. Driving To The Morales Residence

After driving to the motel where Frank was staying, appellant drove Antonio Sanchez, Jose Luis Ramirez and Joaquin Nuñez to the Morales residence. (41 RT 8004.) Appellant parked the car near the residence. (41 RT 8005-06.) According to Jose Luis Ramirez, appellant went to the front door first because no one would know him. (41 RT 8007.)[47]

C. The Purpose Of Going To The Morales Residence

According to Jose Luis Ramirez, Antonio Sanchez and appellant planned to rob and murder Ramon Morales and anyone else who was present

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[46] Jose Luis Ramirez never mentioned going to his friend's to get a gun in any of his interviews or prior testimony. (42 RT 8233-34.) Nor was it mentioned in the summary of the case in the plea bargain agreement. (Exhibit 52.)

[47] According to Jose Luis Ramirez, when Antonio Sanchez became nervous, appellant said, "Just go ahead and go inside the house." (41 RT 8013.)

at the Morales residence. (40 RT 7854; 41 RT 8007.)[48]

According to appellant – who did not know Ramon and was not a party to the disagreement between Ramon and Antonio (41 RT 8007) – the group went to Ramon's residence merely to "pick up"some things which Antonio had left there. (50 RT 9816-17, Exhibit 85A [appellant's video taped statement]; 4 SCT 1037.) They took guns as a "precaution" because Ramon had threatened Antonio. (4 SCT 1037.) There was no plan to "loot" the residence or to kill anyone. (*Ibid.*) Numerous items of value – including $378 in cash – were not taken from the residence. (See Guilt Phase: Statement Of Facts § E(3), pp. 36-37, incorporated herein.)

As acknowledged by the prosecutor, the jurors' failure to agree as to the special verdicts suggested that at least some jurors may have believed that appellant only intended to take Antonio Sanchez' property. (67 RT 13229.)

D. Events At The Morales Residence

1. Entry Of The Residence

According to Jose Luis Ramirez, appellant walked up to the door of the

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[48] However, when Jose Luis Ramirez talked to Antonio Sanchez on the phone the day after the killings Jose Luis Ramirez said "I didn't think you were going to do that." (42 RT 8247-48.) If Ramirez had thought that anything serious was going to happen to the Morales he would have warned the couple before the men entered the residence. (42 RT 8242; 8250.)

Amy Trejo heard Antonio Sanchez say he was going to kill Ramon Morales but she didn't take him seriously. (44 RT 8696-97 [Antonio wanted "to get" Ramon Morales and Ramon Morales wanted "to get" Antonio Sanchez]; 44 RT 8720-21.) Amy was surprised by the killings because they were not the "type of people" who would do anything like that. (44 RT 8712-13.) Antonio Sanchez used the terms "to get" or "to kill" as a way of expressing his anger. (*Ibid.*) It ". . . never, never crossed [her] mind [that he would actually kill Ramon]." (44 RT 8713.)

Morales residence and knocked. (41 RT 8013.)[49] There was no answer and no sound coming from the house so appellant opened the door which was not locked. (41 RT 8014-15.)[50] Appellant and the others entered the residence. (*Ibid.*) As they did Antonio Sanchez had the AR-15 rifle and Joaquin Nuñez had the .30/.30. (41 RT 8008-09; 8019-20.)

2. Whether Appellant Used A Knife After Entering The House

According to Jose Luis Ramirez, immediately after they entered the residence appellant held a knife to the throat of Fernando Martinez, who was sleeping on the living room floor and appellant told Fernando Martinez not to look at anyone. (41 RT 8015-17.) However, the jurors unanimously rejected this testimony and found that the use of a knife allegation was not proved. (4 CT 969-70; 973-74; 977-787.)

3. Searching The Residence

According to Jose Luis Ramirez, Antonio Sanchez pointed the automatic rifle at Fernando while the others searched the residence. The house appeared to have been thoroughly searched. (38 RT 7428; 7435; 7439; 45 RT 8865; Exhibits 3, 5(D) and 65; see also Guilt Phase: Statement Of Facts § E(2), p. 36, incorporated herein.)[51] In the words of the prosecutor the "house [was] "tossed." (37 RT 7253.)

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[49] Appellant went to the door first because, according to Jose Luis Ramirez, the residents wouldn't know or recognize appellant. (37 RT 7252; 41 8007.)

[50] The police found no evidence of forced entry. (45 RT 8881-86.)

[51] Boxes of .38 and .380 ammunition (.38 and .380 are different calibers) and a "Huggies" box on the bed in the bedroom each had fingerprints matching appellant's. (See Guilt Phase: Statement Of Facts § E(6), p. 38, herein.) Jose Luis Ramirez' fingerprints were found on a cash/tackle box which was also on the bed. (*Ibid.*)

4. Taking Of Items From The House By Jose Luis Ramirez

Jose Luis Ramirez testified that Antonio Sanchez told him to take whatever he could from the house. (41 RT 8020; 42 RT 8215.) Jose Luis Ramirez made three trips from the house to the car taking items such as a VCR and stereo equipment. (41 RT 8019-20.)[52] Jose Luis Ramirez also took a necklace from the bed stand and a jar of "Tres Flores" hair oil–which was the brand Ramirez used. (41 RT 8042; 8045-46; 44 RT 8633; 8649-50; 8655-56.) He also took a .32 caliber handgun which Antonio gave him shortly after they entered the residence. (41 RT 8022-23; 8042; 42 RT 8238-39.) Jose Luis Ramirez took the .32 handgun, the necklace and the hair oil with him when he left. (41 RT 8042.) Appellant denied any intent to help Jose Luis Ramirez "loot" the residence. (4 SCT 1037.)

5. Taking Of Handguns From The Locked Box

Jose Luis Ramirez told the police that he didn't see appellant with any kind of gun at any time on November 16, 1994. (41 RT 8011.) On another occasion, however, Jose Luis Ramirez told the police that appellant took two guns from a box in the kitchen and gave one of the guns to him (Ramirez) and put the other one in Antonio's pocket. (42 RT 8225-28.) At trial Jose Luis Ramirez testified that appellant kept one of the guns for himself and put the other in Antonio Sanchez' coat pocket. (41 RT 8032-33.)

Ramirez also told the police that while he was standing outside the residence and looking through the window he saw appellant in the house with a gun in his hand. (42 RT 8217-18.) However, because appellant would not have been visible through the window, Jose Luis Ramirez was forced to admit at trial that he had deliberately lied to the police. (See 42 RT 8217-18.) He

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[52] No other evidence was presented regarding the VCR and stereo equipment.

then changed his story and testified that he was looking through the front door when he saw appellant with a gun. (*Ibid.*)

The jurors could not agree whether or not the prosecution had proved the special allegation that appellant personally used a .38 handgun. (4 CT 970; 974; 978; 981; 983; 985-86; 988-89; 991-92; 994-95.)

6. The Arrival Of Ramon And Martha Morales

When Jose Luis Ramirez was outside on his third trip to the car with items taken from the house, he saw Ramon and Martha Morales drive up. (41 RT 8025.) Jose Luis Ramirez went inside and told the others. (41 RT 8025-26.) According to Jose Luis Ramirez, everyone hid and when the Morales' entered, Antonio confronted Ramon with the automatic rifle. (41 RT 8028-31.) Martha Morales and the infant were taken into the bedroom by Joaquin Nuñez while appellant was in the kitchen. (41 RT 8030-31.)

Jose Luis Ramirez did not warn the Morales' about going inside even though he could have done so since he was outside when they arrived. (41 RT 8025.)[53]

7. The Shootings

Jose Luis Ramirez testified that he first heard .30/.30 shots as he was walking away from the residence.[54] He began to run and then heard another

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[53] He testified that he did not warn them because he was afraid Antonio Sanchez would "do something to me." (42 RT 8213-14; but see 42 RT 8248-49 [Jose Luis Ramirez didn't think Antonio Sanchez was going to kill the victims].)

[54] Jose Luis Ramirez originally testified that after he heard the shots he started to walk toward the front of the house. (41 RT 8036.) Subsequently, he testified that he was "in the front door" when he first heard the shot and walked out. (41 RT 8037.) He continued walking and heard another shot. After he heard the first shot he ran down the walkway (42 RT 8242.)

.30/.30 shot and about 20 rounds of automatic rifle fire after that. (41 RT 8037.)[55]

Delia Longoria, a close neighbor, testified that she first heard automatic fire then regular shots. (39 RT 7668-69; 7678.)

From across the street, Glenn Evans heard only the automatic fire. (39 RT 7650-52.)

Ramon Morales was shot and killed in the living room and sustained at least 18 bullet wounds, one from a .38 and the rest from a .223 caliber automatic weapon. (48 RT 9412-15.) The shots were fired from two directions: from the kitchen area and from the front door area. (62 RT 12225-27.) Fernando Martinez was shot and killed in the hallway area and sustained one .30/.30 caliber wound to the back of the head from less than a couple of inches away and one .38 handgun wound to his back. (48 RT 9433-34; 9469.) Martha Morales was shot and killed in the bedroom; she sustained a .30/.30 caliber wound, a .38 caliber wound and a .223 caliber wound. (48 RT 9417-18.) The infant, whom Martha was holding when she was shot, sustained two non-fatal .38 caliber wounds. (46 RT 9014; 47 RT 9283-84; 9291; 62 RT 12242.)

8. Whether Appellant Fired A Weapon

Jose Luis Ramirez was not present during the shootings but testified that appellant was holding a handgun shortly before he heard the first .30/.30 rifle shots. (42 RT 8217-18; 41 RT 8036-37.) Appellant's fingerprints were found on boxes of handgun ammunition in the bedroom. (46 RT 9039-53.) Delia Longoria, who saw the men leaving the victims' residence after the

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[55] 18 spent .223 cartridges and at least four .30/.30 casings were found in and around the scene. (See Guilt Phase: Statement Of Facts § E(7)(a), p. 38, incorporated herein.)

shootings, testified that appellant was carrying a rifle when she saw him. (39 RT 7710; but see Guilt Phase: Statement Of Facts § B(5), p. 24, fn. 39, incorporated herein.)

In appellant's video statement he said that "[w]e fired the weapons we had" out of fear after Ramon Morales "pulled out a gun . . . in order to defend ourselves . . . we shot like crazy because we shouldn't have done anything . . . to his wife . . . but the crime took place out of fear. . . . " (4 SCT 1037-38.)

The jurors did not reach a verdict on the use of a firearm allegation charged against appellant. (See Statement Of Case § C, pp.11-12, herein.)

9. Jose Luis Ramirez' Flight And Disposal Of The Property He Took

Jose Luis Ramirez fled on foot to his cousin's house. (41 RT 8042-43.) He left the .32 caliber handgun, the necklace and the "Tres Flores" hair oil there that night. (41 RT 8044; 44 RT 8630-34.) The next day Jose Luis Ramirez returned and picked up all three items. (41 RT 8045-56; 44 RT 8635-37.) He gave the handgun to his friend, Daniel Barba, who was a gang member. (42 RT 8243.) With the help of his cousin's husband, Arturo Perez, Jose Luis Ramirez pawned the necklace, receiving $40. (41 RT 8045-46.)

10. The Flight Of Appellant, Joaquin Nuñez and Antonio Sanchez

After the shooting, appellant, Joaquin Nuñez and Antonio Sanchez drove off in appellant's car with appellant driving. (41 RT 8039-40.)[56]/[57]

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[56] At approximately 9:00 p.m. on November 16, 1994, appellant borrowed $50 from Jesus Hernandez for gas. (43 RT 8435-37; 8443-44.) A collect call was made from a pay phone in Greenfield outside of a business to the phone number of appellant's wife, Yolanda Garay at 9:46 p.m. on November 16, 1994. (48 RT 9475-81.)

[57] The record did not establish whether or not Antonio Sanchez and Joaquin (continued...)

Appellant drove to Mexico where he remained until he was abducted by bounty hunters. (But see 11 RT 2017-19; 3 CT 683-88 [defense precluded from referring to the bounty hunter abduction].)

11. Summary Of The Items Taken

The evidence, as discussed above, revealed four discrete takings upon which the robbery convictions could have been based:

1. VCR and stereo equipment that Jose Luis Ramirez said he put in the trunk of the car. (41 RT 8019-20.)

2. .32 handgun that Ramirez said Antonio Sanchez gave him inside the Morales residence. (41 RT 8022-23; 42 RT 8238-39.)

3. Two handguns Ramirez said appellant took out of the locked box in the kitchen. Appellant allegedly kept one and put the other in Antonio Sanchez' pocket. (41 RT 8025-33.)

4. The gold necklace and hair oil that Ramirez took from the night stand in the bedroom and carried with him when he fled from the Morales residence. (41 RT 8044-45; 44 RT 8635-37.)

E. The Crime Scene Evidence

1. Overview

Salinas Police Department criminalist Larry Waller was called at approximately 9:00 p.m. on November 16, 1994 to report to the scene of a multiple homicide at 1022 East Market Street in Salinas. Waller was the chief crime scene investigator on this case. (46 RT 9054-55.) Waller videotaped the

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[57](...continued)
Nuñez went to Mexico with appellant. Antonio Sanchez did end up in Mexico as evidenced by his call to Jose Luis Ramirez during which he asked to have his things sent to Mexico (41 RT 8058; see also 71 RT 14012-16 [testimony of Mexican Consulate representative at appellant's sentencing].)

crime scene before collecting any evidence and took photos of each of the victims as they were found. (45 RT 8859; 8887-89 [Exhibit 65].)[58]

2. The Residence Had Been Thoroughly Searched

The house was a detached garage which had been converted into a residence. (38 RT 7414-15; 7469; 44 RT 8622; 45 RT 8807.) The home was a one bedroom, single-family residence, with a kitchen, living room and bathroom. (45 RT 8807.) The living room and kitchen were approximately 10 x 10. (38 RT 7428.)

There were things strewn out on the kitchen floor (38 RT 7428; Exhibit 3) and the garbage can had been dumped over. (45 RT 8865.)

The mattresses were tossed about, the TV was knocked over, and other items in the room were disturbed. The bedroom was in disarray. (38 RT 7435; 7439; 45 RT 8865; 46 RT 9077; see also Exhibit 5(D) [photo]; Exhibit 65 [videotape taken by Detective Waller].)

Jose Luis Ramirez testified that he and Joaquin Nuñez searched the house looking for things to steal. (41 RT 8018; 8020.)

The state of disarray in the house made it appear that someone was "looking for items to take." (53 RT 10405 [DA's argument].)

3. Cash And Property Not Taken From The Residence

a. No Cash Was Taken From The Victims

Each of the victims had cash on their person which was not taken. Ramon Morales had $204.37 in his pockets, Fernando Martinez had $123.00 and Martha Morales had $51.00 in her purse. (46 RT 9107-09; 47 RT 9206-

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[58] Waller was at the scene for 38 hours straight during the night of November 16 and the morning of November 17, 1994. (46 RT 9012-13.)

07.)[59]

b. Other Items Of Value Were Left

Various items of value that were not taken included jewelry (48 RT 9409), a watch (RT 9408-09), a television (RT 7439), five boxes of ammunition (RT 8828; RT 8833-34; RT 9032; RT 9067; RT 9069), a Taser gun (RT 9070) and three handguns (RT 9073; RT 9081-84; RT 9871).

4. Spent Casings and Bullets Found At The Scene

Investigators found 18 .223 caliber spent casings, which could have been from an automatic rifle such as an AR-15, throughout the residence and outside as well. (45 RT 8889-93; 9013-18.) There were also four spent .30-.30 casings. (45 RT 8905-06.)[60]

5. Firearms and Unused Ammunition Evidence Found At The Scene

A box of .22 caliber ammunition was found by the trash in the kitchen, a box of .32 caliber bullets was found on top of the refrigerator and another box of .22 caliber ammunition was found on the floor by the TV cart in the southeast corner of the bedroom. (46 RT 9067-69.) Waller collected a box of 45 .380 automatic full metal jacket bullets. (46 RT 9032-39 [Exhibit 50].) The box, which was designed to hold 50 rounds, was partially open at the end. (46 RT 9038-39.)

Waller also found a box of .38[61] full metal jacket rounds in the bedroom. (Exhibit 51A.) The box was partially open and there were at least

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[59] The total amount of cash was approximately $378.

[60] Waller, Gates and McLaughlin also collected actual bullets at the scene which were .30/.30 caliber. (45 RT 8908-09; 47 RT 9268-70.)

[61] .38 caliber is different from .380 caliber. (46 RT 9033.)

four rounds missing from the box. (46 RT 9039-40).

A .380 automatic handgun was found in the wooden box in the kitchen. There were no usable prints on it. (46 RT 9073-75.) Waller didn't run any tests on this weapon. (46 RT 9073-75 [Exhibit 49/Item 19].) The police also found a Taser gun on the floor next to the TV cart in the bedroom. (46 RT 9070-71.) Two additional hand guns and a .22 rifle were found during subsequent searches of the residence In January and February 1995 by the prosecutor's investigator. (46 RT 9081-84.)

6. Fingerprints

Jose Luis Ramirez' fingerprints were found on the bottom portion of the cash/tackle box on the bed. (46 RT 9043-45; 9052-53.) Appellant's fingerprints were found on a "Huggies" box and a box of .380 ammunition which were also on the bed. (46 RT 9039-53.) A fingerprint found on the box of .38 ammunition also matched appellant. (46 RT 9051-53.)[62]

There was a wooden box in the kitchen on the floor between the refrigerator and the stove. It had been pried open. There were no usable prints on the box. (46 RT 9029-32.)

7. Ballistics Expert Testimony

a. Shell Casings

Scott Armstrong of the Department of Justice Lab concluded that most of the .223 casings he received were fired by the same rifle. (47 RT 9251-57;

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[62] John Clark of the California Department of Justice compared the known fingerprints of appellant with the fingerprints taken from the boxes of ammunition and the "Huggies" box and stated beyond a reasonable doubt and "to an absolute certainty" that certain fingerprints were made by appellant to the exclusion of all others in the world. (47 RT 9228-33.) In response to an objection by defense attorney West, the judge struck the term "reasonable doubt" but allowed the term "absolute certainty." (47 RT 9231-33.)

47 RT 9263-64.) Armstrong also concluded that all of the .30/.30 casings were fired by the same rifle. (47 RT 9264-67.)[63]

b. Bullets[64]

Armstrong compared the .38 cartridges in the box found on the bed (Exhibit 51A) with the jacketed bullets which were fired at the scene. They all appeared to come from the same source and to be of the same type of construction. (47 RT 9289-92.) However, all he could tell for sure is that the bullets were from the same batch of thousands made with the same markings. Beyond these class characteristics, no match was possible. (47 RT 9294-98.)[65]

Armstrong did not have an opinion as to whether or not the .223 bullets were fired from an AR-15. (47 RT 9300.)

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[63] There would have been no casings ejected from the .38 handgun. (47 RT 9281-82.)

[64] Armstrong could not find enough similarities in the comparison of the .30/.30 caliber bullets to determine if they had been fired by the same weapon. (47 RT 9270-71.) Many of the .223 bullets were identified by Armstrong as having been fired by the same weapon. (47 RT 9277-81.) However, some of the fragments were too small to afford a basis for making a determination. (47 RT 9280-81.)

Armstrong received five .38 caliber bullets. (Items 1, 2, 18, 19, and 21; Exhibits 40, 41, 42, and 82). Armstrong concluded that Items 1, 18, 19, and 21 were all fired from the same weapon but he could not make a determination as to Item 2. (47 RT 9282-87.)

[65] A .38 pistol can fire many different types of .38 ammunition. In the present case, there were a total of three different types of .38 ammunition that were fired from the .38 weapon. (47 RT 9298-9300.) Armstrong believed some of these could have come from the same batch as those in the box (Exhibit 51). (47 RT 9298-9300.)

F. Victim's Wounds

1. Summary

Each victim sustained numerous wounds from either the .223 weapon, the .30/.30 weapon and/or the .38 caliber weapon. One .38 caliber round was recovered from each victim. Numerous .223 rounds were recovered from Ramon Morales and .30/.30 rounds were recovered from Martha Morales and Fernando Martinez.

2. Ramon Morales

Ramon Morales sustained at least 18 bullet wounds and several bullets and fragments were recovered during the autopsy. (48 RT 9412-14.) All but one of these bullets and fragments were small caliber .223 rounds. (48 RT 9413-14; 9441-49.) A .38 bullet was recovered from the back of Ramon Morales' head. (48 RT 9414-15; 9441; 9449-50.)

The trajectories of the bullets through Ramon's arm and head indicated that the bullets came from somewhere between the kitchen and living room. This was also confirmed by the location of the fired cartridge cases found in that area. (62 RT 12225-26.) The bullets which caused the wounds in Ramon's abdomen and chest originated from near the front door. (62 RT 12227-28.)[66]

3. Martha Morales

Martha Morales sustained at least two gunshots to the head. (48 RT

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[66] Three smaller caliber (.223) bullets entered on the left side of the lower chest and did enormous damage to the heart. (48 RT 9442; see also 48 RT 9447-48.) The cause of death was numerous gunshot wounds. (48 RT 9450.) Dr. Hain could not tell with any degree of certainty whether the .38 caliber wound was inflicted before or after the smaller caliber wounds. (48 RT 9464-65.) The .38 caliber weapon was eighteen inches or more away when fired. (48 RT 9460-61.)

9417-18; 9451-9456; 9466.) These wounds were caused by both .30/.30 and .38 caliber bullets. (48 RT 9417-18.) Additionally, Martha had a .223 bullet wound to the right shoulder which traveled through the lungs. (48 RT 9418; 9456; 9457-59; 9468.)[67]

4. Fernando Martinez

Martinez received a bullet wound to the back of the head. (48 RT 9425-33.) This wound had been fired from less than a couple of inches away and was instantaneously fatal. (48 RT 9427-29; 9433-34; 9469.) Martinez also had a .38 caliber gunshot wound in the back. (48 RT 9404-08; 9429-33 [Exhibit 41].) This wound was postmortem and not fired at close range. (48 RT 9433; 9461; 9469.)[68]

5. Alejandra Morales

The infant sustained a .38 caliber bullet wound to the left chest and shoulder area. (39 RT 7624-25; 7627-28; 46 RT 9014; 47 RT 9283-84; 9291; 49 RT 9603-04.) Alejandra also had a wound to the right thigh and calf. (39 RT 7624; 7628; 62 RT 12250.)

G. Statement Of Facts: Defense

1. Lies And Inconsistencies In The Statements Of Jose Luis Ramirez

a. Whether They Went To The House of Jose Luis Ramirez' Friend To Look For A Gun For Appellant

Detective Joseph Gunter of the Salinas Police Department interviewed

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[67] Martha Morales died within a matter of minutes after the gunshot wounds to the head but Dr. Hain could not tell which wound was made first. (48 RT 9460; 9469-70.)

[68] The person who fired this shot was somewhere between the living room and the kitchen. (62 RT 12239-40.)

Jose Luis Ramirez on November 18, 1994. During that interview, Ramirez did not tell Gunter about going to a friend's house to look for a weapon for appellant. (50 RT 9851-52.) DA Investigator Richard Moore interviewed Jose Luis Ramirez for three hours on October 31, 1995. During this interview, Ramirez never stated that they went to a friend's house to look for a gun for appellant. (50 RT 9869.)

b. Whether They Went To Guillermo Morales' House

Jose Luis Ramirez did not tell Detective Gunter during the November 1994 interview that they went to Guillermo Morales' house to try to kill Guillermo prior to going to Ramon Morales' house. (50 RT 9852-53.) Nor did Jose Luis Ramirez say anything about going to Guillermo Morales' house in the October 1995 interview with Richard Moore. (50 RT 9869.)

c. Whether Appellant Had A Weapon

In November 1994 Jose Luis Ramirez told Detective Gunter that appellant did not have a weapon. (50 RT 9852-53.) However, at trial Jose Luis Ramirez testified that appellant had a knife when they entered and that appellant obtained a handgun in the house. (See Guilt Phase: Statement Of Facts § D(2) and (5), pp. 30-31, incorporated herein.)

d. Whether Jose Luis Ramirez Was Intoxicated

At trial Jose Luis Ramirez denied that he was intoxicated during the shootings and the preceding events. (41 RT 8067.) However, prior to trial Jose Luis Ramirez told D.A. Investigator Moore that he was drunk on the evening of November 16, 1994. (50 RT 9874.)

e. Whether Antonio Sanchez And Appellant Talked About Robbing And Killing Ramon Morales

At trial Jose Luis Ramirez testified that Antonio Sanchez and appellant had discussed robbing and killing Ramon Morales and anyone else in the

residence. (See Guilt Phase: Statement Of Facts § C, p. 28, incorporated herein.) However, when Jose Luis Ramirez talked to Antonio Sanchez on the phone the day after the killings Jose Luis Ramirez said "I didn't think you were going to do that." (42 RT 8247-48.) If Jose Luis Ramirez had thought that anything serious was going to happen to the Morales he would have warned them before the assailants entered the residence. (42 RT 8242; 8250.)[69]

f. Whether Appellant Obtained A Handgun From The Box In The Kitchen

Jose Luis Ramirez told the police that he didn't see appellant with any kind of gun at any time on November 16, 1994. (41 RT 8011.) However, Ramirez testified at trial that appellant obtained two handguns from a box near the refrigerator, one of which appellant kept after putting the other in Antonio Sanchez' coat pocket. (41 RT 8032-33; see also 50 RT 9852-53.)

g. Whether Appellant Gave A Handgun To Jose Luis Ramirez

Jose Luis Ramirez told the police that appellant gave him a handgun while there were in the residence. (42 RT 8225-28.) However, at trial Jose Luis Ramirez testified that appellant kept the handgun for himself and did not give it to Ramirez. (41 RT 8032-33; 50 RT 9852-53.)

h. Admitted Lie About Seeing Appellant With A Gun Through The Window

Jose Luis Ramirez told the police that he saw appellant with a gun in his hand. Ramirez claimed he made this observation while standing outside the residence and looking through the window. (42 RT 8217-18.) However,

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[69] Jose Luis Ramirez testified that he was outside when the Morales' arrived and could have warned them. (41 RT 8025.)

because appellant would not have been visible through the window, Ramirez was forced to admit that he had deliberately lied about seeing appellant through the window. He then changed his story and testified at trial that he was looking through the front door when he saw appellant with the gun. (42 RT 8217-18.)

i. Whether Appellant Used A Knife After Entering The House

According to Jose Luis Ramirez, immediately after they entered the residence, appellant held a knife to the throat of Fernando Martinez, who was sleeping on the living room floor and told him not to look at anyone. (41 RT 8015-17.) However, the jurors rejected this testimony finding that appellant did not use a knife. (4 CT 969-70; 973-74; 977-787.)

j. On What Day Did Jose Luis Ramirez, Joaquin Nuñez And Antonio Sanchez Purchase Ammunition

According to Jose Luis Ramirez, on the afternoon of November 16, 1994, appellant drove Antonio Sanchez, Joaquin Nuñez and Jose Luis Ramirez to the JKD Shooting Sports store on North Main Street in Salinas and, while appellant waited in the car, the three others went into the store to obtain ammunition. (40 RT 7837-39; 42 RT 8281-83.)

However, based on the register receipt, James Fletcher, who worked at JKD Shooting Sports, was certain that the transaction took place early in the morning on November 15, not November 16, 1994. (42 RT 8273-74.) Fletcher testified that ". . . I can say with absolute, unequivocal, bet-my-life-on-it certainty that [November 15] is the correct date." (42 RT 8273-74.)[70]

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[70] Fletcher remembered three young Hispanic men who purchased ammunition for an AR-15 and another kind of rifle. (42 RT 8260-62.) Appellant was not (continued...)

2. Defendant's Intoxication On The Night Of The Homicides

Jose Luis Ramirez testified that appellant had consumed as many as 12 beers on the day of the homicide (see Guilt Phase: Statement Of Facts § B(8) and (9), pp.26-27, herein) and two other prosecution witnesses testified that appellant was "drunk" or "intoxicated" on the night of the homicides. (*Ibid.*)

Jorge Acosta, Bertha Sanchez' son, testified that on the day of the killings he saw appellant, Antonio Sanchez, Jose Luis Ramirez and Joaquin Nuñez drinking in appellant's car which was parked outside of Acosta's house. (50 RT 9836.) Acosta spoke with appellant, who was his uncle, for a while and thought appellant was intoxicated. (50 RT 9836-37.) Acosta, who had seen appellant intoxicated on prior occasions, feared that he would get into an automobile accident or get stopped by the police and go to jail. (50 RT 9837-39.)

3. Lorenzo Nuñez, Antonio Sanchez And Joaquin Nuñez Handled The Rifles At Bertha's House

Jorge Acosta was present when the rifles appeared in Bertha's "family room." (50 RT 9839-41 [Defense].) He remembered that Antonio Sanchez, Joaquin Nuñez, Lorenzo Nuñez and appellant were at the house. (*Ibid.*) Antonio Sanchez was handling the one that looked like an assault rifle. (50 RT9839-40.) Jorge couldn't remember who had the other rifle, which was a lever action .30/.30. (50 RT 9839-41.) Jorge did not see appellant handle either weapon. (50 RT 9839-40.) Jorge did not see who took the rifles out of the house because he had left the room. (50 RT 9850.)

4. Subsequent Discovery Of Weapons At The Morales Residence

On January 26, 1995 DA Investigator Richard Moore went to 1022 East

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[70](...continued)
one of the three men who purchased the ammunition. (42 RT 8276.)

Market Street to talk to Mr. Longoria, who called in to report that he found something in the chicken coop. (50 RT 9870-71.) Moore found a .22 caliber rifle inside the shed behind the chicken coop. He ran a check on the .22 and there was no record on file for it. (50 RT 9870-71.)

On February 17, 1995, Moore again went to 1022 East Market to return property to Guillermo Morales. On this trip, Moore found two additional .380 caliber pistols in the bedroom in a cardboard moving box. (50 RT 9871-72.)

H. Overview Of Penalty Facts

1. Prosecution Case For Death

The centerpieces of the prosecution's case for death primarily were (1) the circumstances of the shootings which the prosecutor called "bare unadulterated violence" (67 RT 13241) and (2) the impact of the crimes on the families of the victims. The prosecution highlighted these factors early and often by utilizing every available medium including:

A. Photos of the victims showing the nature and extent of their wounds (see Guilt Phase: Statement Of Facts § F, pp. 40-41, herein);

B. Expert testimony regarding the nature of the victims' wounds at both the guilt and penalty trial (see Guilt Phase: Statement Of Facts § F, pp. 40-41, and Penalty Phase: Statement Of Facts § B(1), p. 506, incorporated herein);

C. Video tape of the murder scene (see Exhibit 65; 51 RT 10023-25);

D. Demonstrative evidence including rifles similar to the ones used in the shootings; an actual portion of the residence wall with blood and brain matter on it (38 RT 7431-32) and mannequins dressed in the victims' bloody clothing with protruding rods to illustrate the numerous bullet holes (see Claim

59 E, p. 545, herein)[71];

E. Lengthy and detailed victim impact testimony accompanied by emotional physical exhibits including: a marriage certificate for Ramon and Martha Morales (Exhibit 45); wedding photos showing Ramon and Martha Morales with their family (Exhibits 117 & 118); a photo of Ramon and his mother doing laundry at her house (Exhibit 126); a photo of Fernando Martinez and his daughter Paula (Exhibit 119); a letter written by Ramon Morales' mother to him in October 1994 (Exhibit 57A); a doll used by the penalty phase expert to put children's clothing on (Exhibit 116); photos of the surviving infant at age 5. (Exhibits 121, 130 & 131.)[72]

F. A theatrical audio-video montage portraying, on a big screen, the most inflammatory items of evidence with the 911 tape playing in the background (see Penalty Phase: Statement Of Facts § B(6), pp.24-25, herein).

The prosecution also presented evidence that while awaiting trial appellant struck a guard in an alleged attempt to escape from county jail and possessed dismantled razor blades in his jail cell. (See Penalty Phase: Statement Of Facts § B(5), pp.23-24, incorporated herein.)

The prosecution further contended that appellant was a major participant in the crimes and, therefore, any juror findings that he did not intend to kill and/or did not fire a gun during the shootings had "very minimal"

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[71] The mannequins were in the courtroom in front of the jurors during the testimony of several witnesses. (See 48 RT 9401.) Also, during the guilt phase deliberations the jurors requested to see the wall and the mannequins. (6 CT 1198.) The judge arranged for a special viewing in the courtroom. (55 RT 10804.)

[72] Photos of the victims in their caskets at the funeral were shown to the witnesses over objection but not admitted into evidence. (Exhibits 122, 123 & 129; 62 RT 12279, 63 RT 12401, 12437.)

if any mitigating weight. (67 RT 13233.)

Finally, the district attorney's penalty phase argument continued with the theme – first argued at the guilt trial – that appellant "doesn't live by the same morals . . . that the rest of us have." (53 RT 10417.) At the penalty trial the prosecutor argued that appellant was there "just for the thrill" and "just for the fun of it." (67 RT 13241.)

In sum, the prosecutor's penalty theory depended on a continuing emphasis of (1) the gruesomeness of the shootings; (2) the highly emotional victim impact testimony; and (3) the prosecution's implication that appellant was morally corrupt.

2. Defense Case For Life

The guilt and penalty evidence supported several substantial mitigating factors which could have rationally justified a verdict of life without parole notwithstanding the aggravating evidence.

First, the defense – while conceding that the crimes were "terrible" – argued that appellant was only an accomplice who did not personally shoot any of the victims. This argument was reinforced by the fact that the jurors' failed to find the gun use and conspiracy to commit murder special allegations. (See e.g., 68 RT 13404; 13409-10; 13417-21; see also Statement Of Case § C, pp.11-12, incorporated herein.) Thus, the defense contended that even a lingering doubt that appellant was an "actual shooter" gave the jurors a basis for returning a life verdict by differentiating between the moral culpability of appellant as opposed to the actual shooters: Antonio Sanchez and Joaquin Nuñez. (68 RT 13419-20.)

Second, the jury finding that appellant did not use a knife and their failure to agree that appellant used a firearm and conspired to murder provided a basis for the jurors to conclude that appellant did not knowingly intend to kill

and/or participate in a plan to kill anyone. Such a conclusion was also supported by the following:

1. Appellant's video statement in which he denied an intent to kill or rob the victims;

2. Evidence that appellant had not motive or "stake" in the venture;

3. Evidence of appellant's intoxication;

4. Appellant's lack of prior felony convictions;

5. Appellant's absence of a history of criminal violence.

Third, substantial positive character testimony was presented which showed appellant to be a caring, generous person who was warm, friendly and respectful to other people. (63 RT 12407-09; 12430-34.)

Fourth, the only expert witness to testify regarding appellant's psychological makeup, Dr. Thomas Reidy, concluded that appellant did not have anti-social personality disorder and was not a psychopath.

Fifth, appellant experienced multiple childhood traumas because (1) he grew up in poverty; (2) his father was very intolerant and a poor father figure; (3) appellant's mother was often absent for periods of six months at a time; (4) appellant's brother, Jesus – who became a father figure for appellant – was murdered when appellant was 7 or 8 years old.

Sixth, the above childhood traumas, as well as genetic predisposition, contributed to appellant's alcoholism, which began in his teens.

Seventh, appellant had no prior felony convictions.

Eighth, appellant did not have a history of criminal violence. (64 RT 12622-24; 12631; 12688-91.)

Ninth, appellant expressed remorse and regret about his participation in the offenses. (64 See RT 12630.)

I. Penalty Phase Prosecution Evidence

See Penalty Phase: Statement Of Facts § B, pp. 506-20, incorporated herein.

J. Penalty Phase Defense Evidence

See Penalty Phase: Statement Of Facts § C, pp. 520-29, incorporated herein.

CLAIMS 1-8: JURY SELECTION ERRORS

CLAIM 1

JUROR 16 SHOULD NOT HAVE BEEN EXCUSED FOR CAUSE WITHOUT ORAL VOIR DIRE BECAUSE HE HEDGED HIS KEY QUESTIONNAIRE RESPONSES WITH THE AMBIGUOUS TERMS "PROBABLY" AND "POSSIBLY"

A. Introduction

The judge excused Juror 16 based solely on his written questionnaire and denied the defense request for oral voir dire of the juror. This was reversible error because the questionnaire failed to make it clear that Juror 16 "automatically" would "vote in ways that precluded the death penalty." (*People v. Avila* (2006) 38 Cal.4th 491, 531.) Unlike the jurors in *Avila* – whom this court determined were properly excused based solely on their questionnaires – Juror 16 gave equivocal, ambiguous and conflicting questionnaire answers. Hence, Juror 16 was improperly excused because the questionnaire "did not negate the possibility the juror[] could set aside [his] feelings and deliberate." (*Id.* at 530.)

B. Procedural Background

The trial judge decided to use a written jury questionnaire as part of the jury selection process. The judge requested that each party submit a proposed questionnaire and from these the judge drafted a questionnaire that was given to all prospective jurors. (9 RT 1607; 10 RT 1818-19; 6 CT 1351-4604.) The death penalty portion of the questionnaire began at Question 50 and continued through Question 63. (See e.g. 6 CT 1361-65.)

After swearing the prospective jurors and giving them some introductory information about the case, the judge admonished them to fill out the questionnaires on their own. The court explained that the questionnaire is

a "big time saver" because all the questions would not have to be repeated during voir dire for each juror. The court further explained that it was very important for the jurors to answer the questions faithfully and truthfully and to provide accurate and complete information. (28 RT 5416-20.)

After the completed questionnaires had been collected, but before commencement of voir dire and outside the presence of the prospective jurors, the judge informed the attorneys that he had "gone through and reviewed each and every one of these questionnaires and [culled] out some that [the] court regards as being clearly challenges for cause *based upon the responses to the questionnaire*." [Italics added.] (32 RT 6203.) The judge also stated that he had identified other potential cause challenges as to which he would invite a stipulation. (32 RT 6203.)

C. Juror 16: Disposition

The judge initially concluded that Juror 16 should not be excused based solely on his questionnaire responses:

> "Juror 16 states that he is a CTF [Soledad State Prison] Captain; strongly opposes the death penalty; *probably* would disregard the evidence and vote for life without the possibility of parole under any circumstances, although the other questions were sufficiently within the ballpark of rationality and responsibility. *But I can't say that it's a court challenge for cause*." [Italics added.] (32 RT 6205.)

However, the prosecutor challenged Juror 16 for cause in light of the juror's opposition to the death penalty and his statement that he would "possibly" follow the law. (32 RT 6205.)[73] The defense objected to the challenge pointing out that the questionnaire showed "equivocation." (32 RT

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[73] The juror actually stated, "Yes – most probably" in response to the question about whether he could follow the law. (Question 59(F); 6 CT 1574.)

6205.)

The judge granted the challenge to Juror 16 for cause based solely on the questionnaire responses and denied the defense request for oral voir dire. (32 RT 6205; 6215.)

D. Juror 16: Questionnaire Answers (6 CT 1571-75)

50 Q. Views on Death Penalty:
A. Strongly Oppose. I believe that the death penalty should be abolished as there is no assurance that the state many not be killing an innocent person.

50 Q. Reason for opposition:
A. In addition to the above, I feel the state does not have the right to take a life in revenge for the crime the person commits. I also feel it is not a deterrent to crime.

51 Q. Ever held a different opinion?
A. No.

52 Q. Is Death or LWOP more severe?
A. I think life in prison without parole is more severe as the person must live with their actions for the rest of their life.

53 Q. Any religious affiliation that takes a stance on the death penalty?
A. No.

54 Q. Read articles or viewed TV programs about the death penalty?
A. Yes.

55 Q. Followed news coverage of Robert Alton Harris, etc?
A. Yes.

55 Q. Did the above news coverage change your view of the death penalty?
A. No.

56 Q. Do you understand that not all those convicted of murder are death eligible?
A. Yes.

57 Q. Hold prosecution to higher standard of proof at guilt?
A. No.

58(A) Q. Is death penalty used too often?
A. Too often as I oppose it completely.

58(B) Q. Belong to groups that advocate increased use or abolition of death penalty?
A. No.

58(C) Q. Answers to 58A & 58B based on religious considerations?
A. No.
59(A) Q. Refuse to vote for guilt of first degree murder?
A. No.
59(B) Q. Refuse to find special circumstance?
A. No.
59(C) Q. Assuming jury found defendant guilty of first degree murder and one or more special circumstances would you refuse to vote for death and automatically vote for LWOP?
A. **Probably.** [Emphasis added.]
59(D) Q. Refuse to vote for LWOP and automatically vote for death?
A. No.
59(E) Q. Change answer to 59C if instructed and ordered by the court to consider aggravating and mitigating factors?
A. **Possibly.** [Emphasis added.]
59(F) Q. Could you set aside your own personal feelings and follow the law as the court explains it?
A. **Yes–most probably.** [Emphasis added.]
60 Q. Difficulty in not talking about the case?
A. No.
61 Q. How would you vote as to penalty for a defendant convicted of multiple premeditated murder during the course of a robbery and burglary?
A. I would **most probably** vote for LWOP. [Emphasis added.]
62(A) Q. Would consideration of appellant's background including emotional difficulties and substance abuse be helpful in deciding whether to impose death or LWOP?
A. Yes.
62(B) Q. Would you reject any of those factors automatically?
A. No.
63 Q. Would the fact that defendant has young children preclude you from voting for the penalty of death?
A. **No.**

E. Juror 16 Was Improperly Excused Over Objection Based Solely On The Juror Questionnaire

1. Regardless Of Whether Or Not The Questionnaire Is Defective, It Is Error To Excuse A Juror Based Solely On The Questionnaire When The Answers Are Conflicting And Ambiguous

In *People v. Stewart* (2004) 33 Cal.4th 425, 451-52, this court identified two ways in which excusal of jurors based solely on their written questionnaires could be held erroneous: (1) the questionnaire itself may be defective and (2) the answers to the questionnaire may be ambiguous or conflicting.[74]

In the present case, excusal of Juror 16 violated the second ground articulated in *Stewart* because the questionnaire answers were ambiguous and thus "did not negate the possibility the juror [] could set aside his feelings and deliberate." (*People v. Avila*, *supra*, 38 Cal,.4th at 530.).

2. To Justify Excusal For Cause The Questionnaire Must Leave "No Doubt" That The Juror Would Disregard The Law

"The prosecution, as the moving party, bore the burden of

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[74] In *Stewart*, this Court reversed on both of these grounds:

> "[A]lthough the poor phrasing of the juror questionnaire used in this case contributes to our conclusion that the prospective jurors were excused in violation of *Witt* (*Wainwright v. Witt* (1985) 469 U.S. 412, 424), we note that even if the questionnaire had tracked the "prevent or substantially impair" language of *Witt*, we still would find that the prospective jurors could not properly be excused for cause without any follow-up oral voir dire by the court. (*People v. Stewart*, *supra*, 33 Cal.4th at 451-52.)

demonstrating to the trial court that [the *Witt*[75]] standard was satisfied as to each of the challenged jurors. [Citation.]" (*People v. Stewart, supra*, 33 Cal.4th at 445.) "As with any other trial situation where an adversary wishes to exclude a juror because of bias . . . it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality . . . It is then the trial judge's duty to determine whether the challenge is proper." (*Wainright v. Witt, supra*, 469 U.S. at 423.) However, the above burden is not satisfied by written answers to a juror questionnaire which are conflicting and/or ambiguous and thus in need of clarification on oral voir dire. (*People v. Avila, supra*, 33 Cal.4th at 531; *People v. Stewart, supra*, 33 Cal.4th at 448.) Thus, the questionnaire alone is not sufficient if it only provides "a *preliminary* indication that the prospective juror *might* prove, upon further examination, to be subject to a challenge for cause." (*Ibid.*) Such a "preliminary indication" is insufficient to meet the prosecution's burden under *Witt* "absent clarifying follow-up examination. . . ." (*People v. Stewart, supra*, 33 Cal.4th at 449 [emphasis added].)

Accordingly, a prospective juror may properly be excused for cause without oral voir dire only if the questionnaire "leave[s] ***no doubt*** that [the jurors's] views on capital punishment would prevent or substantially impair the performance of [the juror's] duties in accordance with the court's instructions and the juror's oath." [Emphasis added.] (*People v. Avila, supra*, 38 Cal.4th at 531.) In other words, "a prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law. [Citation.]"

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[75] *Wainwright v. Witt* (1985) 469 U.S. 412.

(*Ibid.*)

For example, in *Avila* the questionnaire answers for each of the four jurors left "no doubt" that they would "automatically" vote to defeat the death penalty "in every case."

Three of the four *Avila* jurors unequivocally stated that they would in every case, regardless of the evidence, "automatically" vote to defeat the death penalty in every case. (*People v. Avila, supra*, 38 Cal.4th at 531-32.) And the fourth juror (C.H.) stated that she couldn't even vote on the question of penalty and could not set aside her personal feelings and follow the law. (*Ibid.*)

3. There Was Doubt That Juror 16 Would Automatically Vote To Defeat The Death Penalty

Unlike the *Avila* jurors, Juror 16 did not unequivocally state that he would automatically vote to defeat the death penalty in every case regardless of the evidence. Even though the juror "completely" and "strongly opposed" the death penalty, he stated that these beliefs would not have prevented him from voting for first degree murder with special circumstances (6 CT 1571-74.) And, he left the door open to the possibility that he could vote for death by stating that he "probably" would vote for life. (6 CT 1573.)

Moreover, when asked if he would change his answer if "instructed and ordered" by the court to consider the evidence before voting Juror 16 answered "possibly." (6 CT 1574.)

Additionally, when asked if he could set aside his own personal feelings about what the law "ought to be" and follow the law as explained by the court, Juror 16 answered, "Yes, most probably." (6 CT 1574.)

Moreover, in response to Question 61 as to how he would vote if a defendant was convicted of multiple premeditated murder the juror declined to check either of the answers which would have clearly stated his feelings,

i.e., (b) "Always vote for life with possibility of parole" or (c) "I would not automatically vote for either life without possibility of parole or the death penalty. I would consider all the evidence and vote my conscience." Instead, Juror 16 responded: "I would most probably vote for LWOP." (6 CT 1574.)

Furthermore, his responses to Question 62 (a) and (b) and 63 further suggested he might consider voting for death.

Question 62 asked:

> If this case has a penalty phase, you will be instructed that you may consider factors in the defendant's background such as his upbringing, emotional difficulties and possible substance abuse in deciding whether to impose the death penalty or life in prison without the possibility of parole.
>
> a. Do you feel that those factors would be helpful to you in reaching a decision as to whether the death penalty or life in prison without the possibility of parole is the appropriate sentence?
>
> [Juror 16 answered this question "yes."]
>
> b. Would you reject any of those factors automatically in deciding in a sentence?
>
> [Response: "no."] (6 CT 1575.)

Question 63 asked if the fact that the defendant had young children would "preclude you personally from voting for the death penalty." (6 CT 1575.)

Juror 16 responded: "No."

Finally, in Question 65, the questionnaire affirmed that Juror 16 did not "know of any reason why [the juror] could not be completely fair and impartial to both parties." (6 CT 1575.)

These responses, when considered together, indicate a level of

ambiguity which contrasts with the clarity and certainty of the responses in *Avila*. Juror 16's use of the terms "probably" and "possibly" suggested a degree of doubt in the juror's mind about his answers, and cried out for further probing on voir dire. Without such *oral* voir dire "[w]e simply do not know how . . . [Juror 16] would have responded to appropriate clarifying questions . . . ." (*People v. Stewart, supra*, 33 Cal.4th at 450-51.)

It is also significant that the record in the present case demonstrated the efficacy of follow-up voir dire. (34 RT 6620:15-16; see also 34 RT 6679:7-8 [Defense counsel states that: "Many people have changed their opinions over the weekend."].)[76] Indeed, the present record is replete with examples of

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[76] As the judge observed:

> "Juror questioning is not just a process whereby juror attitudes are elicited. There is a learning component to that process as well for jurors. And I think any adequate voir dire involves some degree of education of jurors as to their responsibilities, as to what they can and should not do, what they should do, what feelings they have that really do tend to disqualify them from service, what feelings they have that really don't disqualify them from service. And they need to be oriented to some degree as to whether or not certain feelings are going to cause difficulty with them performing the function as jurors. [Para.] **Oftentimes jurors have feelings and they think that they are disqualified and biased when in fact those feelings don't disqualify them at all, but they need some kind of process where they can put those kind of things into perspective and begin to make some sense out of the process itself and where they fit into it.** And the initiative recognizes that there is great profit and benefit to the trial process from having jurors questioned together where a question-and-answer sequence that one juror undergoes overheard by another juror can help the second juror place his own attitudes and feelings into some perspective. **That is why we don't just do the voir dire on the questionnaire alone.**
>
> (continued...)

jurors whose initial responses to the questionnaires were subsequently clarified and/or changed in response to oral voir dire.[77]

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[76](...continued)

> We could easily do that, send out a questionnaire and have a million questions on it and have it brought back and you have asked everything you need to ask and the jurors have told you the answer. **The problem with that is they don't know as lay people oftentimes what their own responses and attitudes really mean in terms of their potential service as jurors. And it's important to go back into those areas to some degree and to allow the jurors to have some input and some feedback and some information and some education and some orientation**, and then to go into those areas again and those answers get refined and those attitudes get retained in that process." [Emphasis added.] (26 RT 5014-15.)

[77] (See 32 RT 6259 [DA recognized that jurors' opinions would change after having an opportunity to think about their opinion following filling out the questionnaire]; 34 RT 6679 [defense counsel notes that: "Many people have changed their opinions over the weekend"]; 33 RT 6433 [juror changed view "as a result of further reflection after [he] filled out the questionnaire"]; 33 RT 6459 [juror changed answer to Question 62(a) since filling out the questionnaire; now expresses a willingness to "consider all the things presented"]; 32 RT 6270 [juror misunderstood the question on the questionnaire and after voir dire would consider the defendant's upbringing in determining the question of what penalty to impose]; 32 RT 6282-83 [voir dire differed from questionnaire responses of Juror 9]; 33 RT 6459 [Juror's answer to Question 62(a) changed since filling out the questionnaire]; 33 RT 6472 [juror had presumption as to penalty when filling out the questionnaire but not during voir dire]; 33 RT 6475 [on questionnaire juror stated that "mitigating factors would have to be extreme and immediate to the time of the crime." On voir dire juror expressed an ability to follow the judge's instructions and consider all relevant factors including the defendant's childhood upbringing and "good things that he had done in his life several years prior to this incident . . ."]; 33 RT 6480 [juror did not understand question on questionnaire regarding holding prosecution to a higher standard of proof]; 33 RT 6482-83 [Juror stated on questionnaire that the victim would have to suffer "great pain (continued...)

In sum, Juror 16 was improperly excused without "clarifying follow up examination" because his questionnaire "indicated strong reservations about the death penalty but did not negate the *possibility* the juror[] could set aside [his] feelings and deliberate fairly." [Emphasis added.] (*People v. Avila, supra*, 38 Cal.4th at 530.)

F. The Error Violated State Law And The Federal Constitution

To justify exclusion of Juror 16 the prosecution was required to demonstrate that he could not perform his duties in accordance with the judge's instructions and his oath. (*Wainwright v. Witt, supra*, 469 U.S. at 424.)

Because Juror 16's ambiguous questionnaire responses did not satisfy the prosecution's burden, and because the judge never questioned him orally or observed Juror 16's demeanor on voir dire, excusing him for cause violated appellant's state (Article I, section 7 and 15) and federal (6th and 14th Amendments) constitutional rights to trial by an impartial jury and due process. (*Ibid.*; see also *Morgan v. Illinois* (1992) 504 U.S. 719; *Adams v. Texas* (1980) 448 U.S. 38; *Witherspoon v. Illinois* (1968) 391 U.S. 510.)

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[77](...continued)
and suffering" to justify the death penalty but on voir dire, after giving the issue more thought, the juror did not rule out the death penalty "if someone died instantly . . ."]; 33 RT 6498 [juror's responses to Questions 62 and 63 on the questionnaire were a product of confusion]; 33 RT 6522-23 [on the questionnaire Juror 60 was "very opposed" to the death penalty and it was not an option; but after having "a couple of days to think about this" the juror expressed an ability to sentence someone to death]; 34 RT 6625-26 [Juror 72, after thinking about the matter over the weekend, could not vote for imposition of the death penalty even though the juror stated an ability to do so on the questionnaire]; 35 RT 6842-43 [Juror 127 stated that hearing the additional charges–which he didn't hear at first–changed his view from not being able to vote for the death penalty to being able to do so]; 36 RT 7003-04 [judge noted that Juror 152 had a misunderstanding of the question regarding discussion of the case with other people].)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; California Penal Code[78] [hereinafter "Penal Code"] §1044.)[79] The judge's erroneous excusal of Juror 16 as described in this claim arbitrarily violated the above state law rules. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

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[78] All references are to the California Penal Code unless otherwise noted.

[79] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

G. The Erroneous Cause Excusal Warrants Reversal Of The Guilt And Penalty Judgments

1. The Penalty Judgment Should Be Reversed

For the reasons set forth above, the record does not support the trial court's excusal for cause of Juror 16 under the governing legal standard. (*Wainright v. Witt, supra*, 469 U.S. at 424; *Morgan v. Illinois, supra*, 504 U.S. 719.) Therefore, this error requires reversal of appellant's death sentence, without any inquiry into prejudice. (See *Davis v. Georgia* (1976) 429 U.S. 122, 123; *Gray v. Mississippi* (1987) 481 U.S. 648, 659-67; see also *People v. Stewart, supra*, 33 Cal.4th at 454.)

2. The Guilt Judgement Should Be Reversed

In *Stewart*, this Court reversed as to penalty but not guilt. However, both the guilt and penalty judgements should be reversed in the present case.

"[A] State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.'[Citation.]" (*Witherspoon v. Illinois*, supra, 391 U.S. at 522.) In *Witherspoon*, the United States Supreme Court once acknowledged that, if a defendant were in the future to succeed in establishing that a death qualified jury was less than neutral with respect to guilt, "the question would arise whether the State's interest in submitting the penalty issue to jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence – given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment." (*Id.* at 110.)

Since *Witherspoon*, numerous studies have been conducted which "all but confirm that death-qualified juries are conviction-prone." (*Wainwright v. Witt, supra*, 469 U.S. at 460, fn. 11 (dissenting op. Brennan, J., with whom

Marshall, J. joins, dissenting); *Lockhart v. McCree* (1986) 476 U.S. 162, 173; see also *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 26-67.) Many studies also suggest that the process of death-qualification itself tends to bias remaining jurors toward the prosecution. (*Ibid.*)

Despite overwhelming evidence that death-qualified juries are substantially more likely to find defendants guilty than juries on which unalterable opponents of capital punishment are permitted to serve (*Buchanan v. Kentucky* (1987) 483 U.S. 402, 426-427 (dissenting op. Marshall, J., with whom Brennan, J. and Stevens, J., join), this court and United States Supreme Court have consistently held that exclusion through "California death qualification" of "guilt phase includables" at the guilt-phase of a bifurcated capital trial does not offend the Sixth Amendment or article I, section 16 of the California Constitution as to the guaranty of trial by a jury drawn from a fair cross-section of the community. (*People v. Ashmus* (1991) 54 Cal.3d 932, 956-957; *Lockhart v. McCree, supra*, 476 U.S. at 173-177.) Both courts have also consistently refused to hold that such exclusion violates state and federal guaranties of trial by an impartial jury. (*People v. Ashmus, supra*, at 957; *Lockhart v. McCree* at 177-184.) For the reasons set forth in the dissenting opinion of Justice Marshall in *Lockhart* and in *Buchanan v. Kentucky, supra*, 483 U.S. at 426-434, this Court should revisit these questions, reaching a contrary conclusion supported by sociological data.

Furthermore, the present case involves more than just *Witherspoon* error or the disqualification of so-called "guilt-phase includables" from the guilt phase of the trial. The judge's exclusive reliance on written questionnaires to perform the important function of identifying jurors excusable for death penalty bias, was a "structural defect" of constitutional magnitude – similar to the wrongful denial of the right to exercise a

peremptory challenge – which immeasurably affects the entire proceeding. (*People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1026-1027; see *United States v. Annigoni* (9th Cir. 1996) 96 F.3d 1132, 1142-1143.) "'The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.' [Citations.]" (*People v. Wheeler* (1978) 22 Cal.3d 258, 283.) In this case, the trial court failed to properly perform its constitutionally mandated function of engaging in meaningful voir dire to obtain an impartial jury.

Accordingly, both the guilt and penalty judgements should be reversed.

3. The Error Was Cumulatively Prejudicial

Even if the erroneous excusal of Juror 16 was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the additional errors the judge committed – e.g., excusing four other jurors without allowing oral voir dire (Claims 2-3), not allowing oral voir dire to rehabilitate any jurors excused based solely on their questionnaires (Claim 4), using a defective questionnaire (Claim 5), impairing counsel's ability to intelligently exercise peremptory challenges (Claim 6) and denying individual death qualification voir dire (Claim 7) – it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments; *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614,

622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 2

JURORS 11 AND 39 SHOULD NOT HAVE BEEN EXCUSED WITHOUT ORAL VOIR DIRE BECAUSE THEIR QUESTIONNAIRE RESPONSES WERE INTERNALLY INCONSISTENT AND INCOMPLETE

A. Overview

On his own motion the judge excused Jurors 11 and 39 for cause, based solely on their written responses to death penalty questions in the pre-voir dire jury questionnaire. (32 RT 6203.) However, the failure to conduct oral voir dire of these jurors was error because their questionnaires were internally inconsistent and incomplete.

B. Juror 11: Proceedings

1. Juror 11 Questionnaire Answers (6 CT 1487-91[emphasis added.)

50. Q. Views on Death Penalty:
A. Strongly Oppose. **I can't give life so why should I take it?**
Q. Reason for opposition:
A. **Eye for an eye --**

51 Q. Ever held a different opinion?
A. No. **You're doing the same thing the person you said is guilty.**

52 Q. Is Death or LWOP more severe?
A. Yes. **You have a chance to repent.**

53 Q. Any religious affiliation that takes a stance on the death penalty?
A. **Yes. Church of God in Christ.**

54 Q. Read articles or viewed TV programs about the death penalty?
A. Yes.

55 Q. Followed news coverage of Robert Alton Harris, etc?
A. No.

56 Q. Do you understand that not all those convicted of murder are death eligible?
A. Yes.

57 Q. Hold prosecution to higher standard of proof at guilt?
A. *Juror 11 did not answer "yes" or "no" but wrote:* I can only judge

myself.

58(A) Q. Is death penalty used too often? Too infrequently?

A. Too often.

58(B) Q. Belong to groups that advocate increased use or abolition of death penalty?

A. No.

58(C) Q. Answers to 58A & 58B based on religious considerations?

A. Yes.

59(A) Q. Refuse to vote for guilt of first degree murder?

A. *Juror 11 did not answer.*

59(B) Q. Refuse to find special circumstance?

A. *Juror 11 did not answer.*

59(C) Q. Refuse to vote for death and automatically vote for LWOP?

A. *Juror 11 did not answer.*

59(D) Q. Refuse to vote for LWOP and automatically vote for death?

A. *Juror 11 did not answer.*

59(E) Q. Change answer to 59C if instructed and ordered by the court to consider aggravating and mitigating factors?

A. *Juror 11 did not answer.*

59(F) Q. Could you set aside your own personal feelings and follow the law as the court explains it?

A. *Juror 11 did not answer.*

60 Q. Difficulty in not talking about the case?

A. *Juror 11 did not answer.*

61 Q. How would you vote as to penalty for a defendant convicted of multiple premeditated murder during the course of a robbery and burglary?

A. I would not automatically vote for either life without possibility of parole or the death penalty. I would consider all the evidence and vote my conscience.

62(A) Q. Would consideration of appellant's background including emotional difficulties and substance abuse be helpful in deciding whether to impose death or LWOP?

A. *Juror 11 did not answer "yes" or "no" but wrote:* **I could not vote to kill someone.**

62(B) Q. Would you reject any of those factors automatically?

A. No.

63 Q. Would fact that defendant has young children preclude you from voting for the penalty of death?

A. No.

65 Q. Any reason why you could not be completely fair and impartial to both parties? A. No.

2. Juror 11: Ruling

The judge summarized Juror 11's questionnaire responses as follows:

> "There were some inconsistent responses, but the juror said that they could not vote under any circumstances for the death penalty. Again, a Court challenge for cause." (32 RT 6203.)

The prosecutor agreed with the court's assessment but the defense submitted the matter without joining in the challenge. (32 RT 6204.)[80] The judge then excused the juror.

C. Juror 39 Proceedings

1. Juror 39 Questionnaire Answers (7 CT 1844-48 [Emphasis added].)

50 Q. Views on Death Penalty:
A. Strongly Oppose. In my opinion, man do not have the right to end a person life.
50 Q. Reason for opposition:
A. No.
51 Q. Ever held a different opinion?
A. No.
52 Q. Is Death or LWOP more severe?
A. No.
53 Q. Any religious affiliation that takes a stance on the death penalty?
A. Yes. In reading the Holy word, God said 'man should not kill"
54 Q. Read articles or viewed TV programs about the death penalty?
A. Yes.

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[80] The defense was not obligated to affirmatively oppose the challenge to preserve it for appeal. (*People v. Lewis* (2006) 39 Cal.4th 970, 1007.) Note additionally, that the *Lewis* citation to *People v. Hill* (1992) 3 Cal.4th 959, 1005 [holding defendant "waived any error" by "failing to object to the prosecutor's challenges"] was inapposite because *Hill* found waiver based on a failure to object to the prosecution's *peremptory* challenges of death scrupled jurors not a cause challenge under *Witt.*

55 Q. Followed news coverage of Robert Alton Harris, etc?
A. No.

55 Q. Did the above news coverage change your view of the death penalty?
A. No.

56 Q. Do you understand that not all those convicted of murder are death eligible?
A. Yes.

57 Q. Hold prosecution to higher standard of proof at guilt?
A. "No op"

58(A) Q. Is death penalty used too often?
A. I never really thought about it

58(B) Q. Belong to groups that advocate increased use or abolition of death penalty?
A. No.

58(C) Q. Answers to 58A & 58B based on religious considerations?
A. *Juror 39 did not answer.*

59(A) Q. Refuse to vote for guilt of first degree murder?
A. **Yes**.

59(B) Q. Refuse to find special circumstance?
A. **I have mixed emotions right now.**

59(C) Q. Refuse to vote for death and automatically vote for LWOP?
A. **Yes**.

59(D) Q. Refuse to vote for LWOP and automatically vote for death?
A. No.

59(E) Q. Change answer to 59C if instructed and ordered by the court to consider aggravating and mitigating factors?
A. "No op"

59(F) Q. Could you set aside your own personal feelings and follow the law as the court explains it?
A. *Juror 39 did not answer.*

60 Q. Difficulty in not talking about the case?
A. I might.

61 Q. How would you vote as to penalty for a defendant convicted of multiple premeditated murder during the course of a robbery and burglary?
A. **I would not automatically vote for either life without possibility of parole or the death penalty. I would consider all the evidence and vote my conscience**.

62(A) Q. Would consideration of appellant's background including emotional

difficulties and substance abuse be helpful in deciding whether to impose death or LWOP?

A. **No. I really don't feel that I am the right person for this case.**

62(B) Q. Would you reject any of those factors automatically?

A. "No op"

63 Q. Would fact that defendant has young children preclude you from voting for the penalty of death?

A. "No op"

65 Q. Any reason why you could not be completely fair and impartial to both parties? A. No.

2. Juror 39: Ruling

The prosecutor stated: "I would stipulate to a cause challenge . . . 'I strongly oppose. Would refuse to find guilt. Always would find life without possibility. I really feel I'm no the right person for this case,' are all comments by this juror." (34 RT 6601.) The defense submitted without argument in opposition and the judge excused the juror for cause. (*Ibid.*)[81]

D. Juror 11 And Juror 39 Were Improperly Excused Over Objection Based Solely On Their Inconsistent And Incomplete Death Penalty Responses To The Juror Questionnaire

1. Conflicting And Incomplete Questionnaire Answers Are Insufficient to Justify Excusal Without Oral Voir Dire

"The prosecution, as the moving party, bore the burden of demonstrating to the trial court that [the *Witt*[82]] standard was satisfied as to each of the challenged jurors. [Citation.]" (*People v. Stewart* (2004) 33 Cal.4th 425 at 445.) "As with any other trial situation where an adversary wishes to exclude a juror because of bias . . . it is the adversary seeking exclusion who

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[81] See Claim 2 § B(2), p. 69, fn. 80, incorporated herein [no objection required to preserve *Witt* error].

[82] *Wainwright v. Witt* (1985) 469 U.S. 412.

must demonstrate, through questioning, that the potential juror lacks impartiality . . . It is then the trial judge's duty to determine whether the challenge is proper." (*Witt, supra*, 469 U.S. at 423.) However, the above burden is not satisfied by conflicting written answers to a juror questionnaire which fail to "negate the possibility that the jurors could set aside their feelings and deliberate fairly." (*People v. Avila* (2006) 38 Cal.4th 491at 530; see also *People v. Stewart, supra*, 33 Cal.4th at 448.)[83]

2. Juror 11's Responses Were Inconsistent And Incomplete

The questionnaire responses of Juror 11 – as recognized by the judge – were "inconsistent." (32 RT 6203.) On the one hand, Juror 11stated: "I could not vote to kill someone." (6 CT 1490.) On the other hand the juror expressed an "ability to approach the case with an open mind and a willingness to fairly

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[83] For example, in *Avila* there was no possibility that any of the *Avila* jurors could have set aside their feelings and follow the law. (See Claim 3 § D(1), p. 82, fn. 88, incorporated herein.) It is true that one of the *Avila* jurors stated that he could follow the law. However, his answers to the other questions demonstrated such strong and entrenched feelings that, taken together, the answers "professed an opposition to the death penalty that would prevent him from performing his duties as a juror." (*People v. Avila, supra*, 38 Cal.4th at 532.)

Moreover, in *Avila*, "this query preceded questions asking directly how his pro-life views would affect his votes on guilt, special circumstances, and penalty, and it immediately followed much narrower questions about whether he agreed with, and could follow, the law requiring consideration of defendant's background, including mental defects and upbringing." (*People v. Avila, supra*, 38 Cal4th 533, n. 26.) Thus, given the location of this question in the questionnaire, "the answer may have been directed only at the background and upbringing question that immediately preceded it." (*Ibid.*)

In the present case, by contrast, the query regarding ability to set aside personal feelings and follow the law came after the crucial questions regarding the jurors' ability to vote for death. (6 CT 1510-11; 1993-94.)

consider whatever evidence is presented. . . " by checking the following answer as best describing her attitude: "I would not automatically vote for either life without possibility of parole or the death penalty. I would consider all the evidence and vote my conscience." (6 CT 1490.)

Such inconsistent and conflicting responses created ambiguity and left doubt as to the juror's true feelings. (See *People v. Stewart, supra*, 33 Cal.4th at 448 ["juror's written responses suggested ambiguity and a need for clarification on oral voir dire"] compare *People v. Avila, supra*, 33 Cal.4th at 531 [juror properly excused where "responses were internally consistent and unambiguous"].) And, the ambiguity about the juror's ability to set aside her feelings was heightened by the juror's failure to answer many of the important death penalty questions – including the inquiry as to whether the juror could set aside her own personal feelings regarding what the law ought to be and follow the law as the court explains it to you. (6 CT 1489-90 [seven death penalty questions not answered].) A juror's failure to answer a question allows inferences both that the juror may have answered the question in the affirmative and in the negative. (See *People v. Avila, supra*, 33 Cal.4th at 533, fn. 26.)

In sum, the internal inconsistency and incompleteness of Juror 11's questionnaire responses demonstrated a need for follow-up oral voir dire. Without *oral* voir dire "[w]e simply do not know how . . . [Juror 11] would have responded to appropriate clarifying questions . . . ." (*People v. Stewart, supra*, 33 Cal.4th at 450-51.)[84]

In short, the questionnaire alone failed to foreclose the "possibility" that

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[84] The present record is replete with examples of jurors whose initial questionnaire responses changed after clarification during oral voir dire. (See Claim 1 § E(3), p. 60, fn. 77, incorporated herein.)

the juror could follow the law and deliberate fairly. (*People v. Avila*, *supra*, 38 Cal.4th at 530.)

3. Juror 39's Questionnaire Answers Were Internally Inconsistent And Incomplete

The questionnaire responses of Juror 39 failed to "negate the possibility that juror [] could set aside [her] feelings and deliberate fairly." (*People v. Avila*, *supra*, 38 Cal.4th at 530.)

Juror 39 "strongly opposed" the death penalty and did not believe in it for religious reasons. (7 CT 1844-45.) Also, Juror 39 responded affirmatively to Question 59(A) [refuse to vote for guilt]; and 59(C)] automatic imposition of life without parole]. (7 CT 1846.) However, she expressed "no opinion" as to whether she would hold the prosecution to a higher standard of proof due to the potential for a penalty of death. (Question 57.) Moreover, as to Question 59(B) [refuse to find special circumstance] Juror 39 stated: "I have mixed emotions right now." And, the juror failed to answer two other key questions in this series: 59(E) [would answer to 59(D) change if judge instructed and ordered that aggravating and mitigating factors have to be considered]; 59(F) [ability to set aside personal feelings and follow the law].) (7 CT 1847.)

Furthermore, the juror expressed an "ability to approach the case with an open mind and a willingness to fairly consider whatever evidence is presented. . . " by checking the following answer as best describing her attitude: "I would not automatically vote for either life without possibility of parole or the death penalty. I would consider all the evidence and vote my conscience." (7 CT 1847.)

In sum, Juror 39's answers and non-answers created ambiguity and left doubt as to whether or not the juror could "set aside the juror's own personal

feelings" and to "follow the law." (*People v. Avila, supra*, 38 Cal.4th at 531.) [85]

Under these circumstances, denial of the failure to conduct oral followup voir dire of this juror was error. (See also Claim 5, pp. 94-99, incorporated herein.)

E. The Error Violated State Law And The Federal Constitution

To justify exclusion of Jurors 11 and 39 the prosecution was required to demonstrate that he could not perform his duties in accordance with the judge's instructions and his oath. (*Wainwright v. Witt, supra*, 469 U.S. at 424.) Because the jurors' questionnaire responses did not satisfy the prosecution's burden, and because the judge never questioned the jurors orally or observed their demeanor on voir dire, excusing them for cause violated appellant's state (Article 1, sections 7 & 15) and federal (6th and 14th Amendments) constitutional rights to due process and trial by an impartial jury. (*Ibid.*; see also *Morgan v. Illinois* (1992) 504 U.S. 719; *Adams v. Texas* (1980) 448 U.S. 38; *Witherspoon v. Illinois* (1968) 391 U.S. 510.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

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[85] See § D(1) above, p. 72, footnote 83, incorporated herein.

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[86] The judge's erroneous excusals arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Erroneous Cause Excusals Warrant Reversal Of The Guilt And Penalty Judgments

1. The Penalty Judgment Should Be Reversed

For the reasons set forth above, the record does not support the trial court's excusal for cause of Jurors 11 and 39 under the governing legal standard. (*Witt, supra*, 469 U.S. at 424; *Morgan v. Illinois, supra,* 504 U.S. 719.) Therefore, this error requires reversal of appellant's death sentence, without any inquiry into prejudice. (See *Davis v. Georgia* (1976) 429 U.S. 122, 123; *Gray v. Mississippi* (1987) 481 U.S. 648, 659-67; see also *People v. Stewart, supra*, 33 Cal.4th at 454.)

2. The Guilt Judgement Should Be Reversed

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[86] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

See Claim 1 § G(2), p. 63, incorporated herein.

3. The Error Was Cumulatively Prejudicial

Even if the erroneous excusal of Jurors 11 and 39 was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the additional errors the judge committed – e.g., excusing three other jurors without allowing oral voir dire (Claims 1 and 3), not allowing oral voir dire to rehabilitate any jurors excused based solely on their questionnaires (Claim 4), using a defective questionnaire (Claim 5), impairing counsel's ability to intelligently exercise peremptory challenges (Claim 6) and denying individual death qualification voir dire (Claim 7) – it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo, supra*, 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 3

BECAUSE THEIR QUESTIONNAIRES EXPRESSED AN ABILITY TO BE "COMPLETELY FAIR AND IMPARTIAL TO BOTH PARTIES" AND TO "SET ASIDE [THEIR] OWN PERSON FEELINGS AND FOLLOW THE LAW AS THE COURT EXPLAINS IT" – JURORS 12 AND 50 SHOULD NOT HAVE BEEN EXCUSED WITHOUT ANY ORAL VOIR DIRE

The judge excused Jurors 12 and 50 for cause, over defense objection, based solely on their written responses to the pre-voir dire jury questionnaire. The dismissal of those jurors was reversible error because their questionnaire answers failed to "negate the possibility that the jurors could set aside their feelings and deliberate fairly." (*People v. Avila*, *supra*, 38 Cal.4th at 530; see also *People v. Stewart*, *supra*, 33 Cal.4th at 448.)

A. Procedural Background: Overview

See Claim 1 § B, pp. 51-2, incorporated herein.

B. Juror 12: Proceedings

1. Juror 12 Questionnaire Answers (6 CT 1508-12 [emphasis added].)

50. Q. Views on Death Penalty:
A. Oppose. I can't actively make the decision to take a life.
Q. Reason for opposition:
A. Spiritual reasons and also my profession.

51 Q. Ever held a different opinion?
A. No.

52 Q. Is Death or LWOP more severe?
A. No Opinion. I don't like either.

53 Q. Any religious affiliation that takes a stance on the death penalty?
A. No.

54 Q. Read articles or viewed TV programs about the death penalty?
A. Yes.

55 Q. Followed news coverage of Robert Alton Harris, etc?
A. No.

56 Q. Do you understand that not all those convicted of murder are death

eligible?

A. Yes.

57 Q. Hold prosecution to higher standard of proof at guilt?

A. No.

58(A) Q. Is death penalty used too often? Too infrequently?

A. Since I'm not in favor of it, I guess I'd say it is used too often.

58(B) Q. Belong to groups that advocate increased use or abolition of death penalty?

A. No.

58(C) Q. Answers to 58A & 58B based on religious considerations?

A. No.

59(A) Q. Refuse to vote for guilt of first degree murder?

A. No.

59(B) Q. Refuse to find special circumstance?

A. No.

59(C) Q. Refuse to vote for death and automatically vote for LWOP?

A. Yes.

59(D) Q. Refuse to vote for LWOP and automatically vote for death?

A. No.

59(E) Q. Change answer to 59C if instructed and ordered by the court to consider aggravating and mitigating factors?

A. No.

59(F) Q. **Could you set aside your own personal feelings and follow the law as the court explains it?**

A. **Yes.**

60 Q. Difficulty in not talking about the case?

A. No.

61 Q. How would you vote as to penalty for a defendant convicted of multiple premeditated murder during the course of a robbery and burglary?

A. Always vote for LWOP.

62(A) Q. Would consideration of appellant's background including emotional difficulties and substance abuse be helpful in deciding whether to impose death or LWOP?

A. No.

62(B) Q. Would you reject any of those factors automatically?

A. Yes. Accountability is critical & I can't support the death penalty.

63 Q. Would fact that defendant has young children preclude you from voting for the penalty of death?

A. No. I wouldn't vote for it.

65 Q. Any reason why you could not be completely fair and impartial to both parties? No.

2. Juror 12: Ruling

The judge stated that he wanted to dismiss Juror 12 for cause based solely on the juror's questionnaire responses. (32 RT 6204.) The prosecutor agreed with the court's assessment but the defense objected. (32 RT 6204.) The judge "noted" the defense objection but "nonetheless, excuse[d] [Juror 12] for cause based [solely upon the questionnaire] responses." (32 RT 6204.)

C. Juror 50 Proceedings

1. Juror 50 Questionnaire Answers (7 CT 1991-95 [Emphasis added].)

50 Q. Views on Death Penalty:
A. Strongly Oppose. I do not believe in the death penalty.
50 Q. Reason for opposition:
A. My religion & my own views.
51 Q. Ever held a different opinion?
A. No.
52 Q. Is Death or LWOP more severe?
A. Yes. Life in prison for the rest of their life is severe punishment.
53 Q. Any religious affiliation that takes a stance on the death penalty?
A. Yes. My religion does not believe in death penalty.
54 Q. Read articles or viewed TV programs about the death penalty?
A. No.
55 Q. Followed news coverage of Robert Alton Harris, etc?
A. Yes.
55 Q. Did the above news coverage change your view of the death penalty?
A. No.
56 Q. Do you understand that not all those convicted of murder are death eligible?
A. Yes.
57 Q. Hold prosecution to higher standard of proof at guilt?
A. Yes.
58(A) Q. Is death penalty used too often?

A. It should not be used at all.

58(B) Q. Belong to groups that advocate increased use or abolition of death penalty?

A. No.

58(C) Q. Answers to 58A & 58B based on religious considerations?

A. Yes.

59(A) Q. Refuse to vote for guilt of first degree murder?

A. No.

59(B) Q. Refuse to find special circumstance?

A. No.

59(C) Q. Refuse to vote for death and automatically vote for LWOP?

A. Yes.

59(D) Q. Refuse to vote for LWOP and automatically vote for death?

A. No.

59(E) Q. Change answer to 59C if instructed and ordered by the court to consider aggravating and mitigating factors?

A. No.

59(F) Q. **Could you set aside your own personal feelings and follow the law as the court explains it?**

A. **Yes.**

60 Q. Difficulty in not talking about the case?

A. No.

61 Q. How would you vote as to penalty for a defendant convicted of multiple premeditated murder during the course of a robbery and burglary?

A. Always vote for LWOP.

62(A) Q. Would consideration of appellant's background including emotional difficulties and substance abuse be helpful in deciding whether to impose death or LWOP?

A. Yes.

62(B) Q. Would you reject any of those factors automatically?

A. No.

63 Q. Would fact that defendant has young children preclude you from voting for the penalty of death?

A. Yes. I would feel bad for his children & family.

2. Juror 50: Ruling

In the judge's view, Juror 50 stated "unequivocally for religious reasons, [that he] won't ever impose the death penalty." The juror also stated

"death penalty should not be used at all and [he] will always vote for LWOP." (32 RT 6207-08.) However, defense counsel objected based on the juror's statement that "he could set aside his personal feelings and follow the law as the court explains it." (32 RT 6207.) The defense contended that "this entitles us to explore the possibility of rehabilitation." (*Ibid.*) However, the judge overruled the defense objection and denied the request for oral voir dire. Juror 50 was excused for cause based solely on the questionnaire responses. (32 RT 6207-08; 6215.)

D. Juror 12 And Juror 50 Were Improperly Excused Over Objection Based Solely On Their Death Penalty Responses To The Juror Questionnaire

1. Conflicting Questionnaire Answers Are Insufficient to Justify Excusal Without Oral Voir Dire

"The prosecution, as the moving party, bore the burden of demonstrating to the trial court that [the *Witt*[87]] standard was satisfied as to each of the challenged jurors. [Citation.]" (*People v. Stewart, supra*, 33 Cal.4th at 445.) "As with any other trial situation where an adversary wishes to exclude a juror because of bias . . . it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality . . . It is then the trial judge's duty to determine whether the challenge is proper." (*Wainwright v. Witt, supra*, 469 U.S. at 423.) However, the above burden is not satisfied by written answers to a juror questionnaire which fails to "negate the possibility that the jurors could set aside their feelings and deliberate fairly." (*People v. Avila, supra*, 38 Cal.4th at 530; see

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[87] *Wainwright v. Witt* (1985) 469 U.S. 412.

also *People v. Stewart, supra*, 33 Cal.4th at 448.) [88]

2. Juror 12's Responses Revealed A "Possibility" That The Juror Could Follow The Law

The questionnaire responses of Juror 12 demonstrated a possibility that the juror could have followed the law.

Juror 12 checked the box on Question 50 indicating that he "opposed" [rather than strongly opposed] the death penalty. The juror's comment stated "I can't actively make the decision to take a life." (6 CT 1508.) However, the juror's answers to the remaining questions conflicted with these statements.

Some answers reflected an inability to "vote for" the death penalty (E.g., Question 59 (c); Question 61 (b); Question 62 (b).) (See Section B, pp 78-80, above.)

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[88] For example, in *Avila* there was no possibility that any of the *Avila* jurors could have set aside their feelings and follow the law. Two of the jurors expressly stated on the questionnaire that they could not do so and another failed to answer one question at all. One of the jurors stated that he could follow the law but his answers to the other questions demonstrated such strong and entrenched feelings that, taken together, the answers "professed an opposition to the death penalty that would prevent him from performing his duties as a juror." (*People v. Avila, supra*, 38 Cal.4th at 532.)

Moreover, in *Avila*, "this query preceded questions asking directly how his pro-life views would affect his votes on guilt, special circumstances, and penalty, and it immediately followed much narrower questions about whether he agreed with, and could follow, the law requiring consideration of defendant's background, including mental defects and upbringing." (*People v. Avila, supra*, 38 Cal4th 533, n. 26.)

Thus, given the location of this question in the questionnaire, "the answer may have been directed only at the background and upbringing question that immediately preceded it." (*Ibid.*) In the present case, however, the query regarding ability to set aside personal feelings and follow the law came after the crucial questions regarding the jurors' ability to vote for death. (6 CT 1510-11; 7 CT 1993-94.)

On the other hand, the juror answered "*Yes*" to the following question: "*Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the court explains it to you*?" [Italics added] (6 CT 1511 [Question 59(f)].) Similarly, in response to Question 65, Juror 12 could not think of any reason why he could not be "*completely fair and impartial to both parties*." [Italics added.] (6 CT 1512.)

These answers created an inherent conflict which required follow-up oral voir dire. Even if the answers provided a "preliminary indication" that the juror might not be able to vote for a death verdict, the ability and willingness of Juror 12 to "*set aside his own personal feelings*" and "*follow the law*" evidenced at least a "possibility" that the juror could perform his duties "as defined by the court's instructions and the juror's oath." (*Wainwright v. Witt*, *supra*, 469 U.S. 412, 424; *People v. Avila*, *supra*, 38 Cal.4th at 530; *People v. Stewart*, *supra*, 33 Cal.4th at 440-41; *People v. Heard* (2003) 31 Cal.4th 946, 958; see also e.g., *People v. Kelly* (1990) 51 Cal.3rd 931, 960 [juror at first expressed a preference under certain circumstances for the death penalty but ultimately juror agreed to follow the court's instructions and keep an open mind]; *People v. Stankewitz* (1990) 51 Cal.3rd 72, 103 [same]; *People v. Johnson* (1989) 47 Cal.3rd 1194, 1224-25 [juror indicated he favored the death penalty but ultimately stated that he would follow the law as given and would not automatically vote for the death penalty]; *People v. Garceau* (1993) 6 Cal.4th 140, 174, fn. 11 [juror stated that he favored the death penalty but also that he would consider the evidence and would not hesitate to follow the law]; *People v. Coleman* (1988) 46 Cal.3rd 749, 765-67 [juror initially indicated conscientious objection to the death penalty and that she would vote for a verdict of less than first degree murder; on further examination, she stated she would listen to all the evidence and be guided by the court in determining the

appropriate penalty]; compare *People v. Ruiz* (1988) 44 Cal.3rd 589, 618 [no error in failing to excuse jurors who confirmed they would follow the court's instructions].)

Without *oral* voir dire "[w]e simply do not know how . . . [Juror 12] would have responded to appropriate clarifying questions . . . ." (*People v. Stewart, supra*, 33 Cal.4th at 450-51.)[89] Moreover, the judge never had an opportunity to make an individual assessment of Juror 12's demeanor and credibility. (*Ibid.*) Thus, "the trial court's determination [was] informed by no more information than the cold record of . . . [the] prospective juror's check marks and brief handwritten comments . . . ." (*Id.* at 451.) Such information was "insufficient to support an assessment, required by *Witt* [citation] that . . . [Juror 12] would be unable faithfully to perform the duties required of a juror by the law." (*Ibid.*)[90]

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[89] The present record is replete with examples of jurors whose initial questionnaire responses changed after clarification during oral voir dire. (See Claim 1 § E(3), p. 60, fn. 77. incorporated herein.)

[90] *People v. Avila, supra*, 38 Cal.4th at 532 held that Juror O.D. was properly excused based solely on his questionnaire even though he stated he could set aside his personal feelings and follow the law. However, Juror O.D. "also indicated that he entertained such conscientious opinions regarding the death penalty that he would, in every case and regardless of the evidence presented, automatically vote for something other than first degree murder so as not to reach the penalty phase, automatically vote for a verdict of not true as to the special circumstances alleged so as not to reach the penalty phase, and, automatically vote for life imprisonment without the possibility of parole if there were a penalty phase."

By contrast, in the present case, Jurors 12 and 50 stated unequivocally that they would neither always vote for first degree murder nor always vote "untrue as to the special circumstances to prevent the death penalty from taking place." (6 CT 1510; 1993.) Moreover, both jurors in the present case expressly affirmed their ability to be "completely fair and impartial to both

(continued...)

In short, the questionnaire alone failed to foreclose the "possibility" that the juror could follow the law. (*People v. Avila*, *supra*, 38 Cal.4th at 530.)

3. Juror 50's Questionnaire Answers Failed To Foreclose The "Possibility" That The Juror Could Follow The Law

The questionnaire responses of Juror 50 failed to "negate the possibility that juror [] could set aside [his] feelings and deliberate fairly." (*People v. Avila*, *supra*, 38 Cal.4th at 530.)

Juror 50 "strongly opposed" the death penalty and did not believe in it for religious reasons. (7 CT 1991-92.) The juror also responded affirmatively to Question 57, which asked whether he would hold the prosecution to a higher standard of proof due to the potential for a penalty of death. In addition, this juror responded affirmatively to the question regarding automatic imposition of life without parole. (Question 59(c); Question 61(b); Question 63.)

Conversely, Juror 50 answered Question 59 by affirming that he could "set aside [his] own personal feelings regarding what the law ought to be and follow the law as the court explains it . . . ." (7 CT 1994.) Furthermore, the juror answered Question 62(A) in the affirmative and Question 62(B) in the negative, thus suggesting that the juror could, if so instructed, consider the

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[90](...continued)
sides." (6 CT 1512; 1995.)

Furthermore, in *Avila* Juror O.D. also answered additional questions regarding the death penalty as follows:

"O.D. also strongly disagreed with the following three statements based on his religious beliefs: (1) "Any person who intentionally kills another person, unless the killing was in self-defense or the defense of another, deserves the death penalty"; (2) "Convicted murderers should be swiftly executed once they are convicted"; and (3) belief in the adage "An eye for an eye." (*Ibid.*)

Thus, the questionnaire responses of Juror O.D. in *Avila* are distinguishable from the responses of Jurors 12 and 50 in the present case.

aggravating and mitigating evidence, and if warranted, vote for death. This possibility was further suggested by the juror's statement that he did not "know of any reason why [he] could not be completely fair and impartial to both parties." (7 CT 1995.)

Hence, as with Juror 12, the responses of Juror 50 were inherently conflicting. While some answers suggested an unwillingness to vote for the death penalty, other answers indicated an ability to be fair and impartial to both sides and to "*set aside the juror's own personal feelings*" and to "*follow the law.*"[91] Under these circumstances, denial of the defense requests for oral followup voir dire and excusal of this juror based solely on the questionnaire was error. (See also Claim 5, pp. 94-99, incorporated herein.)

E. The Error Violated State Law And The Federal Constitution

To justify exclusion of Jurors 12 and 50 the prosecution was required to demonstrate that he could not perform his duties in accordance with the judge's instructions and his oath. (*Wainwright v. Witt, supra*, 469 U.S. at 424.) Because the jurors' questionnaire responses did not satisfy the prosecution's burden, and because the judge never questioned the jurors orally or observed their demeanor on voir dire, excusing them for cause violated appellant's state (Article 1, sections 7 & 15) and federal (6th and 14th Amendments) constitutional rights to due process and trial by an impartial jury. (*Ibid.*; see also *Morgan v. Illinois* (1992) 504 U.S. 719; *Adams v. Texas* (1980) 448 U.S. 38; *Witherspoon v. Illinois* (1968) 391 U.S. 510.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of

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[91] Compare footnote 90, above.

guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[92] The judge's erroneous excusals arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Erroneous Cause Excusals Warrant Reversal Of The Guilt And Penalty Judgments

1. The Penalty Judgment Should Be Reversed

For the reasons set forth above, the record does not support the trial

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[92] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

court's excusal for cause of Jurors 12, 16, and 50 under the governing legal standard. (*Witt, supra*, 469 U.S. at 424; *Morgan v. Illinois, supra*, 504 U.S. 719.) Therefore, this error requires reversal of appellant's death sentence, without any inquiry into prejudice. (See *Davis v. Georgia* (1976) 429 U.S. 122, 123; *Gray v. Mississippi* (1987) 481 U.S. 648, 659-67; see also *People v. Stewart, supra*, 33 Cal.4th at 454.)

2. The Guilt Judgement Should Be Reversed

See Claim 1 § G(2), p. 63, incorporated herein.

3. The Error Was Cumulatively Prejudicial

Even if the erroneous excusal of Juror 16 was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the additional errors the judge committed – e.g., excusing three other jurors without allowing oral voir dire (Claims 1-3), not allowing oral voir dire to rehabilitate any jurors excused based solely on their questionnaires (Claim 4), using a defective questionnaire (Claim 5), impairing counsel's ability to intelligently exercise peremptory challenges (Claim 6) and denying individual death qualification voir dire (Claim 7) – it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo, supra*, 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 4

THE QUESTIONNAIRE IN THE PRESENT CASE WAS DEFICIENT BECAUSE IT FAILED TO DEFINE THE JURORS' DUTIES IN TERMS OF THE JURORS' OATH

A. The Questionnaire Was Insufficient

As indicated above (see Claims 1, 2 and 3), the trial court erred in excusing jurors based solely on their incomplete and equivocal responses to the jury questionnaire forms; in order to gain a clear understanding of these jurors' views, appellant has argued, oral voir dire was essential.

The use of the written questionnaires also introduced further error into the selection process because it contained a crucial omission – it failed to query prospective jurors about their adherence to the jurors' oath.

It is one thing for a person to abstractly state that he or she would always vote for or against the death penalty, it is quite another to violate the solemn oath a sitting juror takes. This is so because a juror who is not willing to vote for a death sentence in the abstract may feel a civic or moral duty to faithfully follow the judge's instructions after taking an oath to do so.

Accordingly, the questionnaire in the present case was insufficient to justify excusing a juror for cause over defense objection because the questionnaire failed to ask the jurors whether they could consider voting for the death penalty if they were under an oath to do so. (See *Wainwright v. Witt*, *supra*, 469 U.S. 412, 424 [inquiry should focus on juror's ability to perform his or her duties "as defined by the court's instructions and the juror's oath"]; see also *Adams v. Texas* (1980) 448 U.S. 38, 45; *People v. Stewart*, *supra*, 33

Cal.4th at 440-41.)[93]

This error violated state law and the federal constitution. The error warrants reversal of both the guilt and death judgments.

B. The Error Violated State Law And The Federal Constitution

To justify exclusion of jurors based solely on their written questionnaires the prosecution was required to demonstrate that the questionnaire could accurately determine that the jurors could not perform their duties in accordance with the judge's instructions and his oath. (*Wainwright v. Witt, supra*, 469 U.S. at 424.) Because the questionnaire in the present case did not satisfy the prosecution's burden, excusing the jurors for cause based solely on the questionnaire violated appellant's state (Article 1, sections 7 and 15) and federal (6th and 14th Amendments) constitutional rights to due process and trial by an impartial jury. (*Ibid.*; see also *Morgan v. Illinois* (1992) 504 U.S. 719; *Adams v. Texas* (1980) 448 U.S. 38; *Witherspoon v.*

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[93] A juror questionnaire in a capital case must articulate the proper legal standard under *Witt.* (See *People v. Avila, supra*, 38 Cal.4th at 531 [" . . . excusal without oral voir dire is improper where the prospective juror's answers to a jury questionnaire leave no doubt that his or her views on capital punishment would prevent or substantially impair the performance of his or her duties in accordance with the court's instructions and the juror's oath"]; see also *People v. Stewart, supra*, 33 Cal.4th at 447 [questionnaire did not inquire about jurors' ability to put aside their personal views and deliberate fairly]; *U.S. v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1272 [". . . none of the questions . . . answered articulated the proper legal standard under *Witt*"].)

The *Witt* standard requires inquiry into the jurors' ability to perform their duties "as defined by the court's instructions and the juror's oath." (*Wainwright v. Witt, supra*, 469 U.S. at 424; see also *Adams v. Texas* (1980) 448 U.S. 38, 45; *People v. Stewart, supra*, 33 Cal.4th at 440-41.)

Accordingly, because the questionnaire in the present case failed to inquire about the jurors' ability to follow their oath it failed to correctly articulate the *Witt* standard.

Illinois (1968) 391 U.S. 510.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[94] The judge's erroneous excusals arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

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[94] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

C. The Error Warrants Reversal

1. The Penalty Should Be Reversed

See *People v. Stewart*, *supra*, 33 Cal.4th 425; see also Claim 1 § G(1), p. 63, incorporated herein.

2. The Guilt Verdicts Should Be Reversed

See Claim 1, § G(2), p. 63, incorporated herein.

3. The Error Was Cumulatively Prejudicial

Even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the additional errors the judge committed – e.g., excusing five jurors without allowing oral voir dire (Claims 1 and 2), not allowing oral voir dire to rehabilitate any jurors excused based solely on their questionnaires (Claim 5), impairing counsel's ability to intelligently exercise peremptory challenges (Claim 6) and denying individual death qualification voir dire (Claim 7) – it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 5

IT WAS ERROR TO EXCUSE THE JURORS FOR CAUSE OVER DEFENSE OBJECTION WITHOUT GIVING THE DEFENSE AN OPPORTUNITY TO REHABILITATE THE JURORS THROUGH ORAL VOIR DIRE

A. The Defense Should Have Been Allowed To Rehabilitate The Excused Jurors

As discussed above, *Stewart* and *Avila* warrant reversal based on the conflicting and/or ambiguous responses of the specific jurors. However, even if the jurors' responses had been clear and unambiguous, denial of the defense requests for follow-up voir dire was reversible error.[95]

The practice of excusing jurors for cause based entirely on their written responses to a juror questionnaire absent a stipulation by the parties is problematic for several reasons. First, while the questionnaire may provide a "preliminary" insight into whether the juror is qualified, the questionnaire is often inadequate in terms of reaching a definitive view of the juror's qualifications. In some situations, the questionnaire responses may reveal "unambiguous and entrenched support for or opposition to the death penalty." (See *Stewart*, 33 Cal.4th 444, fn. 11.) Thus, in *Stewart* the court did not "hold that a trial court never may properly grant a motion for excusal for cause over defense objection based solely on a prospective juror's checked answers and written responses contained in a juror questionnaire." (*Id.* at 449.) However, the *Stewart* court went on to observe that it was "unaware of any authority

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[95] Defense counsel expressly requested oral voir dire of Jurors 16 and 50. (32 RT 6205; 6207.) Although there was no such express request as to Juror 12 (32 RT 6204), the defense objection to excusal without voir dire, in context, reasonably should be construed as a request for oral voir dire of that juror as well.

upholding such a practice." (*Id.* at 449-50; see also *United States v. Chanthadra* (10th Cir. 2000) 230 F.3d 1237 [death penalty judgment reversed for excusing nine jurors for cause based solely upon the jurors' responses to a questionnaire]; *State v. Anderson* (2000) 197 Ariz. 314 [4 P. 3d 369, 372-79] [finding error in excusing three jurors over objection for cause based solely upon each juror's responses to a juror questionnaire].)

Furthermore, as this Court observed in *Stewart*, none of the "numerous . . . publications that exist to assist [trial courts] in properly conducting voir dire in capital cases" provide any suggestion that ". . . granting challenges for cause over defense objection–involving *exclusive* reliance upon checked answers to questions and brief written comments–is permissible or adequate." (*People v. Stewart*, 33 Cal.4th at 450; see also *People v. Heard* (2003) 31 Cal.4th 946, 966, fn 9.) Instead, those sources proceed on the assumption that, except for prospective jurors who both parties stipulate should be excused for cause (see *People v. Erin* (2000) 22 Cal.4th 48, 73-74, 78) will not *obviate* the need for oral voir dire . . . ." (*People v. Stewart, supra*, 33 C4th at 450.) [Italics in original.]

The essential deficiencies of relying entirely on juror questionnaires arise from the fact that (1)"[w]e simply do not know how . . . potential jurors would have responded to appropriate clarifying questions posed. . ." and (2) in making such an excusal, the judge never has an opportunity to make an individual assessment of the juror's demeanor and credibility. (*People v. Stewart, supra*, 33 Cal.4th at 450-51.) "Had the trial court conducted a follow-up examination of each prospective juror and thereafter determined (in light of the questionnaire responses, oral responses, and its own assessment of demeanor and credibility) that the prospective juror's views would substantially impair the performance of his or her duties as a juror in this case,

the court's determination would have been entitled to deference. [Citations.]" (*Id.* at 451.) However, when the excusal is based entirely on the questionnaire, "the trial court's determination [is] informed by no more information than the cold record of . . . a prospective juror's check marks and brief handwritten comments–the exact same information that [the reviewing court has]." (Id. at 451.) Such information is "insufficient to support an assessment, required by *Witt* [citation] that...[the] prospective jurors would be unable faithfully to perform the duties required of a juror by the law." (*Ibid.*) Therefore, even if the written responses are framed in terms of the "prevent or substantially impair" language of *Witt*, a prospective juror may "not properly be excused for cause without any follow-up oral voir dire by the court." (*Id.* at 451-52.)

Moreover, it is indisputable that oral voir dire will more effectively ferret out a juror's true views than a simple written questionnaire. This is so because the oral voir dire allows the juror an opportunity to further evaluate his or her views and to place them in perspective. (See e.g., *People v. Lucas* (1995) 12 Cal.4th 415, 485 [juror thought she had made a mistake on the questionnaire and did not believe that death should be imposed in every intentional homicide].) Also, oral voir dire is helpful in clarifying things that the jurors may have misunderstood about the written questionnaire. (See Claim 1, § E(3), p. 59, fn. 76, incorporated herein [observations of trial judge regarding ability of voir dire to rehabilitate].)

Furthermore, in the present case there were numerous examples of jurors whose initial responses to the questionnaires were subsequently clarified and/or changed in response to oral voir dire. (See Claim 1, § E(3), pp. 60, fn. 77, incorporated herein.)

In sum, it undermined the reliability of the fairness and reliability of appellant's trial, and was a violation of the state (Article I, sections 7 and 15)

and federal (6th, 8th and 14th Amendments) constitutions, to dismiss any jurors, including Jurors 11, 12, 16, 39 and 50, based on their written questionnaire responses without first affording the defense an opportunity for oral voir dire of the jurors.

B. The Error Violated State Law And The Federal Constitution

Allowing a juror to be challenged for cause under *Wainwright v. Witt*, *supra*, 469 U.S. at 424) without allowing oral voir dire to rehabilitate the juror violated appellant's state (Article 1, sections 7 & 15) and federal (6th and 14th Amendments) constitutional rights to due process and trial by an impartial jury. (*Ibid.*; see also *Morgan v. Illinois* (1992) 504 U.S. 719; *Adams v. Texas* (1980) 448 U.S. 38; *Witherspoon v. Illinois* (1968) 391 U.S. 510; People v. Stewart (2004) 33 c4th 425.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785 *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044;

see also § 1093(f) [power to instruct jury]; § 1127 [same].)[96] The judge's erroneous excusals arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

C. The Judgment Should Be Reversed

The guilt and penalty judgments should be reversed. (See Claim 1 § G(1) and (2), pp. 63, incorporated herein.)

Moreover, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the additional errors the judge committed – e.g., excusing five jurors without allowing oral voir dire (Claims 1-3),using a defective questionnaire (Claim 4), impairing counsel's ability to intelligently exercise peremptory challenges (Claim 6) and denying individual death qualification voir dire (Claim 7) – it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v.*

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[96] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

Walker (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 6

THE JUDGE ERRED BY UNNECESSARILY USING A JURY SELECTION METHOD THAT IMPAIRED COUNSEL'S ABILITY TO INTELLIGENTLY EXERCISE HIS PEREMPTORY CHALLENGES

Over vigorous defense objection the judge opted to use a jury selection method in which both the cause and peremptory challenges were exercised as to groups of 18 jurors at a time. (27 RT 5218.) Defense counsel objected to this procedure because it "would prevent the defense from effectively exercising [their] peremptory challenges." [97]

After the challenges to the first panel of 18 was complete defense counsel Landreth again explained how the procedure was impairing his ability to exercise peremptory challenges and asked that the remaining 15 jurors yet to be called be challenged for cause before the exercise of any more peremptory challenges:

> Your Honor, there are approximately 15 members of this panel still out there who have not been examined for cause which -- members of this particular panel, and from looking at those and reading the questionnaires that we have got, it makes -- puts me, us in the impossible position of having to adequately judge these jurors and I would request that at the very least we be able to get the rest of these through with cause before we are required to exercise peremptory challenges. (33 RT 6537-38.)

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[97] Defense counsel West questioned the procedure of piecemeal peremptory challenges. (27 RT 5220.) Attorney Landreth then stated that because this was a death penalty case, they were exercising their peremptory challenges weighted system for each particular juror. Thus, Landreth explained, the judge's selection method "would simply destroy our ability to really weigh our...reasons for exercising peremptories..." and would prevent the defense from effectively exercising their peremptory challenges. (27 RT 5221-22.)

Thereafter, counsel filed a formal written objection to the procedure (4 CT 929-31) which the judge denied. (28 RT 5249.)

The judge denied this request as well, while simply stating, "I have ruled on that." (33 RT 6538.)

In *People v. Avila* (2006) 38 Cal.4th 491, this Court held that under California law the judge is not obligated to conduct cause voir dire and challenges to more than one panel of prospective jurors at a time. However, even if a judge's ruling is technically in compliance with state law, if the procedure effectively impairs counsel's ability to intelligently exercise peremptory challenges then there has been a violation of the federal constitution. This is so because, although there is nothing in the Constitution of the United States which requires the States to grant peremptory challenges, (*United States v. Martinez-Salazar* (2000) 528 U.S. 304), nonetheless the challenge is "one of the most important of the rights secured to the accused," *Pointer v. United States* (1894) 151 U.S. 396, 408.) Thus a state procedure which impairs the defendant's ability to exercise his challenges intelligently may be a violation of the federal constitution. (See *Knox v. Collins* (5th Cir. 1991) 928 F.2d 657, 660-661.)

Thus, although the courts have indicated that there is no constitutional right to peremptory challenges in themselves, where such challenges are provided, the constitutional right to a fair and impartial jury – per the Sixth and Fourteenth Amendments – includes the right to a voir dire procedure that permits the intelligent exercise of those challenges. (See *Swain v. Alabama* (1965) 380 U.S. 202; *Knox v. Collins, supra*, 928 F.2d 657.) Additionally, the denial of such a right also necessarily violates the Fifth Amendment right to liberty, the Sixth Amendment right to effective counsel, the Fifth and Fourteenth Amendment rights to due process and the Eighth Amendment right to heightened capital case due process, as well as the Fifth, Eighth and fourteenth Amendment rights to reliability in guilt and penalty adjudication.

(See *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; see also Claim 1 § F, pp. 61-2, incorporated herein.)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[98] The failure to allow intelligent exercise of peremptory challenges arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Nor can is there any doubt that the procedure used in the present case impaired counsel's ability to intelligently exercise his peremptory challenges. First, there is counsel's on-the-record statements as to how the procedure put him in an "impossible position" and prevented him from effectively exercising his peremptory challenges. Second, this Court has acknowledged that such a procedure makes the exercise of peremptory challenges "less informed" because "[i]t is clear that knowledge of the composition of the entire panel can be relevant to the informed exercise of a peremptory challenge against a

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[98] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

particular juror." (*People v. Wright* (1990) 52 Cal.3d 367, 397; *People v. Avila*, *supra*, 38 Cal.4th at 538 ["knowledge of the composition of the entire panel can be relevant to the exercise of a peremptory challenge against an individual juror"]; *People v. Reynoso* (2003) 31 Cal.4th 903, 919) [in deciding on peremptory challenges ". . .a lawyer necessarily evaluates . . . the prospective jurors remaining in the courtroom . . ."].)

Accordingly, because the procedure used in the present case unnecessarily impaired counsel's ability to effectively exercise their peremptory challenges, the guilt and penalty judgement should be reversed. (*Swain v. Alabama*, *supra*, 380 U.S. at 219.) Moreover, even if the guilt judgement is not reversed, the penalty judgement should be reversed because intelligent jury selection is critically important in capital cases,[99] and thus any impairment of counsel's ability to effectively use his peremptory challenges violated the 8th amendment and unconstitutionally undermined the fairness and reliability of the sentencing trial. (See also Claim 59 § G(2), pp. 550-51, incorporated herein [penalty trial was closely balanced].)

Finally, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the additional errors the judge committed – e.g., excusing five jurors without allowing oral voir dire (Claims 1-3), using a defective questionnaire (Claim 4), not allowing oral voir dire to rehabilitate any jurors excused based solely on their questionnaires (Claim 5) and denying individual death qualification voir dire (Claim 7) – it is apparent that appellant's trial was

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[99] See generally *Wainwright v. Witt* (1985) 469 U.S. 412; *Witherspoon v. Illinois* (1968) 391 U.S. 510; *People v. Cummings* (1993) 4 Cal.4th 1233.

fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 7

THE JUDGE ERRONEOUSLY REFUSED TO CONDUCT INDIVIDUAL DEATH QUALIFICATION VOIR DIRE

In *Covarrubias v. Superior Court* (1998) 60 Cal.App. 1168, in response to a pretrial write in the present case, the Court of Appeal held sequestered individual death qualification of jurors is not required unless group voir dire is not practical. (See also *People v. Waidla* (2000) 22 Cal.4th 690, 713; California Code of Civil Procedure § 223.

Following the pretrial writ ruling the judge denied a request by both the defense and prosecution for individual voir dire. (26 RT 5007-16.)

In accordance with *People v. Schmeck* (2005) 37 Cal.4th 240 appellant seeks reconsideration – without complete briefing – of this Court's holding that individual voir dire is not constitutionally required.[100]

Group qualification is unconstitutional for numerous reasons, including but not limited to those discussed by this Court in *Hovey v. Superior Court* (1980) 28 Cal.3d 1 and in empirical studies.[101]

Put simply, juror exposure to death qualification in the presence of other jurors leads to doubt that a convicted capital defendant was sentenced to death by a jury empaneled in compliance with constitutionally compelled

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[100] In light of *People v. Schmeck* (2005) 37 Cal.4th 240, 304 and the Calif. Rules of Court, Rule 8.630 (b)(1)(A), appellant has not fully briefed this claim.

[101] See e.g., Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process* (1984) 8 Law & Human Behavior 121, 132 [death qualification creates an imbalance to the detriment of the defendant]; Haney, *Examining Death Qualification: Further Analysis of the Process Effect* (1984) 8 Law & Human Behavior 133, 151; and Allen, Mabry & McKelton, *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis* (1998) 22 L. & Hum. Behv. 715, 724.

impartiality principles. Such doubt requires reversal of appellant's death sentence. (See e.g., *Morgan v. Illinois* (1992) 504 U.S. 719,739; *Turner v. Murray* (1986) 476 U.S. 28, 37.)

Nor can such restriction withstand Eighth Amendment principles mandating a need for the heightened reliability of death sentences. (See e.g., *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

Likewise, because the right to an impartial jury guarantees adequate voir dire to identify unqualified jurors and provide sufficient information to enable the defense to raise peremptory challenges (*Morgan v. Illinois, supra*, 504 U.S. at p. 729; *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188), the negative influences of open death qualification voir dire violate the Sixth Amendment's guarantee of effective assistance of counsel.

Accordingly, the death judgment should be reversed.

CLAIM 8

THE GUILT AND PENALTY JUDGEMENTS SHOULD BE REVERSED BECAUSE DEATH QUALIFICATION IS UNCONSTITUTIONAL

Before a prospective juror may sit on a death penalty jury, the trial judge questions the individual in a group with other prospective jurors to learn whether he or she is "death qualified," i.e., whether the person is willing, in some cases at least, to sentence to death someone who stands convicted of a capital crime. If the court determines that the prospective juror is so strongly in favor of the death penalty that his or her views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath," then that juror may be excused for cause. (*Wainwright v. Witt* (1985) 469 U.S. 412, 582.) Such "death qualified" jurors are not permitted to serve at either the guilt or penalty phase of a trial. This process of death qualification violates appellant's federal and state constitutional rights to due process, a fair trial and to a fair and reliable guilt and penalty determination for the following reasons: (1) death qualification does not screen out everyone who would always impose the death penalty, so that such jurors remain on the jury even after *Witt* voir dire; (2) death qualification results in jurors who are less likely to consider the defendant's mitigation evidence; (3) juror's expose to the death qualification process are more likely to impose death; (4) death qualified jurors are more likely to convict a defendant at the guilt/innocence phase.

The process by which a death penalty jury is selected in California violates appellant's federal and state constitutional rights to trial by an impartial jury. (U.S. Const., 6th & 14th Amends.; *Morgan v. Illinois*, *supra*, 504 U.S. 719, 726; *Taylor v. Lousiana*, *supra*, 419 U.S. 522, 530-531; Cal.

Const., Article. I, §§ 7, 15 & 16.) Death qualification violates appellant's Eighth and Fourteenth Amendment right to a reliable death sentence. (*California v. Ramos* (1983) 463 U.S. 992, 998-999; *Gardner v. Florida*, *supra*, 430 U.S. 349, 357-358; *Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305.) It also violates his right to a jury selected from a representative cross-section of the community. (U.S. Const., 6th & 14th Amends; Cal. Const., Article I, § 16; *Taylor v. Louisiana*, *supra*, 419 U.S. 522, 526.)

Appellant recognizes that these issues have previously been rejected. This Court has held that individual sequestered voir dire is not required by the constitution. (See, e.g., *People v. Carter* (2005) 36 Cal.4th 1215, 1247-1248, and cases cited there.) This Court and the United States Supreme Court has also rejected the claim that the use of death-qualified jurors for guilt and penalty violates the Sixth and Fourteenth Amendments in *Lockhart v. McCree* (1986) 476 U.S. 162. This Court has rejected a similar challenge in *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1, and more recently in *People v. Lenart* (2004) 32 Cal.4th 1107, 1120, *People v.* Steele (2002) 27 Cal.4th 1230, 1240, and *People v. Jackson* (1996) 13 Cal.4th 1164, 1198-1199. These holding are wrong and appellant urges their reconsideration without full briefing. (*People v. Schmeck* (2005) 37 Cal. 4th 240, 304.)[102]

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[102] See also Claim 7, p. 105, fn. 100, incorporated herein.

CLAIM 9: COURTROOM SECURITY ERRORS

CLAIM 9

THE JUDGE PREJUDICIALLY ABUSED HIS DISCRETION BY COMPELLING APPELLANT TO WEAR A STUN BELT

A. Overview

Prior to trial the Sheriff stated his intent to restrain appellant with a REACT[103] stun belt throughout the jury trial. This stun belt was designed to deliver an eight-second, 50,000 volt electric shock if activated by a remote transmitter controlled by an attending officer. (3 SCT 839; see also *People v. Mar* (2002) 28 Cal.4th 1201, 1215.) "The wearer is generally knocked to the ground by the shock and shakes uncontrollably. Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal." (*Ibid.*)

"The most unique feature of the belt is the psychological impact rendered on the wearer [from] knowing that the belt contains a jolt of 50,000 volts of unleashed electricity at officer discretion. . . ." (3 SCT 839.)

The defense objected to using "that kind of restraint" on appellant based on appellant's fear that the device might be activated accidentally or unnecessarily. (RT1813.) Appellant's concern about accidental discharge was justified by the manufacturer's own statistical data which stated that over 42 percent of all known belt activations had been accidental. (3 SCT 836.) Appellant's fear that the belt might be unnecessarily activated was justified by

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[103] "REACT" is the manufacturer's acronym for "Remote Electronically Activated Control Technology Belt." (SCT 838.) The documents submitted by the sheriff's stun belt memo included documentation from the manufacturer of the REACT stun belt. (Court Exhibit 1; SCT 836-851.)

the fact that the sheriff's deputy who held the remote activation trigger for the belt had the discretion to decide whether appellant's movements and/or response to the deputies verbal commands were sufficient to warrant activation of the belt. And, even if not justified, appellant's concern was "plausible" because the sheriff's office had accused appellant of assaulting a sheriff's deputy (3 SCT 823), and the stun belt was controlled by another sheriff's deputy. (See *People v. Mar*, *supra*, 28 Cal.4th at 1223.)

Moreover, appellant's objection to the stun belt was also justified by the painful and humiliating consequences of the belt's activation which were described on the "Defendant Notification Form" as follows:

> "YOU ARE HEREBY ADVISED THAT YOU ARE BEING REQUIRED TO WEAR AN ELECTRONIC IMMOBILIZATION BELT.
> This belt contains 50,000 volts of electricity. By means of a remote transmitter, an attending officer has the ability to activate the stun package attached to the belt, thereby causing the following results to take place:
>
> 1. Immobilization causing you to fall to the ground
> 2. Possibility of self-defecation
> 3. Possibility of self-urination
>
> FAILURE TO COMPLY WITH OFFICER DIRECTION COULD LEAD TO ANY OF THE ABOVE!" (3 SCT 849.)

The stun belt literature also made it clear that fear, anxiety and psychological distraction were natural and probable consequences of wearing the REACT stun belt: "By merely strapping the belt on an individual, the element of 'implied force' control is being demonstrated by psychological power." (3 SCT 847.)

In sum, the record contained substantial evidence which should have alerted the judge that appellant's ability to effectively participate in his defense would likely be impaired by the "adverse psychological consequences" of the

stun belt. (See *People v. Mar, supra*, 28 Cal.4th at 1228.)

However, the judge never considered these psychological consequences. Instead he erroneously relied on the unwarranted presumption that the stun belt would not prejudice appellant so long as the jury did not see it. Accordingly, the judge abused his discretion by:

1. Not engaging in the required balancing process before ruling that appellant must be restrained during trial.

2. Failing to consider the psychological impact of the stun belt on appellant;

3. Failing to consider whether the security purposes could be served by other less onerous or restrictive restraints especially in light of the sheriff's statement that appellant could be restrained by hand cuffs and/or leg irons;

4. Relying on his view that the stun belt would benefit appellant;

5. Failing to find that the belt used on appellant had the least invasive design capable of accomplishing the security purposes.

6. Relying on hearsay to justify imposition of physical restraints on appellant.

For all of the above reasons, the judge erroneously compelled appellant to wear a stun belt which prejudicially undermined the fairness and reliability of both the guilt and penalty verdicts.

B. Proceedings Below

1. The Sheriff's Stun Belt Memo Failed To Explain Why Traditional Restraints Would Not Have Been Adequate

Prior to jury selection, the sheriff stated his intention – based on hearsay incident reports – to make appellant wear a REACT stun belt while in the presence of the jury. (Court Exhibit 1; 3 SCT 823-851.) However, the sheriff provided no explanation as to why the stun belt – which would inflict a 50,000

volt electric shock upon appellant for 8-10 seconds if activated – was the least onerous or restrictive restraint available to serve the security purpose. In fact, the sheriff's memo indicated that "handcuffs and/or leg irons" would have been sufficient. (3 SCT 823.)

2. 42% Plus Rate Of Accidental Activation

The stun belt documentation included statistical data showing that over *42 percent* of the REACT stun belt's known activations had been accidental. (3 SCT 836 [12 intended activations; 9 accidental activations].)

3. The Stun Belt Was Designed For "Mind Control" And "Psychological Supremacy" Over The Defendant

According to the manufacturer's documentation, the goal of the REACT stun belt system was "total psychological supremacy . . . of potentially troublesome prisoners." (Court Exhibit 1, p. 4; 3 SCT 838.) "Just knowing the belt contains a jolt of 50,000 volts of unleashed electricity at officer discretion prompts the most violent inmate into becoming a complying customer." (*Ibid.*) Thus, the intent of the device was to impose "psychological power" over appellant (3 SCT 847) and to "maintain [] an invisible leash between the mind of [appellant] and the officer capable of activating [the belt]. . . ." (3 SCT 845 [emphasis in original].)

4. The Defendant Notification Form Emphasized The Officer's Discretion To Inflict Pain And Humiliation On Appellant

The REACT documentation also included a "Defendant Notification Form" which advised appellant that the belt "contains 50,000 volts of electricity" and if activated will produce "immobilization causing you to fall to the ground" and the "possibility of self-defecation and self-urination." (*Ibid.*) It also advised appellant in capital letters that: FAILURE TO COMPLY WITH OFFICER DIRECTION COULD LEAD TO ANY OF THE ABOVE!"

(3 SCT 849.)

The "Defendant Notification Form" further admonished appellant that:

"The belt could be activated under the following actions on your behalf and notification is hereby made:

A. Any outburst or quick movement

B. Any hostile movement

C. Any tampering with the belt

D. Failure to comply with verbal command for movement of your person

E. Any attempt to escape custody

F. Any loss of vision of your hands by the custodial officer

G. Any overt act against any person within a fifty (50) foot vicinity." (Court Exhibit 1; 3 SCT 849.)

5. First Objection By The Defense

Before the belt was used on appellant, the defense objected to the placement of "that kind of restraint on Mr. Covarrubias." (10 RT 1813.)[104] The defense argued that the stun belt was not necessary because appellant had not exhibited any indication of being a security risk in his prior court appearances. (10 RT 1813-14.) Defense counsel also conveyed appellant's fear that there might be a "nondiscriminatory" activation of the stun belt and that the deputy might perceive a slight movement as an escape attempt. (10 RT 1814.)

The judge concluded that, because the stun belt would not be "apparent

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[104] The defense also contended that the security proposals were based on mere "incident reports" without affording appellant an opportunity to challenge or have a trial on the merits of those particular incidents. (RT 1813.)

to the jury" (10 RT 1815), there would be "no prejudicial effect to [the stun belt's] use." (10 RT 1816.)[105] Accordingly the judge did not conduct "the usual balancing process" required for traditional restraints and ruled that the stun belt should be used provided that it would not be "obvious" to the jury. (10 RT 1817.)[106] The judge also stated that he would instruct the bailiff that the belt is not to be activated unless there is "something serious" or "some kind of emergency going on." (10 RT 1816.)[107] The judge then ordered that appellant must wear the stun belt in court whenever the jury were present. (2 SCT 318.)

6. Renewed Defense Objection

After suspension of the proceedings for a pretrial writ, the defense renewed its objection to the stun belt "because of the potential discharge either by accident or by people in control of that system." (27 RT 5211.) Defense counsel also objected because "there are less invasive ways to do it. . . ." (17 RT 5212.) The judge summarily overruled the renewed objection stating that he considered the stun belt to be "a perfect security device." (27 RT 5211-12.)

7. Appellant Wore The Stun Belt During The Trial

Appellant was required to wear the REACT stun belt system during all

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[105] The judge also concluded that the stun belt would "serve as a benefit [to appellant] . . . in the sense that it will dissuade the defendant from any thoughts of taking actions that might jeopardize his own position with respect to the jury." (RT 1816:11-16.)

[106] The judge added the caveat that: "If it appears that we can't put the system on without having it be obvious, then at least that issue is raised and we'll have to deal with it. But my understanding is that we can clothe this man so that that belt is not apparent." (RT 1817:5-11.) Defense counsel responded ". . .I'd like to be able to raise it again if that becomes a problem. . . ." (RT 1817:12-13.)

[107] The giving of any such instruction is not in the record.

proceedings at which the jurors were present, including the jury selection, the guilt trial and the penalty trial. (2 SCT 318.)[108]

C. The Law: *Duran* Applies To Stun Belts

In *People v. Mar, supra*, 28 Cal.4th 1201 this Court held that "before the compelled use of . . . a stun belt can be justified for security purposes, the general standard and procedural requirements set forth in *Duran*[109] must be met." (*Id.* at 1219-20.) Accordingly, before a defendant may be compelled to wear a stun belt the judge must find (Prong 1) "a manifest need for such restraint" and (Prong 2) that the stun belt is the least "onerous" or "restrictive" restraint available to provide the needed restraint. (*People v. Mar, supra*, 28 Cal.4th at 1226-28; *People v. Duran, supra*, 16 Cal.3d at 291.)[110]

D. Appellant's Judge Abused His Discretion By Failing To Make The Required *Duran* Findings

1. There Was No Finding Of "Manifest Need"

The judge had a "serious concern as to the viability of having [appellant] completely unrestrained in the courtroom." (10 RT 1816.) However, the judge expressly failed to conduct the "usual balancing" of that concern with the risks to appellant's due process rights as required by *Duran*. (10 RT 1816-17.) This was an abuse of discretion because the judge never made a finding of "manifest need" to restrain appellant with the stun belt. (See

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[108] Appellant did not to testify at trial based on what counsel described as a "tactical" decision. (RT12801-02.)

[109] *People v. Duran* (1976) 16 Cal.3d 282.

[110] See also *U.S. v. Durham* (11th Cir. 2002) 287 F.3d 1297, 1304, 1308; *Gonzalez v. Pliler* (9th Cir. 2003) 341 F.3d 897; *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149; *Hymon v. State* (Nev. 2005) 111 P.3d 1092, 1099; *Rae v. State* (Alaska 1994) 884 P.2d 163, 165-66.

People v. Mar, supra, 28 Cal.4th 1201; see also *Gonzalez v. Pliler* (9th Cir. 2003) 341 F.3d 897.

2. The Judge Erroneously Failed To Consider The Psychological Impact Of The Stun Belt On Appellant

Notwithstanding substantial record evidence regarding the adverse psychological impact of the stun belt on appellant, the judge erroneously assumed that the stun belt was not an onerous or restrictive restraint so long as the jury could not see it. (10 RT 1815-17.) Hence, the judge focused only on the visibility of the device and completely failed to consider the psychological impact of the stun belt from the defendant's perspective. This was an abuse of discretion because the judge must "take into consideration the potential adverse psychological consequences that may accompany the compelled use of a stun belt and give considerable weight to the defendant's perspective in determining whether traditional security measures – such as chains or leg braces – or instead a stun belt constitutes the less intrusive or restrictive alternative for purposes of the *Duran* standard." (*People v. Mar, supra*, 28 Cal.4th at 1228; see also *id.* at 1222; cf., *People v. O'Dell* (2005) 126 Cal.App.4th 562 [failure to consider the facts and special circumstances of the defendant's case provided insufficient evidence to support involuntary medication of the defendant].)

3. The Judge Abused His Discretion By Failing To Consider Less Invasive Ways To Restrain Appellant And Make An On The Record Determination That Less Onerous Restraints Would Not Be Effective

Because the judge concluded that the stun belt was presumptively less invasive than other forms of restraint and was "a perfect security device" (27 RT 5211-12), he never considered less invasive means of restraining appellant.

This was an abuse of discretion because "any presumption that the use of a stun belt is always, or even generally, less onerous or less restrictive than the use of more traditional security measures is unwarranted." (*People v. Mar, supra*, 28 Cal.4th at 1228.)[111]

Moreover, to properly exercise his discretion under *Duran*, the judge was obligated to require an on-the-record showing that the stun belt was the least onerous or restrictive means available to restrain appellant under the circumstances. (See generally *People v. Mar, supra*, 28 Cal.4th at 1222.) "[I]t is the function of the court, not the prosecutor, to initiate whatever procedures the court deems sufficient in order that it might make a due process determination of record that restraints are necessary." (*People v. Duran, supra*, 16 Cal.3d at 293, fn. 12.) Hence, it was the trial court's responsibility to assure that the record included substantial evidence to support its order authorizing use of a stun belt.

In the present case, there was no record evidence which established that the stun belt was the least onerous or restrictive way to restrain appellant. To the contrary the sheriff's memo acknowledged that appellant could be effectively restrained by handcuffs and/or leg irons. (3 SCT 823.)

Accordingly, the judge's failure to consider less invasive means of restraint and to make an adequate record in support of his stun belt order was an abuse of discretion.

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[111] "[A]lthough the use of a stun belt may diminish the likelihood that the jury will be aware that the defendant is under special restraint, it is by no means clear that the use of a stun belt upon any particular defendant will, as a general matter, be less debilitating or detrimental to the defendant's ability fully to participate in his or her defense than would be the use of more traditional devices such as shackles or chains." (*People v. Mar, supra*, 28 Cal.4th at 1226.)

4. The Judge Erroneously Relied On His Belief That The Stun Belt Would "Benefit" Appellant

The fact that a trial judge believes in good faith that wearing a stun belt is in the defendant's best interests does not satisfy the requirements of *Duran*. (See *People v. Mar*, *supra*, 28 Cal.4th at 1223.) Accordingly, appellant's judge abused his discretion by relying on his belief that wearing the belt was in appellant's best interest. (10 RT 1816.)

5. Even If Compelled Stun Belt Use Had Been Justified, There Was No Showing Or Finding That The Design Of The Belt Used On Appellant Was Necessary To Restrain Him

"[A] trial court's assessment of whether the stun belt proposed for use in a particular case is the least restrictive device that will serve the court's security interest must include a careful evaluation of [the belt's] design. . . ." (*People v. Mar*, *supra*, 28 Cal.4th 1229-30.) For example, consideration should be given to whether "a 50,000 volt shock lasting 8-10 seconds, that cannot be lowered in voltage or shortened in duration – is necessary to achieve the court's legitimate security objectives, or whether instead a different design, perhaps delivering a much lower initial shock and equipped with an automatic cutoff switch, is feasible and would provide adequate protection." (*Id.* At 1229-30.)

In the present case the judge failed to conduct any such evaluation and, therefore, the stun belt order was an abuse of discretion.

6. The Justification For Restraining Appellant Was Predicated On Hearsay

Even if the judge had made the required *Duran* findings (but see, above), such a finding would not have been supported by substantial evidence because the only "evidence" in the record consists of pure hearsay which was

never offered into evidence. "The court's decision to physically restrain a defendant cannot be based on rumor and innuendo. [Citation.]." (*People v. Lewis* (2006) 39 Cal.4th 970, 1032.)

The incident reports which the bailiff provided in the package seeking to justify use of the stun belt were pure hearsay and the defense objected to them on that basis. (10 RT 1813.) Morever, the incident reports were never formally offered or admitted into evidence. For these reasons, they can not be relied by the reviewing court as evidentiary support for the judge's decision to require appellant to wear the stun belt. (See *People v. Mar, supra*, 28 C4th at 1221 [". . . when the imposition of restraints is to be based upon conduct of the defendant that occurred outside the presence of the court, sufficient evidence of that conduct must be presented *on the record* . . ."] [Italics added].)

Furthermore, an order based on hearsay is not supported by substantial evidence, particularly where, as here, the affected party objects on that basis. (See e.g., *Daniels v. Dep't of Motor Vehicles* (1983) 33 Cal.3d 532, 536-539; *Walker v. City of San Gabriel* (1942) 20 Cal.2d 779, 781; *San Dieguito Union High School Dist. v. Comm. on Prof'l Competence* (1985) 174 Cal.App.3d 1176, 1179.)

E. The Error Violated State Law And Appellant's Federal Constitutional Rights

The judge's erroneous stun belt order abridged appellant's state and federal constitutional rights to due process, fair trial by jury, personal presence during trial, confrontation, compulsory process, personal presence at trial, assistance of counsel and against self incrimination. (Cal. Const. Article I,

sections 7, 15, 16 and 17; U.S. Const. 5th, 6th, 8th and 14th Amendments.)[112] These rights were abridged due to the strong possibility that the stun belt impaired appellant's ability to defend himself in several ways.[113]

First, the stun belt effectively denied appellant's right to be personally present at his trial. This in turn impaired appellant's ability to effectively participate in his defense, to confront the witnesses against him, to respond and react to the evidence and to consult with counsel. The Supreme Court and the Ninth Circuit have consistently held that due process (14th Amendment) and confrontation (6th Amendment) principles guarantee a criminal defendant's right to be present "at every stage of his trial where his absence might frustrate the fairness of the proceedings." (*U.S. v. Gagnon* (1985) 470 U.S. 522, 526-27; *Illinois v. Allen* (1970) 397 U.S. 337, 338; *Snyder v. Mass.* (1934) 291 U.S. 97, 105-06; *Sturgis v. Goldsmith* (9th Cir. 1986) 796 F.2d 1103, 1108; *U.S. v. Frazin* (9th Cir. 1986) 780 F.2d 1461, 1469; *Badger v. Cardwell* (9th Cir. 1978) 587 F.2d 968, 970; *Bustamante v. Eyeman* (9th Cir. 1972) 456 F.2d 269, 273.)

It is true that appellant was physically present in the courtroom. However, "[p]resence at trial is meaningless if the defendant is unable to follow proceedings or participate in his own defense. Mandatory use of a stun belt implicates this right, because despite the defendant's physical presence in the courtroom, fear of discharge may eviscerate the defendant's ability to take

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[112] The parties agreed that the defense did not have to specify federal constitutional grounds to preserve them for appeal. (27 RT 5204; 4 CT 877-78.)

[113] The appellant's Sixth and Eighth Amendment rights as referenced herein, were violated by the state through the Fourteenth Amendment. (See *Duncan v. Louisiana* (1968) 391 U.S. 145.)

an active role in his own defense." (*United States v. Durham* (11th Cir. 2002) 287 F.3rd 1297, 1306, n. 7.)

> "Wearing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case. It is reasonable to assume that much of a defendant's focus and attention when wearing one of these devices is occupied by anxiety over the possible triggering of the belt. A defendant is likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial. We have noted that the presence of shackles may "significantly affect the trial strategy [the defendant] chooses to follow." [Citation.] A stun belt is far more likely to have an impact on a defendant's trial strategy than are shackles, as a belt may interfere with the defendant's ability to direct his own defense." (*Id.*, at 1306.)

Second, the stun belt also abridged appellant's state (Article I, section 15) and federal (6th Amendment and 14th Amendments) constitutional right to counsel. "The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movements during trial–including those movements necessary for effective communication with counsel." (*Durham*, *supra*, 287 F.3d at 1305; see also *Hymon v. State* (2005) 111 P.3d 1092, 1098.) "[R]equiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences that may . . . interfere with the defendant's ability to assist his or her counsel. . . ." (*People v. Mar*, *supra*, 28 Cal.4th at 1205; see also *Riggins v. Nevada* (1992) 504 U.S. 127, 137 [side effects of forced medication during trial may have impacted "the substance of [defendant's] communication with counsel].)

Third, the stun belt abridged appellant's state (Article I, section 7 and 15) and federal (5th, 6th and 14th Amendments) constitutional rights against

self incrimination, to due process, to trial by jury and to confront the witnesses against him by adversely affecting appellant's demeanor in the courtroom. As this Court observed in *Mar*, "The psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (intentionally or unintentionally) . . . in many instances may impair the defendant's ability to . . . maintain a positive demeanor before the jury." (*People v. Mar, supra*, 28 Cal.4th at 1226; see also *Gonzalez v. Pliler, supra*, 341 F.3d 897, 900 [stun belt "chills" the defendants inclination to make "any movements" during trial]; *U.S. v. Durham, supra*, 287 F.3d at 1305 [same].)

And, even though appellant did not testify, his in-court demeanor was important because it is a reality that the jurors will observe and consider the demeanor of a non-testifying defendant during trial. (See e.g., *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1226, fn. 26; *People v. Heishman* (1988) 45 Cal.3d 147, 197; see also *Riggins v. Nevada, supra*, 504 U.S. 127 [impact of compelled use of anti-psychotic drugs on, *inter alia*, the defendant's "courtroom appearance" impaired his constitutional rights].)

> "It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. [Citation.]. At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial." (*Riggins v. Nevada, supra*, 504 U.S. at 142, Kennedy, J., concurring .)

Furthermore, altering appellant's demeanor also impaired his ability to exercise his Sixth Amendment confrontation rights. (*Id.*, citing *Coy v. Iowa*

(1988) 487 U.S. 1012, 1016-20 [emphasizing the importance of face-to-face encounter between accused and accuser].)

Also, the error abridged the Cruel and Unusual Punishment Clauses of the 8th Amendment because the jurors' consideration of demeanor is especially crucial in a capital case:

> "As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies. [Citation.]" (*Riggins v. Nevada*, 504 U.S. at 143-44, Kennedy, J., concurring.)

Thus, by impairing appellant's ability to maintain a positive demeanor during trial the error undermined appellant 8th Amendment right to a fair, non-arbitrary and reliable determination of guilt and penalty. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044;

see also § 1093(f) [power to instruct jury]; § 1127 [same].)[114] The judge's erroneous excusals arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

In sum, the stun belt violated appellant's state and federal constitutional rights by "confus[ing] and embarrass[ing] his mental faculties, and thereby materially . . .abridg[ing] and prejudicially affect[ing] his constitutional rights of defense . . . .]" (*People v. Mar, supra*, 28 Cal.4th at 1219, internal citations and quote marks omitted.)

F. The Judgement Should Be Reversed

1. Appellant Should Not Be Required To Demonstrate Prejudice

In *People v. Mar, supra*, 28 Cal.4th 1201,1225, n. 7, this Court recognized that the "potential adverse psychological effect of the [stun belt] upon the defendant" might call for application of a "more rigorous prejudicial error test" than the *Watson*[115] standard. While the particular circumstances present in *Mar* allowed the Court to apply the *Watson* "reasonable probability" standard to find reversible error, the Court did not foreclose use of the federal

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[114] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

[115] *People v. Watson* (1956) 46 Cal.2d 818.

standard in future stun belt cases. The Court noted that none of the Court of Appeal decisions[116] applying the *Watson* standard "involved the improper use of a stun belt, where the greatest danger of prejudice arises from the potential adverse psychological effect of the device upon the defendant rather than from the visibility of the device to the jury." (*Id.* at p. 1225, fn. 7.) The *Mar* Court further noted that a case in which such an improper use of a stun belt was considered, *United States v. Durham*, *supra,* 287 F.3d 1297, the Eleventh Circuit court found the error to be of federal constitutional dimension requiring reversal unless the State proved the error was harmless beyond a reasonable doubt. (*People v. Mar, supra*, 28 Cal.4th at 1225, fn.7.)

In *Durham* the court concluded that the trial court abused its discretion in ordering the defendant to wear a stun belt. As a result, several of Durham's fundamental rights were unjustly burdened. (*United States v. Durham, supra*, 287 F.3d at 1308) The court focused on the violation of appellant's right to be present at trial and to participate in his own defense stating, "Once a violation of this right has been established, '[the defendant's] conviction is unconstitutionally tainted and reversal is required unless the State proves the error was harmless beyond a reasonable doubt.'[Citation]."[117] It was also

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[116] *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1827-1830; cf. *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584

[117] In finding the error was not harmless in *Durham*, the court stated that "it is not sufficient for the government to point out that the defendant was represented by an attorney looking out for his interests, thus rendering the defendant's presence or participation at trial unnecessary. Such a claim 'ignores the fact that a client's active assistance at trial may be key to an attorney's effective representation of his interests.' [Citation.]." (*United States v. Durham, supra*, 287 F.3d 1297, 1308-1309.)

Moreover, "[i]n the [defendant's] absence there can be no trial. The (continued...)

insufficient "for the government to argue that the defendant cannot name any outcome-determinative issues or arguments that would have been raised had he been able to participate at trial." (*Id.* at p. 1309.) According to the *Durham* court, "such an argument impermissibly transfer[s] the burden of proof back to the defendant, but it also would eviscerate the right in all cases where there is strong proof of guilt. Id. 'The right to be present at one's own trial is not that weak.' [Citation.]" (*Ibid;* see also (*Wrinkles v. State* (Ind. 2001) 749 N.E.2d 1179, 1194 ["A defendant's ability to participate in his own defense is one of the cornerstones of our judicial system."].)

Durham's approach is consistent with the analysis of prejudice the United States Supreme Court used in *Riggins v. Nevada, supra*, 504 U.S. 127 which involved the involuntary medication of a criminal defendant and raised "some of the same concerns" as compelled stun belt use. (*People v. Mar* at 1228.) In *Riggins* it was "clearly possible that [the involuntary medication] had an impact upon . . . Riggins' outward appearance, . . . the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." (*Riggins v. Nevada, supra*, 504 U.S. at 137.) Accordingly, the Supreme Court concluded that

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[117](...continued)
law provides for his presence. And every step taken in his absence is void and vitiates the whole proceeding. On this point all authorities agree. And no question can be raised, as to the extent of the injury done to the prisoner, or whether any injury resulted from his not being present. [Citation.] . . . In the face of so grave an error as that committed by the trial court in this case, the appellate court should not stop to weigh probabilities, or try to discover from the record whether it was prejudicial to the accused, but must assume that the error amounted to such an invasion of appellant's constitutional rights as to deprive him of a fair and impartial trial. [Citation.]" (*People v. Kohler* (1855) 5 Cal. 72; see also *Campbell v. Rice* (9th Cir. 2005) 302 F.3d 892; *Hegler v. Borg* (9th Cir. 1995) 50 F.3d 1472.)

"[e]fforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative." (*Ibid.*) The high court, therefore, rejected the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been medicated. (*Ibid.*) Instead, because there was "a strong possibility that Riggins' defense was impaired" the court held the error to be prejudicial because the record failed to establish that Riggins' defense was not impaired. (*Ibid.*)

Similarly in *Deck v. Missouri* (2005) 544 U.S. 622, 635 the high court reiterated that the defendant "need not demonstrate actual prejudice" from a practice which "often [has] negative effects"– such as compelling the defendant to wear jail clothing, to stand trial while medicated or to wear visible shackles – because such negative effects " 'cannot be shown from a trial transcript.'[Citation to *Riggins* at 137]."

Under the reasoning of *Durham*, *Riggins* and *Deck*, appellant should not be required to demonstrate actual prejudice from the stun belt. In *Mar* this Court thoroughly discussed the negative effects of compelling a criminal defendant to wear a stun belt which are no less insidious and prejudicial than those that stem from the practices condemned in *Riggins* and *Deck*. For example the compelled medication in *Riggins* risked impairment of the defendants courtroom demeanor and ability to respond to the evidence in a similar way as did the stun belt in appellant's case. Furthermore, while a stun belt worn under the clothing may have less impact on the jury than did the visible shackling or trial in jail clothes referred at issue in *Deck*, the potential impact of the stun belt on the defendant's ability to defend is substantially greater than shackling because the stun belt affects the defendant's ability to

follow the proceedings, participate in the trial and to maintain a positive demeanor before the jury. (See § E, above, pp. 119-24, incorporated herein [describing adverse impact of stun belt on defendant's ability to defend].)

Furthermore, the present record demonstrates a "strong possibility" that the stun belt had a significant psychological impact on appellant during his jury trial.

First, the very design of the belt – 50,000 volts for 8-10 seconds – was ominous and intimidating. The documents in the record reveal the manufacturer's intent to use "mind domination" and "psychological power" for the purpose of imposing "total psychological supremacy" over the defendant. (3 SCT 838.) Thus, the stun belt didn't just restrain appellant, it subjected him to "mental anguish" which "cannot be understated." (*Gonzalez v. Pliler*, *supra*, 341 F.3d 897, 900; see also *Wrinkles v. State*, *supra*, 749 N.E.2d at 1195 [[other forms of] restraint would serve the same purposes without "inflicting the mental anguish that results from simply wearing the stun belt . . .]."")

Second, appellant was justifiably afraid of accidental discharge. The stun belt documentation established that over 42% of the known belt activations were accidental. (3 SCT 836.) This abysmal track record made wearing the stun belt like playing Russian Roulette with 50,000 volts.

Third, in light of the fact that appellant was accused of assaulting a sheriff's deputy – and that the activation of the stun belt was to be controlled by another sheriff's deputy – appellant's expressed anxiety about unnecessary activation of the belt was "plausible." (See *People v. Mar*, *supra*, 28 Cal.4th at 1223.)

Fourth, appellant's fear that the deputy who controlled the belt might misinterpret his movements was also plausible. The notice form given

appellant informed him that the belt could be activated in response to a "quick movement," the failure to "comply with a verbal command" or "loss of vision of [appellant's] hands by the custodial officer." (3 SCT 849; Court Exhibit 1, p. 15.) To comply with this notice form appellant was required to "multi-task" throughout the trial. He could not focus his entire attention on the testimony, exhibits or his attorney because he also had to be ever vigilant to avoid "quick" movements, keep his hands in view of the officer and immediately comply with any verbal command of the officer. (See *Gonzalez v. Pliler, supra*, 341 F.3d 897, 900 ["'The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely' hinders a defendant's participation in defense of the case, 'chilling [that] defendant's inclination to make any movements during trial – including those movements necessary for effective communication with counsel.' [Citation]".)

Fifth, the distraction caused by the stun belt in the present case was heightened by the fact that appellant did not speak or understand English and had to listen to an interpreter through head phones. (See 59 RT 11671; 11686; 2 SCT 303-05.)

Given the above circumstances, there is a "strong possibility" that the stun belt psychologically affected appellant and impaired his ability to defend himself at trial. [118]

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[118] The judge's instruction to the bailiff that the stun belt should not be activated unless there is "some kind of emergency going on" (10 RT 1815-16) did not lessen the psychological impact of the belt on appellant. Such an instruction did nothing to allay appellant's "mental anguish" because the 42% chance of accidental discharge was still present. Moreover, it was still within the discretion of the stun belt operator to decide what movements or conduct by appellant constituted an "emergency going on" or something "really serious." (10 RT 1816; *People v. Mar, supra*, 28 Cal.4th at 1223 [the fact that (continued...)

Accordingly, appellant should not be required to demonstrate actual prejudice from the erroneous order requiring him to wear a stun belt. Instead, the "State must prove 'beyond a reasonable doubt that the [stun belt] error complained of did not contribute to the verdict obtained.' [Citation to *Chapman* at 24]." (*Deck v. Missouri, supra*, 544 U.S. at 635.)

2. The Record Fails To Demonstrate Beyond A Reasonable Doubt That The Error Was Harmless At The Guilt Trial

As discussed above, under the applicable federal standard appellant does not need to show actual prejudice from the stun belt. Instead, the prosecution must demonstrate beyond a reasonable doubt that the error did not contribute to the verdict. The prosecution cannot meet this burden for several reasons.

First, the trial was not one-sided in favor of the prosecution. (See *People v. Mar, supra*, 28 Cal.4th at 1224; cf., *Simmons v. South Carolina* (1994) 512 U.S. 154, 269 [shackling reversible where case was not "open and shut"].) In fact, the jurors could not agree on two of the prosecution's key allegations: (1) That appellant conspired with intent to commit murder and (2) that appellant used a handgun. Moreover, the primary witness against appellant – accomplice Jose Luis Ramirez – was extensively discredited. (See Claim 10 § B(2)(a), pp.141-46, incorporated herein.) And the jurors also unanimously rejected the prosecution's allegation that appellant used a knife. (See Statement Of Case § C, pp.11-12, incorporated herein.)

Second, it was especially important for appellant to be able to concentrate on the testimony because appellant – who was present during the

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[118](...continued)
appellant was accused of assaulting a deputy sheriff made it "plausible" that appellant would fear unnecessary activation of the belt].)

events described by many of the witness – was uniquely capable of identifying inconsistencies in the testimony. In particular, it was essential for appellant to be able to fully focus on the testimony of Jose Luis Ramirez. Any inconsistencies or misstatements which appellant could identify in his testimony would have been important because the defense strategy was to impeach Jose Luis Ramirez' credibility on this basis.

Third, the stun belt adversely affected appellant's ability to "maintain a positive demeanor before the jury." (*People v. Mar*, *supra*, 28 Cal.4th at 1226; *Gonzalez v. Pliler*, *supra*, 341 F.3d at 900; *U.S. v. Durham*, *supra*, 287 F.3rd at 1305.) And, because the jurors had to choose between believing the accomplice-witness Jose Luis Ramirez and appellant – who denied intending to rob and murder in his video statement – any adverse impact on appellant's demeanor in court was crucial.

This is so even though appellant didn't testify. It is a reality that the jurors will observe and consider the defendant's demeanor during trial even if the defendant does not testify. (See e.g., *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1226, fn. 26; *People v. Heishman* (1988) 45 Cal.3d 147, 197; see also *Riggins v. Nevada*, *supra*, 504 U.S. 127 [impact of compelled use of anti-psychotic drugs on, *inter alia*, the defendant's "courtroom appearance" impaired his constitutional rights].)

> "It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. [Citation.]. At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial.

> If the defendant takes the stand, as Riggins did, his demeanor can have a great bearing on his credibility and persuasiveness, and on the degree to which he evokes sympathy." (*Riggins v. Nevada*, *supra*, 504 U.S. at 142, Kennedy, J., concurring .)

In other words, "the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial." (*Id.* at 142.)[119]

Fourth, altering the appellant's demeanor also impaired his ability to exercise his Sixth Amendment confrontation rights. (*Id.*, citing *Coy v. Iowa* (1988) 487 U.S. 1012, 1016-20 [emphasizing the importance of face-to-face encounter between accused and accuser].) Because appellant was required to divide his attention between the stun belt operator and the testimony, appellant's ability to confront the witnesses was impaired.

In sum, the prosecution cannot meet its burden of demonstrating beyond a reasonable doubt that the stun belt error was harmless at the guilt trial.

3. The Record Fails To Demonstrate Beyond A Reasonable Doubt That The Error Was Harmless At The Penalty Trial

The stun belt error cannot be shown to be harmless at the penalty trial for several reasons.

First, as discussed above, it is reasonably probable that the stun belt affected the guilt trial. However, even if the outcome of the guilt trial would not have changed, if any single juror's view of appellant was adversely affected at the guilt trial that juror's penalty decision could have been affected. This is so because the sentencing decision is based on both the guilt and

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[119] The judge concluded that appellant's "passive" demeanor during trial was a mitigating factor. (72 RT 14216.) However, the jurors could have concluded that it showed lack of remorse. (See § F(3), pp. 132-34, below.)

penalty trial evidence.

Second, the stun belt also adversely affected appellant's ability to "maintain a positive demeanor before the jury." (*People v. Mar*, *supra*, 28 Cal.4th at 1226.) As particularly relevant to the penalty trial, the belt likely impaired appellant's ability to "react and respond to the proceedings and to demonstrate remorse or compassion." (See *Riggins v. Nevada*, *supra*, 504 U.S. at 143-44, Kennedy, J., concurring.) "The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies. [Citation.]" (*Ibid.*) Hence, any impact the stun belt may have had on appellant's demeanor was critical.

For example, the judge described appellant's demeanor during the trial as "passive." (72 RT 14216.) While the judge concluded that passiveness is mitigating, the jurors could well have considered passiveness in the face of the emotional penalty evidence to indicate coldness or lack of remorse. (See e.g., *Atkins v. Virginia* (2002) 536 U.S. 304, 320-21 [demeanor of mentally retarded defendant "may create an unwarranted impression of lack of remorse for their crimes"]; *People v. Adcox* (1988) 47 Cal.3d 207, 258 [prosecutor argued that defendant's cold demeanor showed absence of remorse] *People v. Williams* (1988) 44 Cal.3d 883, 971-72 [trial judge may cite defendant's "calm" trial demeanor as weighing against modification of death judgment]; Theodore Eisenberg, Stephen P. Garvey, Martin T. Wells, "*But Was He Sorry? The Role of Remorse in Capital Sentencing,*" 83 Cornell L. Rev. 1599 (Sept. 1998) [The defendant's demeanor during trial also influences jurors' beliefs about remorse]; Scott Sundby, *The Jury and Absolution: Trial Tactics, Remorse and*

the Death Penalty, 83 *Cornell Law Review* 1557 (1998) [The primary source of the juror's perceptions concerning the defendant's remorse . . . appeared to be the defendant's demeanor and behavior during trial. What repeatedly struck jurors was how unemotional the defendants were during the trial, even as horrific depictions of what they had done were introduced into evidence].)

Jurors' perceptions concerning the defendant's remorse, or lack thereof, are primarily molded by the defendant's demeanor during trial. (Scott Sundby, *The Jury and Absolution: Trial Tactics, Remorse and the Death Penalty,* 83 *Cornell Law Review* 1557 (1998).) Thus, it can be especially prejudicial to the defense for the defendant to remain passive while horrific descriptions of the crime are put in evidence. (*Ibid.*)

Moreover, in the present case appellant's character was a key disputed issue at the penalty trial. The defense presented evidence of appellant's good character including his kind and generous nature and his lack of any felony convictions or a record of criminal violence. (See Penalty Phase: Statement Of Facts § C(2)-(5), pp. 523-25, incorporated herein.) On the other hand, the prosecutor contended that appellant had the character of a murderer and specifically urged the jurors to "look into [appellant's] eyes" in deciding whether he deserved sympathy. (67 RT 13237.) Hence, any impact the stun belt may have had on appellant's demeanor was critical.

In sum, because the penalty trial was closely balanced (see Claim 59 § G(2), pp. 550-51,[penalty trial was closely balanced] incorporated herein), there was a reasonable possibility that, but for the error, one or more jurors would not have voted for death. (See Claim 59 § G(1) pp.548-50 [state and federal standards for penalty phase error are equivalent], incorporated herein.)

4. The Error Was Cumulatively Prejudicial

Even if the error identified in this claim was not individually

prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the additional errors the judge committed – including but not limited to: failing to instruct on essential contested elements of the charges (Claims 9-11); undermining appellant's defense theories (Claim 12 and 16-21); giving partisan instructions that favored the prosecution (Claim 22-26); diluting and misstating the prosecution's burden of proof (Claims 27-37); allowing the jurors to make up their minds about penalty before the penalty phase began (Claim 57); allowing the prosecutor to unduly emphasize certain inflammatory matters by use of an "audio-video slingshot" during closing argument at the penalty trial (Claim 58) – it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIMS 10-12: ERRORS WHICH WITHDREW CONTESTED ELEMENTS OF THE ROBBERY AND ROBBERY-BASED CHARGES

CLAIM 10

THE JUDGE ERRONEOUSLY PERMITTED THE JURORS TO CONVICT APPELLANT OF ROBBERY – AND THE ROBBERY BASED CHARGES -- WITHOUT FINDING THAT HE INTENDED TO STEAL

A. Overview

Despite the number of counts and the multiplicity of prosecution theories, the essential factual disputes in this case were straightforward.

The prosecution – based primarily on the testimony of accomplice witness Jose Luis Ramirez – alleged that appellant joined with Antonio Sanchez and Joaquin Nuñez in a plan to enter the residence of Ramon Morales for the purpose of murdering the occupants and stealing their property. Appellant conceded that he went to the Morales residence with Sanchez and Nuñez. However, appellant disputed Jose Luis Ramirez' testimony that he intended to murder and steal.

The jurors could rationally have concluded that intent to steal had not been proved for several reasons.

First, the evidence that appellant intended to steal was weak because it was based on the plea-bargained testimony of Jose Luis Ramirez, a lone accomplice-witness whose veracity was so substantially discredited that the jurors failed to find all three special allegations which depended solely or primarily on belief of the accomplice's testimony.

Second, appellant disputed the existence of intent to steal in his video statement during which he denied any intent to take property belonging to the

victims.[120]

Third, appellant's disavowal of intent to steal was corroborated by the fact that, even though the house was thoroughly searched, numerous items of value were left behind such as three handguns, a Taser gun, five boxes of ammunition, jewelry, a television set and $378 in cash. This suggested an intent to recover specific items of property rather than a generalized intent to steal anything of value.

Fourth, the only things that appellant and Antonio Sanchez took – according to Jose Luis Ramirez – were two handguns. The other items were taken by Jose Luis Ramirez including a necklace which he sold the next day and a bottle of hair oil which was the brand that Jose Luis Ramirez used. This further corroborated appellant's contention that Jose Luis Ramirez was acting on his own when he took those items from the residence.

Fifth, appellant did not know the victims and had nothing to do with the disagreement between victim Ramon Morales and Antonio Sanchez, which allegedly motivated the attack. In other words, as argued by defense counsel, appellant had no "stake in this matter" and no motive to steal the victims' property. (52 RT 10268.)

However, even if the jurors accepted the defense theory that appellant did not intend to steal, they were still permitted–in fact required–to convict on all counts. This is so because the instruction which defined robbery failed to require an intent to permanently deprive *the owner* of the property taken.[121]

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[120] The video statement was put into evidence by the prosecutor who contended that: "It appears to be, by its content, accurate and complete." (50 RT 9820.)

[121] The robbery instruction (CALJIC 9.40) only required that the property be "taken with the specific intent to deprive [the possessor] of the property." (53 (continued...)

Thus, under the instruction given in appellant's trial, even if appellant did not intend to steal the victims' property, he could still be convicted of robbery based on his intent to help Antonio Sanchez take his own property.

Accordingly, because intent to steal is an essential element of robbery, the robbery conviction should be reversed because a disputed element of the offense – which the jurors could rationally have resolved against the prosecution – was removed from the jurors' consideration. "When, as here, the federal constitutional error involves the trial court's failure to instruct on a necessary element, reversal is required under the *Chapman*[122] test when 'the defendant contested the omitted element and raised evidence sufficient to support a contrary finding' but the error is not prejudicial when it is clear 'beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence.'" (*People v. Huggins* (2006) 38 Cal.4th 175, 259 [citing and quoting *Neder v. U.S.* (1999) 527 U.S. 1, 19]; see also *People v. Davis* (2005) 36 Cal.4th 510, 564 [omission of a disputed evidentiary issue is harmless only if there is no record evidence that could rationally lead to a contrary finding with respect to that element]; *People v. Sakarias* (2000) 22 Cal.4th 596; *People v. Jackson* (2003) 109 Cal.App.4th 1625, 1635.)

Additionally, since the other verdicts (for murder, attempted murder, assault and conspiracy) could also have been based on the defective robbery instruction, they too should be reversed. (See *Sandstrom v. Montana* (1979) 442 U.S. 510, 526; *People v. Perez* (2005) 35 Cal.4th 1219, 1232-34; *People*

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[121](...continued)
RT 10463-64; 6 CT 1307-08.) (Compare CALCRIM 1600 which corrected this defect by requiring an intent to permanently "deprive the owner" of the property taken.)

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

v. Swain (1996) 12 Cal.4th 593, 607.)

B. Evidence As To Whether Or Not Appellant Intended To Steal

1. Prosecution Evidence In Support Of Intent To Steal

The prosecution relied on the testimony of Jose Luis Ramirez to allege that appellant knowingly and intentionally helped Antonio Sanchez "steal" property belonging to the victims. Jose Luis Ramirez testified that while appellant and Antonio Sanchez were talking in the car, Sanchez said they were "going to go to [Ramon Morales'] house to rob him and to kill him."[123] No one said anything in return. (40 RT 7854.)[124] Jose Luis Ramirez also testified

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[123] The existence of some kind of disagreement between Antonio Sanchez and Ramon Morales was suggested by the testimony of several witnesses and was not contested by the defense. (See Guilt Phase: Statement Of Facts § B(2), p. 20, incorporated herein.) In his video statement, appellant acknowledged the existence of a disagreement and that Ramon Morales had threatened to kill Antonio Sanchez. (4 SCT 1035-39; Exhibit 85A.)

[124]
Q. (By MS. LOMBARDO) What did Antonio say about Ramon Morales?
A. That we were going to go to his house to rob him and to kill him.
Q. What did Daniel say about Ramon Morales?
A. I don't remember.
Q. When Antonio said that "we were going to go to Ramon Morales's to rob him and kill him," did anyone comment in return?
A. Like what?
Q. Did anyone say anything?
A. No.
Q. Did anyone say, "Yes, that's what we'll do"?

. . .

A. No. No.
Q. Did anyone say, "No, I don't want to go"?
A. No.

(continued...)

that while parked in the car at the victims' residence, before going inside, Antonio Sanchez and appellant talked about going in to "get some drugs, steal stuff and kill them." (41 RT 8006.)[125] Jose Luis Ramirez further testified that once inside the house Antonio Sanchez said to "take whatever we could." (41 RT 8020.)

Jose Luis Ramirez maintained that he was helping his uncle, Antonio Sanchez, take Ramon Morales' things because that's what Antonio Sanchez

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[124](...continued)

Q. Did Daniel make any comments?

. . .

A. I don't remember. (40 RT 7854:13-7855:7.)

[125] Q. Did anyone talk about what would happen once they got into the house?
A. You mean outside the house?
Q. Before you went into the house.
A. When we were parked, they were talking about it.
Q. What was the plan once the group of you got inside the house?
A. That we were going to go in, get some drugs, steal stuff and kill them.
Q. Kill who?
A. Whoever was inside.

. . .

Q. Who made the statement about killing whoever was in the house?
A. Daniel and Antonio.
Q. Was there a reason that everyone inside the house was to be killed?
A. Because they were going to be witnesses.

. . .

Q. They did not want to leave any witnesses?
A. No.
Q. Who made the statement that there should be no witnesses left?
A. Antonio.

wanted. (42 RT 8215.) Jose Luis Ramirez testified that he searched the house looking for things to "steal" and that he made three trips from the house to the car after taking items such as a VCR and stereo equipment. He also took a necklace from the bed stand and a jar of "Tres Flores" [three flowers] hair oil–which was the brand he used. (41 RT 8042; 8045-46; 44 RT 8633; 8649-50; 8655-56.) Jose Luis Ramirez also took a .32 caliber handgun which Antonio gave him shortly after they entered the residence. (41 RT 8022-23; 8238-39; 8042.)[126] Jose Luis Ramirez took the .32 handgun, the necklace and the hair oil with him when he left. (See Guilt Phase: Statement Of Facts § D(4), p. 31, incorporated herein.)[127]

The property in the house was "tossed" around as if someone was searching for something. (See Guilt Phase: Statement Of Facts § E(2), p. 36, incorporated herein.) Appellant's fingerprints were found on two boxes of ammunition and a box of "Huggies" in the bedroom of the residence. (See Guilt Phase: Statement Of Facts § E(6), p.38.) Jose Luis Ramirez' fingerprints were found on a cash/tackle box in the bedroom. (*Ibid.*)

2. Evidence From Which The Jurors Could Have Been Left With A Reasonable Doubt That Appellant Intended To Steal

a. *The Jurors Could Have Disbelieved Jose Luis Ramirez' Testimony*

Because the prosecution's intent-to-steal theory was based primarily on the testimony of Jose Luis Ramirez, any evidence which challenged the credibility of Ramirez logically provided the jurors with a rational basis to

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[126] He did not see where Antonio Sanchez got the handgun from inside the house. (42 RT 8238.)

[127] However, to Jose Luis Ramirez' knowledge, appellant did not take anything from the house. (42 RT 8215.)

doubt that the prosecution had proved appellant intended to steal. (See e.g., *People v. Hill* (1998) 17 Cal.4th 800, 831 [jurors may be left with a reasonable doubt if they are "simply not persuaded by the prosecution evidence"]; *People v. Hammon* (1997) 15 Cal.4th 1117, 1129 [jurors may reject testimony based on the "vulnerable status" of the prosecution witness; see also *Burr v. Sullivan* (9th Cir. 1988) 618 F.2d 583, 586.)

The following record evidence was relevant to the credibility and believability of Jose Luis Ramirez:

– Advantageous Plea Bargain. In exchange for testifying against appellant Jose Luis Ramirez was allowed to plead guilty to three counts of robbery and one count of burglary. He received a sentence of 11 years, 8 months. (40 RT 7802-04; 7813-14; 42 RT 8233-8238.) If Ramirez had not testified he would have received a life sentence. (42 RT 8238; Exhibit 52.)

– Admission Of Untruthfulness: Deliberate Lie About Seeing Through The Window. Jose Luis Ramirez admitted under oath that he "was lying" about being able to see appellant with a gun through the window of the residence. (42 RT 8217-18.)[128]

– Jose Luis Ramirez Was Intoxicated. Jose Luis Ramirez told a prosecution investigator that he was drunk on the evening of November 16, 1994. (50 RT 9874.) Also, Amy Arrendondo testified that Ramirez and the others were intoxicated. (43 RT 8468-72.) At trial, Ramirez denied that he

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[128] Jose Luis Ramirez later told the police that he was looking through the window when he saw appellant with a gun in his hand. (42 RT 8217-18.) However, because appellant would not have been visible through the window, Jose Luis Ramirez was deliberately lying to the police, and he admitted this lie at trial. (42 RT 8217-18.) At trial he changed his story and testified that he saw appellant with the gun while he was looking through the front door, which was ajar about 4 inches. (42 RT 8217-18.)

was intoxicated. (41 RT 8067.)

– Contradictory Statements About The Events Prior To The Entry. Jose Luis Ramirez made various contradictory statements about things that were allegedly done prior to entering the victims' residence. (See Guilt Phase: Statement Of Facts § G(1), pp. 41-44, incorporated herein.)

– Post-Offense Statements Inconsistent With The Alleged Plan To Rob And Kill. At trial Jose Luis Ramirez testified that Antonio Sanchez and appellant discussed robbing and killing Ramon Morales and anyone else in the residence. (See Claim 10 § B(1), pp. 139-40, incorporated herein.) However, when Jose Luis Ramirez talked to Antonio Sanchez on the phone the day after the killings Jose Luis Ramirez said "I didn't think you were going to do that." (42 RT 8247-48.) Also Jose Luis Ramirez admitted that if he had thought that anything serious was going to happen to the Morales' he would have warned them before they entered the residence. (42 RT 8242; 8250.)

– Contradictory Statements Regarding Defendant's Alleged Use Of A Knife. Jose Luis Ramirez told the police that appellant did not have a weapon. (50 RT 9852-53.) However, at trial he testified that appellant carried a knife into the house and held it to the throat of Fernando Martinez. (41 RT 8015-17.) The jurors rejected Jose Luis Ramirez' testimony finding that appellant did not use a knife. (4 CT 969-70; 973-74; 977-787.)

– Contradictory Statements About Whether Appellant Had A Handgun.

Version 1: Jose Luis Ramirez originally told the police that he didn't see appellant with any kind of gun at any time on November 16, 1994. (41 RT 8011.)

Version 2: Jose Luis Ramirez later told the police that appellant took two guns from a box in the kitchen and gave one of the guns to him (Ramirez) and put the other one in Antonio's pocket. (42 RT 8225-28.)

Version 3: Jose Luis Ramirez testified at trial that appellant obtained two handguns from a box near the refrigerator one of which appellant kept after putting the other in Antonio Sanchez' coat pocket. (41 RT 8032-33.)

b. Affirmative Evidence Disputing Intent To Steal

i Appellant's Video Taped Statement Denying Intent To Take The Victim's Property

In a videotaped statement admitted into evidence appellant stated that he entered the residence with the others, but not for the purpose of robbery or murder. Instead, appellant only intended that property belonging to Antonio Sanchez be taken. (Exhibit 85A; 4 SCT 1036-39; 51 RT 10018.)[129] Thus, the jurors could have relied on appellant's statement to conclude that appellant did not intend to rob or murder the victims.[130]

Furthermore, in reference to the "looting" by Jose Luis Ramirez, appellant stated "we didn't go there for that purpose either." (*Ibid.*)

ii. Appellant Had No Motive To Rob Or Kill The Victims

Defense counsel emphasized that the dispute was between Antonio Sanchez and Ramon Morales and that there was no "evidence to prove to you that [appellant] had some sort of stake in this matter." (52 RT 10268; see also 52 RT 10266:19-25 [appellant had no grudge against anyone; no motive]; 52 RT 10266:28-10267:2 [same].) The prosecutor agreed with this assessment:

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[129] In the taped statement, appellant also denied any intent to murder the victims, explaining that the guns were a precaution because "Ramon Morales had threatened to kill Antonio Sanchez." (*Ibid.*)

[130] This statement was placed into evidence by the prosecution. (51 RT 10018.) (See Exhibit 85B: Tape; Exhibit 85A: translated transcript of the tape).

"You know, Antonio really was the one that had the bone to pick here. He was the one that had it in for Ramon Morales." (52 RT 10224:19-24.)

iii. Appellant's Intoxication

Jose Luis Ramirez testified that during the day of November 16, 1994 they bought 48 cans of beer which the four of them drank, each drinking about the same amount. (41 RT 8066-67; see also Guilt Phase: Statement Of Facts § B(8) and (9), pp. 26-27, incorporated herein.)

Amy Arredondo testified that appellant and the others were drinking beer at her house around 5:00-5:30 p.m. (43 RT 8458-61.) Appellant was intoxicated when they left. (RT 8462.)

Bertha Sanchez testified that during the afternoon of November 16, 1994 she saw the defendant pull up outside of her house as she was leaving to do laundry. (43 RT 8419-20.) Antonio, Jose Luis Ramirez and Joaquin were with him. (43 RT 8420.) When she returned at 7:30 or 8:00 they were still there. (43 RT 8421.) She was mad at them because they were outside drinking. (43 RT 8421; 8429.) Bertha had seen appellant drinking on many occasions and that evening she believed he was so drunk that she would not have felt safe riding in a car that appellant was driving. (43 RT 8429-30.) Jorge Acosta, who had observed appellant intoxicated before, believed that appellant was sufficiently intoxicated on the day of the murders that he might get in an accident or be arrested for drunk driving. (50 RT 9837-39.)[131]

iv. Appellant's Character Evidence

Appellant was not involved in selling or distributing drugs. (41 RT 8063.) Nor was there any evidence that he was a violent person. (See 44 RT

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[131] Appellant was slightly built (5 CT 1101) thus providing a rational basis for the jurors to infer – based on their common sense – that the alcohol had a greater than average impact on appellant.

8711-13 [appellant was a "nice guy"].) When intoxicated, appellant was "very happy, a dancer." (43 RT 8429; 8447.)

c. *Physical Evidence Corroborating Appellant's Denial Of An Intent To Steal And Loot*

i. No Cash Was Taken From The Victims

Each of the victims had cash on their person which was not taken. Ramon Morales had $204.37 in his pockets, Fernando Martinez had $123.00 and Martha Morales had $51.00 in her purse. (46 RT 9107-09; 47 RT 9206-07.)

The fact that the cash was not taken contradicted Jose Luis Ramirez' claim that they were there to "take whatever we could" (41 RT 8020), and corroborated appellant's contention that they were looking for things that Antonio Sanchez had left at the Morales residence. (Compare *People v. Tufunga* (1999) 21 Cal.4th 935, 945, fn. 2 [claim of right not available when defendant had "indiscriminately taken items of value"]; *People v. Waidla* (2000) 22 Cal.4th 690 [same].)

ii. Other Items Of Value Were Left

Even though the house appeared to have been thoroughly searched (38 RT 7428; 38 RT 7435; 7439; 45 RT 8865; Exhibits 3; 5(D); 65),[132] numerous

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[132] The house was a detached garage which had been converted into a residence. (38 RT 7414-15; 7469; 44 RT 8622; 45 RT 8807.) The home was one bedroom, single-family residence, with a kitchen, living room and bathroom. (45 RT 8807.) The living room and kitchen were approximately 10 x 10. (38 RT 7428.)

There were things strewn out on the kitchen floor (RT 7428; Exhibit 3) and the garbage can had been dumped over. (45 RT 8865.)

The mattresses were tossed about, the TV was knocked over, and other items in the room were disturbed. The bedroom was in disarray. (38 RT 7435; (continued...)

items of value were not taken including jewelry (48 RT 9409), a watch (48 RT 9408-09), a television (38 RT 7439), five boxes of ammunition (45 RT 8828; 8833-34; 46 RT 9032; 9067; 9069), a Taser gun (46 RT 9070) and three handguns (46 RT 9073; 9081; 50 RT 9871.)

As with the cash, the failure to take these items of value was inconsistent with Jose Luis Ramirez' claim of a plan to steal "whatever we could." (41 RT 8020.)

iii. Physical Evidence Corroborating Appellant's Contention That Jose Luis Ramirez Took Items From the Morales Residence

Jose Luis Ramirez allegedly took three items with him when he left the residence – hair oil, a necklace and a .32 handgun which Antonio Sanchez gave him. (41 RT 8042.) The hair oil was the brand Jose Luis Ramirez used and he pawned the necklace, keeping the proceeds for himself. (41 RT 8042; 8045-46; 44 RT 8633; 8649-50; 8655-56.)[133]

C. Arguments Of Counsel To Jury

The prosecutor relied on the testimony of Jose Luis Ramirez to argue that appellant acted with intent to steal the victims' property. (52 RT 10254:11

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[132](...continued)
7439; 45 RT 8865; 46 RT 9077; see also Exhibit 5(D) [photo]; Exhibit 65 [videotape taken by Detective Waller].)

Jose Luis Ramirez testified that he and Joaquin Nuñez searched the house looking for things to steal. (41 RT 8018; 8020.)

[133] Jose Luis Ramirez gave the .32 gun to a friend of his, Daniel Barba, whom Ramirez said was a gang member. (41 RT 8046-47; 42 RT 8243.) Ramirez was a member of the Surenos gang. (42 RT 8243.)

["They went there to steal"].)[134] The prosecutor also relied on the fact that there had been "rifling through things" in the house to argue that they "were looking to get items" and that "someone has gone through this house." (53 RT 10405; see also 52 RT 10254 ["rifling"]; 37 RT 7253 [opening statement: the "house is being tossed"].)

On the other hand, the defense argued that the jury should not credit the testimony of Jose Luis Ramirez because "he admitted he lied" on one occasion and he also "lied . . . about Danny's involvement in this case . . . because [Ramirez] need[ed] to embellish [appellant's] participation so [Ramirez] won't spend life in prison." (52 RT 10272.) Thus, the defense argued: "Jose Luis Ramirez has a real motive here. He's made the story even more damning and conjured, more make-believe." (52 RT 10272.)

Defense counsel further argued that appellant did not know about Antonio Sanchez' alleged plan to rob and kill the victims: "What did Danny Covarrubias say in that video tape? He said he didn't know. 'We didn't know what was going to happen.' That's the absolute truth. He didn't know what was going to happen that evening." (52 RT 10270.) Counsel further argued that appellant's lack of knowledge was corroborated by evidence such as appellant's character, intoxication and his intent to return to Mexico the day after he arrived in Salinas. (52 RT 10266:3-19 [appellant expected to return to Mexico the next day so he did not have "any kind of intent to kill, rob,

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[134] However, in discussing the elements of robbery the prosecutor followed the instructional definition which did not include intent to steal. (52 RT 10232-33; see also 52 RT 10224-25 ["theft . . . [is] taking something from someone else with the intent to permanently deprive; to keep it from the other person"]; 52 RT 10233 [". . . property is taken with intent to permanently deprive the victim of the property"] .)

commit a burglary against anyone when he came"]; 52 RT 10268; 10271.)[135]

Additionally, counsel emphasized that the dispute was between Antonio Sanchez and Ramon Morales and that there was no "evidence to prove to you that [appellant] had some sort of stake in this matter." (52 RT 10268; see also 52 RT 10266:19-25 [appellant had no grudge against anyone; no motive]; 52 RT 10266:28-10267:2 [same].) The prosecutor agreed with this assessment: "You know, Antonio really was the one that had the bone to pick here. He was the one that had it in for Ramon Morales." (52 RT 10224:19-24; see also 52 RT 10244 [". . . look at the . . . photos of Roman Morales, he was overkilled. He wasn't just killed. He was overkilled with that AR-15."].)

Defense counsel also argued that Jose Luis Ramirez stole items from the house on his own accord as evidenced by the fact that he took the "Tres Flores" hair oil because it was the brand he used. (52 RT 10271 ["Jose saw this as a great opportunity"].)

D. The Jurors' Verdicts Show That They Disbelieved Jose Luis Ramirez

1. The Jury Unanimously Rejected Jose Luis Ramirez' Testimony That Appellant Used A Knife

According to Jose Luis Ramirez, immediately after they entered the residence appellant held a knife to the throat of Fernando Martinez, who was

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[135] "It is not unreasonable to assume that Danny Covarrubias, himself, really didn't believe that anything serious was going to happen either. There was unrebutted testimony about Danny Covarrubias. What happens to him when he's had too much to drink? He gets happy. He's the kind of guy that, he wants to dance. Does that sound like a person who intended to kill the Moraleses that evening? I think not. Amy Trejo said Danny was a nice guy. She said she could never, ever imagine that he would do anything like this." (52 RT 10271:7-17.)

sleeping on the living room floor, and told him not to look at anyone. (41 RT 8015-17.) However, the jurors rejected this testimony finding that appellant did not use a knife. (4 CT 969-70; 973-74; 977-787.)

2. The Jury Failed To Agree That Appellant Used A Handgun

Based in large part upon Jose Luis Ramirez' testimony that he saw appellant with a handgun, the prosecution alleged that appellant used a handgun during the crime. However, the jurors could not agree on this special allegation. (4 CT 970-995.)

3. The Jury Failed To Credit Jose Luis Ramirez' Testimony That Appellant Intended To Kill The Victims

In its conspiracy allegation in Count 9, the prosecution specifically contended that appellant and Antonio Sanchez planned to murder the victims as asserted by Jose Luis Ramirez. However, while the jury did convict appellant of conspiracy to commit robbery and burglary, it could not agree on the allegation of conspiracy to commit murder. (4 CT 996-97.)

4. The Prosecutor Acknowledged The Possibility That Some Jurors Disbelieved Jose Luis Ramirez

The prosecutor candidly acknowledged the possibility that one or more jurors may have disbelieved Jose Luis Ramirez and concluded that appellant did not intend to kill, did not personally shoot a firearm and only intended to help Antonio Sanchez recover his things from the residence. (See 67 RT 13229.)

E. Jury Instructions On Robbery

1. Definition Of Robbery

Robbery was defined for the jurors by CALJIC 9.40 which enumerated the following five elements:

"1. A person had possession of property of some value

however slight;

2. The property was taken from that person or from [his] [her] immediate presence;

3. The property was taken against the will of that person;

4. The taking was accomplished either by force or fear; and

5. The property was taken with the specific intent permanently to deprive that person of the property." (6 CT 1307-08.)

This was the only definition of robbery the jurors received. No other instruction required the jurors to find the property of another was taken with the intent to permanently deprive the owner of that property.[136]

Nor did the jurors receive any instructions on claim of right. (See Claim 12, pp. 195-205, incorporated herein.)

2. Robbery Based Instructions Applicable To The Murder, Burglary, Attempted Murder And Conspiracy Charges

The prosecutor relied, *inter alia*, on robbery based theories of liability as to all ten substantive counts as well as the burglary and robbery special circumstances. The following instructions specifically referred to robbery without further defining it:

– Felony murder based on robbery and burglary [entry with intent to commit a robbery] (53 RT 10447-48; 6 CT 1276-77);

– Conspiracy murder based on conspiracy to commit robbery and burglary (53 RT 10449; 6 CT 1279);

– Natural and probable consequences of aiding and abetting robbery and burglary (53 RT 10435-36; 6 CT 1256-57);

– Burglary with intent to commit robbery (53 RT 10465-

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[136] The jurors also received CALJIC 9.41 – defining the element of fear (53 RT 10465; 6 CT 1309) – and CALJIC 9.42 – defining the degrees of robbery. (53 RT 10465; 6 CT 1310.)

66; 6 CT 1311-12).[137]

F. Legal Principles

1. The Judge Has A Sua Sponte Duty To Instruct On Intent To Permanently Deprive The Owner Of The Property Taken

It is beyond dispute that robbery, like theft, requires intent to steal which is defined as "the intent to deprive the owner of the property permanently. [Citation.]" (*People v. Ortega* (1998) 19 Cal.4th 686, 713.) It is also beyond dispute that because such intent to steal is an essential element of robbery, the judge has a sua sponte duty to instruct on it. "As one of the essential elements of robbery is a specific intent to steal [citations], it follows that it was the trial court's duty in the case at bench to so instruct the jury even without a request therefor by the defendant. [Citations.]" (*People v. Ford* (1964) 60 Cal.2d 772, 792-93; *People v. Stewart* (1968) 267 Cal.App.2d 366, 375-76 ["The jury must, in addition to the statutory definition of robbery, also be told that a felonious taking involves the specific intent to steal – i.e., the intent to permanently deprive an owner of his property"]; see also former CALJIC 9.10 quoted in *People v. Stankewitz* (1990) 51 Cal.3d 72, 104 [elements of robbery include the requirement that the taking be "accomplished . . . with a specific intent permanently to deprive the owner of his property"]; see also CALCRIM 1600 (2006.)[138]

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[137] Both the preamble and enumerated elements of the burglary instruction included entry with intent to commit robbery as an alternative theory upon which to convict appellant of burglary. (53 RT 10466; 56 RT 11004-05; 6 CT 1311-12.)

[138] Penal Code § 211 does not expressly require intent to steal, i.e., intent to permanently deprive the owner of his or her property. Instead, the statutory (continued...)

2. The Duty To Instruct On Intent To Permanently Deprive The Owner Of The Property Does Not Depend On Whether Or Not Instruction On Claim Of Right Is Warranted

The duty to instruct sua sponte on the intent to permanently deprive the owner of his/her property as an element of robbery discussed above is distinguishable from the duty to instruct on the defense of claim of right. (See generally *People v. Tufunga, supra*, 21 Cal.4th 935.) In every robbery trial the judge has a duty to sua sponte instruct on each element of robbery, including

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[138](...continued)
language defines robbery as "the felonious taking of personal property *in the possession of another*. . . ." (Penal Code § 211, italics added.) CALJIC 9.40 – the instruction given in the present case – tracks the statutory language by only requiring the taking of personal property in the possession of another and intent to permanently deprive "that person" of the property.

However, the legislature's use of the phrase "felonious taking" demonstrated its intent to include the common law requirement of "larcenous intent" in the crime of robbery. (*People v. Haley* (2004) 34 Cal.4th 283, 317; *People v. Seaton* (2001) 26 Cal.4th 598, 644 [robbery requires a "union of act and larcenous intent"]; *People v. Turner* (1990) 50 Cal.3d 668, 721 [same]; *People v. Coleman* (1989) 48 Cal.3d 112, 146 [robbery and burglary may be based "on the same larcenous intent"]; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1019 [robbery conviction upheld because "no reasonable juror could have concluded that defendant shot [the victim] without a larcenous intent"]; *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351["If defendant had not harbored a larcenous intent before or during the assault, the taking" was not robbery]; *People v. Rosen* (1938) 11 Cal.2d 147, 151; *Harris v. Reynolds* (1859) 13 Cal.514, 518; *People v. Miramon* (1983) 140 Cal.App.3d 118, 132 [California case law has defined the full scope of the offense by recognition of other required common law elements, including larcenous intent].) Hence, it is beyond dispute that "robbery, like theft, requires the intent to deprive the owner of the property permanently. [Citation to Witkin and Epstein.]" (*People v. Ortega, supra*, 19 Cal.4th at 713; see also *People v. Pollock* (2004) 32 Cal.4th 1153, 1174; *People v. Cash* (2002) 28 Cal.4th 703, 736; *People v. Cummings* (1993) 4 Cal.4th 1233, 1311-12; *People v Bacigalupo* (1991) 1 Cal.4th 103, 126; *People v. Kunkin* (1983) 9 Cal.3d 245, 251.)

intent to steal. (See *People v. Ford, supra*, 60 Cal.2d at 792-93.) This duty is not affected by whether or not a claim of right instruction may also be required sua sponte or on request. A claim of right instruction is given in addition to, not in place of, the elemental instruction on intent to permanently deprive. (See *People v. Tufunga, supra*, 21 Cal.4th at 948, citing *People v. Davis* (1998) 19 Cal.4th 301, 305 [intent to steal requires intent to permanently deprive the owner of possession "*without a good faith claim of right*"], italics by *Tufunga* court; *People v. Barnett* (1998) 17 Cal.4th 1044, 1142-43 [even if an actor takes property with intent to permanently deprive the owner of it, felonious intent exists only if the actor did not believe "in good faith that he had a claim of right to it"]; see also Claim 10, p. 156, fn. 141, herein [discussing CALCRIM 1600 and 1863].)[139]

In sum, the claim of right cases do not relieve the trial court of its sua sponte obligation to instruct the jury, in every robbery case, on the required element of intent to permanently deprive the owner of the property. (See *People v. Ford, supra*, 60 Cal.2d at 792-93 [erroneous failure to sua sponte instruct on intent to permanently deprive the owner].)

G. CALJIC 9.40, As Given In The Present Case, Omitted The Requirement Of An Intent To Permanently Deprive The Owner Of The Property Taken

In the present case the jurors were given the CALJIC 9.40 instruction

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[139] For example, in *People v. Butler* (1967) 65 Cal.2d 569, 572-73 the defendant took the victim's wallet with intent to permanently deprive the victim of the wallet. (*Id.* at 571-72.) However, because the defendant honestly believed he had a rightful claim to the property, a special defense theory instruction on claim of right was required. (*Id.* at 573; see also *People v. Tufunga, supra*, 21 Cal.4th at 942 [defendant took money he "conditionally gave" to the victim]; *People v. Rosen* (1938) 11 Cal.2d 147, 149-50 [defendant took property he lost gambling].)

on robbery. (6 CT 1307-08; 52 RT 10463-64.) This instruction omitted the element of intent to steal because it merely required the taking of property "in the possession of another" with the intent of permanently depriving "that person" of the property.[140] In other words, the instruction allowed the jurors to find that appellant intended to commit robbery even if he only intended to help Antonio Sanchez take his own property. This defect in CALJIC 9.40 was recognized by the Judicial Council's Blue Ribbon Commission on Jury Instructions which included the omitted element in the CALCRIM instruction

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[140] Robbery was defined for the jury as follows:

> Every person who takes personal property in the possession of another against the will and from the person or immediate presence of that person accomplished by means of force or fear and with the specific intent to permanently deprive that person of the property is guilty of the crime of robbery in violation of Penal Code Section 212.
>
> Immediate presence means an area within the alleged victim's reach, observation or control, so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subject property.
>
> Against the will means without consent.
>
> In order to prove this crime, each of the following elements must be proved:
>
> One, a person had possession of property of some value, however slight.
>
> Two, the property was taken from that person or from his or her immediate presence.
>
> Three, the property was taken against the will of that person.
>
> Four, the taking was accomplished either by force or by fear.
>
> And five, the property was taken with the specific intent to permanently deprive that person of the property. (53 RT 10464; see also 6 CT 1307-08.)

on robbery as follows:

> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant took property that was not (his/her) own;
>
> 2. The property was taken from another person's possession and immediate presence;
>
> 3. The property was taken against that person's will;
>
> 4. The defendant used force or fear to take the property or to prevent the person from resisting;
>
> AND
>
> 5. When the defendant used force or fear to take the property, (he/she) intended (***to deprive the owner*** of it permanently. . . .

(CALCRIM 1600 (2006) [emphasis added].)[141]

In sum, the robbery instruction given in the present case omitted the essential element of intent to steal because it did not require an intent to deprive the owner of the property permanently.

H. The Error Violated State Law And The Federal Constitution

1. Due Process And Trial By Jury

Withdrawal of the intent to steal element violated the Due Process and Trial By Jury Clauses of the California Constitution (Article I, section 15) and

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[141] The CALCRIM instruction on robbery also illustrates the distinction between intent to steal as a core element of robbery and claim of right as a defense theory to negate larcenous intent. Even though the CALCRIM instructions contemplate the giving of a defense theory instruction on claim of right when appropriate (see CALCRIM 1863), by making intent to permanently deprive the owner of the property a core element, the CALCRIM Committee correctly recognized that the jurors must be instructed on that element regardless of whether or not a specific claim of right instruction is requested or warranted. (See *People v. Ford, supra*, 60 Cal.2d at 792-93; see also § F(1), p. 152, above, incorporated herein.)

the federal constitution (5th, 6th and 14th Amendments) as applied to California through the Incorporation Doctrine. (*Duncan v. Louisiana* (1968) 391 U.S. 145; see also *Tennessee v. Lane* (2004) 541 U.S. 509, 562.)

In particular, the error violated the presumption of innocence which provides that a person accused of a crime is presumed innocent unless the jury finds that every essential fact necessary to prove the charged crime and every element of the crime has been proved by the prosecution by a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466; *U.S. v. Gaudin* (1995) 515 U.S. 506; *In re Winship* (1970) 397 U.S. 358; *People v. Figueroa* (1986) 41 Cal.3d 714.)

"At a minimum it is the court's duty to ensure the jury is adequately instructed on the law governing all elements of the case. . . ." (*People v. Iverson* (1972) 26 Cal.App.3d 598, 604; *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 836.) The failure to instruct on an essential element of the charge violates the state (Article I, §§ 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and trial by jury. (*In re Winship* (1970) 397 U.S. 358; *People v. Figueroa* (1986) 41 Cal.3d 714.) The rights to due process and to a public trial before an impartial jury "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged . . . .' [Citation.]" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at 476-77; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1312-14; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 741-42; *United States v. Voss* (8th Cir. 1986) 787 F.2d 393, 398.)

2. Meaningful Opportunity To Present A Defense

Furthermore, the error also violated appellant's right to "a meaningful opportunity to present a complete defense." (See *Holmes v. South Carolina*

(2006) _____ U.S. _____ [126 S. Ct. 1727; 164 L. Ed. 2d 503] [internal citations omitted].)[142]

When an element which the defendant seeks to negate is omitted from the instructions the defendant's theory of the case is nullified. (See e.g., *People v. Coria* (1999) 21 Cal.4th 868, 881; *People v. Beeman* (1984) 35 Cal.3d 547, 562 ["correct instruction on the element of intent was particularly important in this case because appellant's defense focused on the question of his intent more than on the nature of his acts"]; *People v. Pierson* (2001) 86 Cal.App.4th 983, 993-94; *U.S. v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, 1414 [defendant has a due process right to have the jury consider defenses recognized by state law which negate elements of the defense].) Indeed, absent an appropriate instruction, the right to present evidence would be entirely meaningless. (*U.S. v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202 ["[p]ermitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal"]; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-42 [same]; see also *People v. Cox* (1991) 53 Cal.3d 618, 695-96 [defendant has right to reasoned, considered judgment of the jury].)

3. Heightened Reliability At Guilt And Penalty Trial

Omission of the intent to steal element of the charge also violated the

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[142] See also *Martin v. Ohio* (1987) 480 U.S. 228, 233-34; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Rock v. Arkansas* (1987) 483 U.S. 44; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Richmond v. Embry* (10th Cir. 1997) 122 F.3d 866, 871; *Taylor v. Singletary* (11th Cir. 1997) 122 F.3d 1390, 1394 [right to present defense witness testimony resides in the compulsory due process clause and the due process clause of the federal constitution]; *U.S. v. Lopez-Alvarez* (9th Cir. 1992) 970 F.2d 583, 588.

Eighth Amendment requirements of heightened procedural protections and reliability at both the guilt and penalty phases of a capital trial. (See *Beck v. Ohio* (1964) 379 U.S. 891; *Kyles v. Whitley* (1995) 514 U.S. 419 [same].)

Furthermore, the error also undermined the reliability of the guilt and penalty verdicts in violation of the Due Process, Trial By Jury, Compulsory Process and Confrontation Clauses of the 6th and 14th Amendments to the federal constitution. (See generally *Crawford v. Washington* (2004) 541 U.S. 36; *White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646; *Beck v. Alabama* (1980) 447 U.S. 625; *Thompson v. City of Louisville* (1960) 362 U.S. 199, 204.)

I. Omission Of The Intent To Steal Element Was Prejudicial As To The Robbery Charge

1. Standard Of Prejudice

Harmless error analysis should not "be applied to instructional error which withdraws from jury consideration substantially all of the elements of an offense and did not require by other instructions that the jury find the existence of the facts necessary to a conclusion that the omitted element had been proved." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1315.)[143] In the present case, the omission of both the-intent-to-steal and the intent-to-take-property-of-another elements, as described in Claims 10 and 11 of this brief, were no less fundamental than the omissions in *Cummings*. Accordingly, the robbery convictions should be reversed without the necessity of engaging in

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[143] Cf., *Blakely v. Washington* (2004) 542 U.S. 296, 314 ["The framers would not have thought it too much to demand that, before depriving a man of ...his [life] [or] liberty, the state should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of 12 of his equals and neighbors,' [citation]... ."].

any harmless error analysis.

Moreover, the error also warrants reversal under the standard of prejudice applicable to removal of a single element of the charge. (*People v. Flood* (1998) 18 Cal.4th 470, 503; see also *Neder v. U.S.*, *supra*, 527 U.S. 1, 8-15.)

"When, as here, the federal constitutional error involves the trial court's failure to instruct on a necessary element, reversal is required under the *Chapman* test when 'the defendant contested the omitted element and raised evidence sufficient to support a contrary finding' but the error is not prejudicial when it is clear 'beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence.'" (*People v. Huggins* (2006) 38 Cal.4th 175, 259 [citing and quoting *Neder v. U.S.*, *supra*, 527 U.S. 1, 19]; see also *People v. Davis* (2005) 36 Cal.4th 510, 564; *People v. Sakarias*, *supra*, 22 Cal.4th 596; *People v. Jackson* (2003) 109 Cal.App.4th 1625, 1635.)

Under this standard, harmless error is demonstrated if the record satisfies at least one of the following requirements:

1) It is clear "beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence. . . ." (*Neder*, *supra*, 527 U.S. at 19; see also *People v. Jackson*, *supra,* 109 Cal.App.4th 1625, 1635.) Or, stated otherwise, "there is no 'record ... evidence that could rationally lead to a contrary finding' with respect to that element." (*People v. Davis* (2005) 36 Cal.4th 510, 564 [citing and quoting *Neder v. U.S.* (1999) 527 U.S. 1, 19]; see also *People v. Hughs* (2002) 27 Cal.4th 287, 348-53 [no factual scenario whereby jury could have found omitted element unproved]; *People v. Ayers* (2005) 125 Cal.App.4th 988, 998 ["overwhelming proof" that

the jury would not have found the omitted element].)[144]

2) The jurors "necessarily resolved the assertedly omitted factual question through other properly given instructions." (*People v. Holloway* (2004) 33 Cal.4th 96, 139-40; see also *People v. Sakarias*, *supra*, 22 Cal.4th 596; *People v. Flood, supra,* 18 Cal.4th 470.)[145]

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[144] See also *Mitchell v. Esparza* (2003) 540 U.S. 12, 18-19 ["no evidence" disputing omitted elements]; *People v. Jurado* (2006) 38 Cal.4th 72, 123 [no "evidence" in the record]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1138 [evidence was "undisputed"]; *People v. Haley* (2004) 34 Cal.4th 283 [no evidence of lack of intent]; *People v. Prieto* (2003) 30 Cal.4th 226, 256-257 ["no evidence"]; *People v. Bolden* (2002) 29 Cal.4th 515, 560 ["evidence . . . was overwhelming"]; *People v. Rodriguez* (2002) 28 Cal.4th 543, 555, Moreno, J., concurring and dissenting [evidence "overwhelming" and "undisputed"]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 ["error did not contribute to the jury's verdict"]; *People v. Catlin* (2001) 26 Cal.4th 81, 156 ["overwhelming" evidence of omitted element]; *People v. Sakarias* (2000) 22 Cal.4th 596, 623-626 ["no substantial evidence" from which the jurors could have failed to find the omitted element]; *People v. Flood* (1998) 18 Cal.4th 470, 507 ["overwhelming, undisputed evidence"]; *People v. Green* (2006) 135 Cal.App.4th 1315, 1333-1335 [testimony on omitted element was "uncontested"]; *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1157-1158 [evidence "overwhelmingly" proved the omitted element]; *People v. Nicholson* (2004) 123 Cal.App.4th 823, 834 ["undisputed evidence" established the omitted element]; *People v. LeCorno* (2003) 109 Cal.App.4th 1058, 1066-1067 [omitted element was "undisputed" and jury necessarily found the element]; *People v. Ortiz* (2002) 101 Cal.App.4th 410, 416 [omitted element established by "uncontradicted testimony"]; *People v. Andrade* (2000) 85 Cal.App.4th 579, 587-590 [omitted element established by "uncontradicted testimony"]; *United States v. Schlisser* (2nd Cir. 2006) 2006 U.S. App. LEXIS 4894, 8-9 ["overwhelming evidence"].

[145] See also *People v. Haley* (2004) 34 Cal.4th 283, 314-317 [jury necessarily found defendant guilty on a proper theory]; *People v. Cole* (2004) 33 Cal.4th 1158, 1208 [omitted element included in another instruction]; *People v. Heath* (2005) 134 Cal.App.4th 490, 498 [omitted element necessarily found in reaching verdict on another count]; *People v. Singh* (2004) 119 Cal.App.4th

(continued...)

3) The error was harmless under the *Cantrell-Thornton*[146] exception which requires that the parties recognized the omitted issue, presented all evidence at their command on the issue and the record not only establishes the element as a matter of law but shows the contrary evidence not worthy of consideration. (*People v. Flood, supra,* 18 Cal.4th at 506.)

2. In The Present Case The Omitted Element Was Contested And The Jurors Could Rationally Have Found It Unproved

The instructions omitted the following factual issue: Did appellant intend to steal the victims' property – as alleged by Jose Luis Ramirez – or did appellant merely intend to help Antonio Sanchez' take his own property – as contended by appellant?

Without a doubt this was a contested issue which the jurors rationally could have resolved in favor of appellant.

First, the evidence that appellant intended to steal was weak because it was based on the plea-bargained testimony of Jose Luis Ramirez, a lone accomplice-witness whose veracity was so substantially discredited that the jurors failed to find all three special allegations which depended solely or primarily on belief of the accomplice's testimony.

Second, appellant disputed the existence of intent to steal in his video statement which the prosecution acknowledged was "accurate and complete."

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[145](...continued)
905, 913-14 [omitted element found in another verdict]; *People v. Petznick* (2003) 114 Cal.App.4th 663, 678-684 [omitted element found in another verdict]; *People v. LeCorno* (2003) 109 Cal.App.4th 1058, 1066-1067 [omitted element was "undisputed" and jury necessarily found the element].

[146] See *People v. Cantrell* (1973) 8 Cal.3d 672 and *People v. Thornton* (1974) 11 Cal.3d 738, both overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.

(50 RT 9820.)

Third, appellant's disavowal of intent to steal was corroborated by the fact that, even though the house was thoroughly searched, numerous items of value were left behind such as three handguns, a Taser gun, five boxes of ammunition, jewelry, a television set and $378 in cash. This suggested an intent to recover specific items of property rather than a generalized intent to loot and steal anything of value. (Compare *People v. Tufunga*, *supra*, 21 Cal.4th at 945, fn. 2 [claim of right not available when defendant had "indiscriminately taken items of value"]; *People v. Waidla* (2000) 22 Cal.4th 690 [same].)

Fourth, the only things alleged to have been personally taken by appellant and Antonio Sanchez were handguns: a .32 handgun which Antonio Sanchez gave to Jose Luis Ramirez and two other handguns which appellant allegedly took from the wooden box in the kitchen. The other items were taken by Jose Luis Ramirez including a necklace which he sold the next day and a bottle of hair oil which was the brand that Jose Luis Ramirez used. This further corroborated appellant's contention that Jose Luis Ramirez was acting on his own when he took those items from the residence.

Fifth, appellant did not know the victims and had nothing to do with the disagreement between Ramon Morales and Antonio Sanchez, which allegedly motivated the attack. In other words, as argued by defense counsel, appellant had no "stake in this matter" and no motive to take the victims' property. (52 RT 10268.)

For any or all of the above reasons, the jurors could rationally have found that the prosecution failed to prove intent to steal.

3. The Jurors Did Not Resolve The Omitted Factual Issue In Another Context

The defective robbery instruction (CALJIC 9.40) was the only instruction which defined and enumerated the required elements of robbery for appellant's jury. Therefore, the jurors had no alternative but to accept and follow the judge's definition of robbery as the one which must govern their deliberations. (See 6 CT 1223 ["You must accept and follow the law as I state it to you . . ."]; see also § I(6)(b), pp. 169-71, incorporated herein.)

Nor did the jurors necessarily find the omitted intent to steal element by convicting appellant of burglary or conspiracy to commit burglary. The burglary instructions did include intent to steal as one of the alternative intent elements. (See 53 RT 10466; 56 RT 11004-05; 6 CT 1311-12.) And, the prosecution did discuss the intent to steal option in her argument.[147] However, intent to rob was also an alternative intent element for burglary. (6 CT 1311-

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[147] The prosecutor's argument focused on the intent to steal and intent to murder theories of burglary. However, the prosecution's argument did not expressly eliminate intent to commit robbery as an option. The prosecutor followed the basic statutory definition of burglary format by defining the required intent in the alternative: intent to steal "***or***" intent to commit another felony. (52 RT 10231; 10254.) In the first discussion the argument suggested that the only other felony was murder. (52 RT 10231 [burglary requires entering with "intent to steal" or "with intent to commit a felony; in this case, murder].) However, in the second discussion the prosecutor said that it "***could be*** murder." (52 RT 10254 ["Remember, burglary is an unlawful entry with an intent to . . . steal something when you're inside, or to commit another felony. In this case it could be murder"].) Hence, the prosecutor's argument did not expressly rule out intent to commit robbery as an option for conviction of burglary.

Moreover, the jurors were duty-bound to follow the instructional definition of burglary – which included the intent to commit robbery option – and to reject any conflicting definition given by the prosecutor in argument. (See § I(6)(b), pp. 169-71, incorporated herein.)

12.) And the verdicts failed to demonstrate that any, much less all, of the jurors relied[148] on the intent to steal alternative to convict appellant of burglary. (See *Sandstrom v. Montana*, *supra*, 442 U.S. at 526; *People v. Swain*, *supra*, 12 Cal.4th at 607; see also *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 670 [instruction on erroneous theory was reversible even though the theory was not argued by the prosecutor and the evidence as to the correct theory was "very strong"].)

In sum, the jurors did not necessarily find the omitted intent to steal element in another context. (Compare *People v. Haley*, *supra*, 34 Cal.4th at 314-17; *People v. Cole*, *supra*, 33 Cal.4th at 1208; *People v. Holloway*, *supra*, 33 Cal.4th at 139-40.)

4. The *Cantrell/Thornton* Exception Does Not Apply

Because the intent to steal element was not proved as a matter of law and because the contrary evidence was not unworthy of belief, the *Cantrell/Thornton* exception to the harmless error rule does not apply. (See *People v. Flood*, *supra*, 18 Cal.4th at 506.)

5. The Omission Negated Appellant's Defense

The error was also prejudicial because it negated appellant's defensive claim that he did not knowingly and intentionally participate in a plan to steal property from the victims. (See *People v. Coria* (1999) 21 Cal.4th 868, 881; see also *People v. Beeman* (1984) 35 Cal.3d 547, 562 ["correct instruction on the element of intent was particularly important in this case because

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[148] The jurors were not required to unanimously agree on a single theory of burglary. (See *People v. Hughs* (2002) 27 Cal.4th 287, 348-49; *People v. Faila* (1966) 64 Cal.2d 560; see generally 6 CT 1311-14 [standard burglary instruction]; 56 RT 11003-06 [additional burglary instruction in response to juror inquiry].)

appellant's defense focused on the question of his intent more than on the nature of his acts"]; *People v. Pierson*, *supra*, 86 Cal.App.4th at 993-94 [failure to instruct on contested knowledge element was not harmless because the evidence was not "undisputed" and "overwhelming" and the defendant "was not allowed to present a full defense"]; *Conde v. Henry*, *supra*, 198 F.3d at 739; see also generally *Holmes v. South Carolina*, *supra*, _____ U.S. _____ [126 S. Ct. 1727, 1731; 164 L. Ed. 2d 503] [judgment reversed where defendant denied a "meaningful opportunity to present a complete defense" [internal citations omitted].)

6. The Error Was Not Cured By The Arguments Of Counsel

a. The Impact Of Neder Error Must Be Evaluated In Light Of The "Record Evidence"

Error is harmless under *Neder* "where an omitted element is supported by uncontroverted evidence," as "where a defendant did not, and apparently could not, bring forth facts contesting the omitted element . . . ." (*Neder v. U.S.*, *supra*, 527 U.S. at 19.) In other words, *Neder* requires a finding of harmless error based on the "***record evidence***." [Emphasis added.] (*People v. Davis* (2005) 36 Cal.4th 510, 564; see also *People v. Jurado* (2006) 38 Cal.4th 72, 101-102; *People v. Hughs* (2002) 27 Cal.4th 287, 352-53.) Hence, the analysis of *Neder* prejudice should focus on the "evidence" rather than the arguments of counsel.

And, this is how the vast majority of cases have analyzed prejudice under *Neder*.[149] Counsel has not found a single case in which a failure to

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[149] See p 161, footnote 144, incorporated herein [cases conducting *Neder* harmless error analysis relying on the record evidence rather than argument of counsel].

instruct on a contested element was held to be harmless under *Neder* based primarily on the prosecution's argument.[150] This is so for the simple reason that argument is not evidence and the jury is so instructed.[151]

Furthermore, prosecutorial argument is not a reliable indicator of how the jurors reached their verdict. (See e.g., *People v. Guerra* (1985) 40 Cal.3d 377, 387-88 [even though the prosecutor "expressly discounted" the felony-murder theory "[t]here is no principled way for us to determine which theory the jury adopted. . . "]; see also *Suniga v. Bunnell, supra*, 998 F.2d 664, 670 [instruction on erroneous theory was reversible even though the theory was not argued by the prosecutor and the evidence as to the correct theory was "very strong"].)[152]

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[150] In *People v. Catlin* (2001) 26 Cal.4th 81, 154 this Court did refer to the "evidence presented in the case and the arguments of counsel." However, this was merely a brief collateral discussion which was not essential to the holding in *Catlin*. The record in *Catlin* fully satisfied the *Neder* standard without consideration of the arguments of counsel. (See *Neder* test as articulated by *People v. Sakarias, supra*, 22 Cal.4th at 625; see also *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1157-58 [arguments of counsel mentioned in context of "reinforcing" reviewing court's finding of "overwhelming" evidence establishing the omitted element].)

[151] "Statements made by the attorneys during trial are not evidence." (6 CT 1225 [CALJIC 1.02]; see also 52 RT 10259:19-25 [judge admonished jury during argument that "[w]hat [counsel] say is not evidence"].)

[152] For example, in *People v. Webster* (1991) 54 Cal.3d 411, 442, the prosecution's argument relied solely upon a theory of robbery based on the defendant's taking of the victim's car. On appeal, the defendant argued that the car was not taken from the "immediate presence" of the victim because the force and fear occurred after the parties had walked a substantial distance from the car. The Supreme Court concluded that the evidence provided two additional theories of robbery based on the separate taking of the car key from the victim. Despite the lack of any prosecution argument on these theories

(continued...)

Finally, as to a general proposition, "the arguments of counsel cannot substitute for correct instructions from the court. . . ." (*People v. Rogers* (2006) 39 Cal.4th 826, 869, citing *Carter v. Kentucky* (1981) 450 U.S. 288, 304.)[153] Thus, even though the arguments of counsel may be appropriate to help "clear up ambiguities in instructions," they should not be considered in evaluating *Neder* error which involves the unambiguous omission of a discrete element of the charge.[154]

In sum, the arguments of counsel should not be relied upon in evaluating *Neder* error.

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[152](...continued)
(*Webster*, 54 C3d at 442, fn. 16), the court determined that the jury "could" have relied upon either of them. (*Id.* at 442.)

[153] Compare *People v. Rogers*, *supra*, 39 Cal.4th at 869 [argument of counsel considered in holding that failure to properly instruct on lesser included offense was harmless under *Watson* standard]; *People v. Fudge* (1994) 7 Cal.4th 1075 ["detailed" argument by defense counsel considered in holding that failure to give pinpoint instruction was harmless under *Watson* standard].

[154] As explained in *People v. Miller* (1996) 46 Cal.App.4th 412, 426:

> While we have no trouble utilizing the argument of counsel to help clear up ambiguities in instructions given, there is no authority which permits us to use argument as a substitute for instructions that should have been given. Logically, this is so, because the jury is informed that there are three components to the trial – evidence presented by both sides, arguments by the attorneys and instructions on the law given by the judge. Jurors are told that their decision must be based on the facts and the law and if counsel says anything that conflicts with the instructions that are given by the judge, they must follow the instructions.

b. Even If The Arguments Of Counsel May Properly Be Considered, They Do Not Establish Harmlessness In The Present Case

The parties argued the knowledge and intent issues to the jury during argument. (See § C, pp. 14748, incorporated herein.)[155] Also, the prosecutor's argument on burglary focused on the intent to steal and intent to murder theories.[156]

However, any such arguments of counsel were insufficient to demonstrate harmlessness under *Neder*.[157] This is so because the jurors were

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[155] The prosecutor argued that appellant acted with intent to steal. (52 RT 10253-54.) The defense argued, based on appellant's video statement and intoxication, that he "didn't know what was going to happen that evening." (52 RT 10270.)

[156] The prosecutor suggested that the options for finding burglary were an intent to steal or an intent to commit murder. However, the prosecution's argument did not eliminate intent to commit robbery as an option. The prosecutor followed the basic statutory definition of burglary format by defining the required intent in the alternative: intent to steal "***or***" intent to commit another felony. (52 RT 10231; 10254.) The argument was ambiguous about the nature of the other felony. In the first discussion, the argument suggested that the only other felony was murder. (52 RT 10231 [burglary requires entering with "intent to steal" or "with intent to commit a felony; in this case, murder].) However, in the second discussion the prosecutor said that it "***could be*** murder." (52 RT 10254 ["Remember, burglary is an unlawful entry with an intent to . . . steal something when you're inside, or to commit another felony. In this case it could be murder"].) Hence, the prosecutor's argument did not expressly rule out intent to commit robbery as an option for conviction of burglary.

[157] For example, in *U.S. v. Alferahin* (9th Cir. 2006) 433 F.3d 1148, 1157-58, the Ninth Circuit conducted a *Neder* analysis where the instructions erroneously omitted the materiality element of the charge. Despite the fact that both counsel argued materiality to the jury as if it were an element of the (continued...)

duty-bound to follow the instructional definition of robbery provided by the judge and to reject any arguments of counsel that conflicted with the judge's definition. The jurors were so admonished by CALJIC 1.00:

> You must accept and follow the law as I state it to you, regardless of whether you agree with the law. If anything concerning the law said by the attorneys in their arguments . . . conflicts with my instructions on the law, you must follow my instructions. (6 CT 1223, emphasis added.)

Furthermore, the judge reiterated this admonition in response to a defense objection during argument: ". . . [W]hat [counsel] say about the law is not the law. You have to follow my instructions on that."[158]

Also, both the district attorney and defense counsel emphasized the jurors' duty to follow the law as given by the judge. The prosecutor admonished the jury that "your job as jurors . . . is to . . . apply the . . . law that you will be hearing from Judge Moody." (52 RT 10217, emphasis added.) Similarly, defense counsel admonished the jury to follow the law as stated in the written instructions.[159]

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[157](...continued)
charge (*id.* at 1152-53), the reviewing court conducted its *Neder* analysis primarily on the record evidence and concluded that the error was not harmless because the defense presented evidence and argument contesting the omitted materiality element. (*Ibid.*)

[158] THE COURT: Well, counsel is permitted to present to you, as I've said, their theory of the case. They're permitted to comment on the facts. They're permitted to comment on the law. ¶ What they say is not evidence. And what they say about the law is not the law. You have to follow my instructions on that. (52 RT 10259:19-25, emphasis added.)

[159] "You'll be given a copy of those instructions I believe, so you'll have a chance to look at it and say, gee, Mr. West said something. Miss Lombardo (continued...)

Hence, to the extent that the arguments of counsel conflicted with the judge's instructions, it must be presumed that the jurors followed the instructions. (See e.g., *People v. Vann* (1974)12 Cal.3d 220, at 227, fn. 6 [" . . . closing arguments . . . did not cure the error of the court's omission . . . [the] final charge . . . made it clear that the jurors were to follow the law as explained by the court, and were not to follow rules of law stated in argument but omitted from the instructions"]; see also *People v. Miller*, *supra*, 46 Cal.App.4th at 426.)[160]

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[159](...continued)
said something. But here's what the judge has, and here's what he instructed us on. That's the law. Whatever he says, that's what goes. If you hear any variations of that while I'm speaking or while Miss Lombardo's speaking, ignore us, because that's the law." (52 RT 10262:21-10263:1, emphasis added.)

[160] The reviewing court must "presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Clair* (1992) 2 Cal.4th 629, 663; see also *People v. Morales* (2001) 25 Cal.4th 34, 47; *People v. Cole* (2003) 33 Cal.4th 1158, 1204.) "The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions." (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn 17; see also *People v. Delgado* (1993) 5 Cal.4th 312; *People v. Cruz* (2001) 93 Cal.App.4th 69, 73 ["We presume that the jury 'meticulously followed the instructions given.' [Citation.]"].)

This presumption is also well recognized by the Ninth Circuit. For example, in *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 968, the trial court gave a confused and incorrect interpretation of the jury's sentencing discretion in a death penalty case. The Ninth Circuit held that the error could not be rectified by counsel's arguments. "This is particularly true given California's general approach to evaluating a jury's interpretation of an instruction based on the plain meaning of the language and the judicial presumption that jurors follow the court's instructions as law and consider attorneys' statements to be advocates' arguments." (255 F.3d at 969; see also (continued...)

7. Conclusion: The Robbery Conviction Should Be Reversed

The jury's determination of the robbery charge should have turned on whether the prosecution proved beyond a reasonable doubt that appellant acted with intent to steal. However, because the judge instructed the jury using a defective CALJIC instruction – which has since been repudiated by the Judicial Council's Blue Ribbon CALCRIM committee – the jurors were permitted to convict appellant of robbery even if they believed that he did not act with the intent to steal. Accordingly, the robbery conviction should be reversed.

J. The Murder Convictions Should Be Reversed Because They Were Founded On Robbery-Based Theories Of Liability

1. Overview

There is no question that the jurors relied on robbery felony murder to convict appellant of first degree murder. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 24-5 ["The robbery-murder special-circumstance finding also dictated a finding of first degree felony murder under section 189 and the corresponding felony-murder instruction . . ."]; see also *People v. Sanders* (1990) 51 Cal.3d 471, 509-10 [same].)

However, because the instructions omitted the intent to steal element of robbery, the robbery felony murder was a legally erroneous theory. And, since the verdicts fail to demonstrate that all jurors relied on a proper legal

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[160](...continued)
Payton v. Woodford (9th Cir. 2002) 299 F.3d 815 [reasonable jurors were not likely to rely on the prosecutor's statements instead of the instructions from the court]; *Morales v. Woodford* (9th Cir. 2003) 336 F.3d 1136, 1146 ["The State also argues that the closing arguments by counsel sufficiently educated the jury that intent was essential. We must presume, however, that the jury took the court's instructions as its authority on the law . . ."].)

theory of murder, the murder convictions should be reversed.

2. Standard Of Prejudice

As discussed above, the definition of robbery which governed the jurors' deliberations unconstitutionally omitted the intent to steal element of the charge and negated appellant's defense that he did not intend to steal. Therefore, any robbery-based theory of liability advanced by the prosecution which relied on the defective definition of robbery was also unconstitutional and legally erroneous. (See e.g., *People v. Swain, supra*, 12 Cal.4th at 607; see also *People v. Green* (1980) 27 Cal.3d 1, 73 ["As we have repeatedly observed . . . an error that relieves the jury from the necessity of making a difficult but crucial finding as to state of mind is especially likely to be prejudicial. [Citation.]"].)

And, the availability of such a legally erroneous theory is reversible error even if other proper theories were also available:

"[I]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." (*Sandstrom v. Montana, supra*, 442 U.S. 510, 526; see also *Zant v. Stephens* (1983) 462 U.S. 862, 881 ["general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground."]; *Yates v. United States* (1957) 354 U.S. 298, 312, ["[T]he proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."]; *Burks v. United States* (1978) 437 U.S. 1; *Stromberg v. California* (1931) 283 U.S. 359, 368 ["[I]f any of the clauses [of the statute] in question is invalid under the Federal Constitution, the conviction

cannot be upheld."].) This line of cases, originating with *Stromberg*, makes clear that "when a jury delivers a general verdict that may rest either on a legally valid or legally invalid ground[,] . . . the verdict may not stand when there is no way to determine its basis." (*Keating v. Hood* (9th Cir. 1999) 191 F.3d 1053, 1062; see also *United States v. Fulbright* (9th Cir. 1997) 105 F.3d 443, 451, cert. denied, 520 U.S. 1236, 117 S. Ct. 1836, 137 L. Ed. 2d 1041 (1997) ["Where a jury returns a general verdict that is potentially based on a theory that was legally impermissible or unconstitutional, the conviction cannot be sustained."].)[161]

A similar rule applies in California. (See *People v. Swain* (1996) 12 Cal.4th 593, 607 [reversal required when record did not establish whether or not the jury relied on the incorrect theory]; *People v. Perez* (2005) 35 Cal.4th 1219, 1232-34; *People v. Guiton* (1993) 4 Cal.4th 1116.)

3. Robbery-Based Theories Of Murder Liability

The jurors had the following robbery-based options for convicting appellant of murder in Counts 1-3:

– Robbery and burglary [entry with intent to commit robbery] felony murder. (52 RT 10229; 6 CT 1276-77.)

– Killing during commission of a conspiracy to commit robbery and/or burglary [entry with intent to commit robbery]. (53 RT 10449; 6 CT 1279.)

– Murder as a natural and probable consequence of aiding and abetting

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[161] There is a limited exception to the principle. "[R]eversal may not be required if the verdicts demonstrate that the jury relied upon the legally correct theory to convict the defendant." (See *Ficklin v. Hatcher* (9th Cir. 1999) 177 F.3d 1147, 1152; see also *Zant v. Stephens, supra*, 462 U.S. at 881 ["The cases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested."].)

burglary [entry with intent to commit robbery] and/or robbery. (53 RT 10435-36; 6 CT 1256-57.)

4. Non-Robbery Theories Of Murder Liability

The jurors could have convicted appellant of murder based on the following non-robbery theories:

– Malice murder with premeditation and deliberation. (53 RT 10446-48; 6 CT 1275-77.)

– Burglary felony murder based on entry with intent to murder (53 RT 10447-48; 6 CT 1276-77.)

– Burglary felony murder based on entry with intent to steal. (53 RT 10447-48; 6 CT 1276-77.)

– Natural and probable consequences of aiding and abetting either of the above non-robbery-based burglaries. (53 RT 10435-36; 6 CT 1256-57.)

– Vicarious conspirator liability for murder committed by co-conspirator in furtherance of conspiracy to commit either of the above non-robbery-based burglaries. (6 CT 1264.)

5. The Verdicts Do Not Demonstrate That All Jurors Relied On A Proper Non-Robbery Theory Of Murder

a. Overview

The only theories not linked to robbery were premeditated malice murder and vicarious murder liability based on burglary with intent to steal or intent to murder. However, the verdicts do not establish that all jurors relied on any of those theories.

b. The Verdicts Do Not Demonstrate That All Jurors Relied On Premeditated Malice Murder

There is no indication in the verdicts that all the jurors relied on malice murder to convict appellant of murder in Counts 1-3. To the contrary, the

jurors apparently could not agree on this issue since they did not make a finding as to the conspiracy to commit murder allegation. (See Statement Of Case § C, pp.11-12, incorporated herein.)

c. The Verdicts Do Not Show That The Burglary Conviction Was Founded On A Finding Of Intent To Steal

Because the burglary verdicts were general, the record fails to demonstrate that all jurors[162] found intent to steal in convicting appellant of burglary. (*Sandstrom v. Montana*, *supra*, 442 U.S. at 526; *People v. Swain*, *supra*, 12 Cal.4th at 607; see also § K, below.)

6. Conclusion: The Murder Convictions Should Be Reversed

In sum, the murder convictions should be reversed because the record fails to demonstrate that all jurors relied on a proper theory to convict appellant of murder.

K. The Burglary Conviction Should Be Reversed

The burglary conviction (Count 9; 4 CT 993-95) was predicated on the alternative theories of entry to "steal and take away someone else's property" or entry to commit "the crime of robbery or murder." (6 CT 1312.) [163] However, due to the defective definition of robbery which governed the jury deliberations, the entry with intent to rob alternative was a legally erroneous theory of burglary.[164] And, the verdicts fail to demonstrate that no juror relied on the entry to commit robbery theory in voting to convict appellant of

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[162] The jurors did not have to all agree on a single theory. (See Claim 10, p. 165, fn. 148, incorporated herein.)

[163] See Claim 10, p. 169, fn. 156, herein [prosecutor's argument did not require the jurors to find intent to steal as to burglary].

[164] The intent to murder option was also legally erroneous. See Claim 14, pp.216-21, incorporated herein.

burglary. To the contrary, the jurors' other verdicts all demonstrate that they likely relied on the robbery option to convict appellant of burglary. (See e.g., Counts 6, 7 and 8 [appellant convicted of substantive crime of robbery as to each adult victim] (4 CT 984-92); Count 10 [robbery found to be an object of the conspiracy] (4 CT 996-97); [robbery felony murder special circumstance found true as to Counts 1, 2 and 3] (4 CT 968; 972; 975).)

In sum, the record fails to demonstrate that all jurors relied on a proper theory – instead of the defective intent to rob theory – to convict appellant of burglary. Therefore, the burglary conviction should be reversed. (See Claim 10 § E(4), pp. 190-91, fn. 176, incorporated herein [erroneous theory is prejudicial unless verdicts demonstrate that all jurors relied on proper theory].)

L. The Conspiracy Conviction Should Be Reversed

The conspiracy conviction was based on the predicate objectives of robbery and burglary. (4 CT 996-97.) Hence, the legally erroneous definition of

robbery was reversible error as to the conspiracy conviction.[165] Robbery, as defined by the erroneous instruction, was obviously an improper predicate for the conspiracy conviction and burglary was also an improper conspiracy predicate because it was alternatively defined in terms of intent to rob. (See pp. 176-7, § K, above.)

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[165] The error also invalidated at least two of the alleged overt acts (Nos. 5 and 6) since they were predicated on the finding of an intent or plan to commit robbery. Because the record does not disclose which overt act or acts the jurors found, submission of the erroneous robbery-based overt acts to the jurors was reversible error. (See § J(2), above, pp. 173-74, incorporated herein [erroneous theory is prejudicial unless verdicts demonstrate that all jurors relied on proper theory].)

M. The Assault With A Deadly Weapon And Attempted Murder Conviction Should Be Reversed

The erroneous robbery instruction was also reversible error as to the assault with a deadly weapon and attempted murder conviction. (Counts 4 and 5; 1 CT 126-129.) This is so because the prosecution's theory as to the assault and attempted murder was based, *inter alia*, on the alternative vicarious liability theories premised on the allegation that appellant either aided and abetted a robbery/burglary or conspired to commit a robbery/burglary. (See e.g., 52 RT 10223-24; 10254 [argument of prosecutor]; 6 CT 1283-84 [jurors instructed on attempted murder predicated on aiding and abetting robbery and burglary]; 6 CT 1264 [jurors instructed on vicarious liability based on the acts of a co-conspirator].) Because the verdicts fail to demonstrate that no juror relied on one of these robbery-based theories, the assault and attempted murder conviction should also be reversed. (See *Sandstrom v. Montana* (1979) 442 U.S. 510, 526; see also *People v. Perez*, *supra*, 35 Cal.4th at 1232-34.)

N. The Special Circumstances Should Be Reversed

Because the error warrants reversal of the murder convictions, the special circumstance convictions should also be reversed. (See generally Penal Code § 190.2.)

O. The Error Was Cumulatively Prejudicial

Even if the failure to instruct on the intent to steal element of robbery was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with additional errors the judge committed – including but not limited to: failure to instruct on the property of another element (Claim 10); failure to instruct on claim of right (Claim 11); undermining appellant's defense theories (Claims 12 and16-20); giving

partisan instructions that favored the prosecution (Claims 22-26); diluting and misstating the prosecution's burden of proof (Claims 27-37); allowing the jurors to make up their minds about penalty before the penalty phase began (Claim 57); allowing the prosecutor to unduly emphasize certain inflammatory matters by use of an "audio-video slingshot" during closing argument at the penalty trial (Claim 58) – it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo, supra,* 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

P. Conclusion: The Judgment Should Be Reversed Because The Jury Did Not Resolve The Fundamental Factual Issue Presented At Trial

The jury's determination of guilt based on the various robbery-based theories advanced by the prosecution should have turned on whether or not the prosecution had proved beyond a reasonable doubt that appellant acted with the required intent to steal. However, because the judge instructed the jury using a defective CALJIC instruction – which has since been repudiated by the Judicial Council's CALCRIM instructions – the jury was permitted to convict appellant of robbery and the other robbery-based charges even if they accepted appellant's defense theory that he did not intend to kill or to steal. Such convictions violated appellant's most fundamental rights to due process and trial by jury. In short, appellant's trial was fundamentally unfair and the verdicts produced by that trial were inherently unreliable. Therefore, the guilt, special circumstances and penalty verdicts should be reversed.

CLAIM 11

THE ROBBERY INSTRUCTION OMITTED THE ESSENTIAL ELEMENT THAT THE "PROPERTY OF ANOTHER" BE TAKEN

In the previous argument it was shown that the robbery instruction omitted the essential intent to steal element of robbery, i.e., intent to permanently deprive the owner of the property. In the present argument, it will be shown that the instructions also omitted an essential actus reus element of robbery: that the property *of another* be taken.[166] Because this element was contested by appellant, its omission from the jury instructions removed a crucial factual issue from the jury's consideration and the judgement should be reversed.[167]

A. The Act Of Taking The Property Of Another Is An Essential Element Of Robbery

It is beyond dispute that an element of robbery which the prosecution must prove beyond a reasonable doubt is the taking of property not belonging to the taker. The existence of this element is demonstrated by (1) the statutory language and history; (2) lesser included offense analysis, and (3) by the

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[166] Because the taking of the "property of another" is an essential actus reus element of robbery, the judge committed constitutional error by failing to instruct on that element regardless of whether or not further instruction on a "claim of right" defense to negate felonious intent was warranted. (See also Claim 10 § F(2), pp.153-54, incorporated herein.)

[167] In addition to reversal of the substantive robbery conviction, the error also warrants reversal of all the other convictions and special circumstance findings. This is so because those convictions and findings were all predicated on robbery based theories such as felony murder, aiding and abetting and/or vicarious conspiratorial liability. (See Claim 10 § E, pp. 150-51, incorporated herein [robbery based theories of liability to all ten counts and felony murder special circumstances].)

standard jury instructions.

1. Statutory Language And History Analysis

The robbery statute (Penal Code § 211) does not expressly require that the property taken belong to a person other than the taker:

> Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. (Cal Pen Code § 211. Enacted 1872.)

However, the use of the terminology "felonious taking" demonstrates a legislative intent to incorporate the common law definition of robbery into the California statute. (*People v. Tufunga* (1999) 21 Cal.4th 935, 945-46; see also *Harris v. Reynolds* (1859) 13 Cal. 514, 518.)

At common law, robbery "was viewed simply as an aggravated form of larceny. . . ." (*People v. Tufunga*, *supra*, 21 Cal.4th at 945.)[168] Therefore, because larceny cannot be based on the taking of one's own property, neither can robbery: "The owner of property is not guilty of robbery in taking it from the person of the possessor, though he may be guilty of another public offense." (*People v. Vice* (1863) 21 Cal. 344 [interpreting original 1850 statute]; see also *People v. Rosen* (1938) 11 Cal.2d 147, 151 [citing *Vice* for proposition that the current 1872 robbery statute is not violated when the owner takes his own property]; *People v. Ammerman* (1897) 118 Cal. 23.)

Moreover, the note accompanying Penal Code § 211 in the first annotated edition of the current 1872 statute [under which appellant was prosecuted] cited the *Vice* decision for the proposition that "the owner of

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[168] "California courts have long held that theft by larceny requires the intent to permanently deprive the owner of possession of the property." (People v. Avery (2002) 27 Cal.4th 49, 54.)

property is not guilty of robbery in taking it from the possession of the possessor." (Code comrs. note foll. Ann. Pen. Code § 211 (1st ed. 1872 Haymond & Burch, comrs.-annotators) p. 99; *People v. Tufunga, supra*, 21 Cal.4th 935, 947.)

In sum, the statutory language and legislative history of Penal Code § 211 unquestionably requires the prosecution to allege and prove that the property taken did not belong to the taker. (See e.g., *People v. Hicks* (1884) 66 Cal. 103 [information not deficient because it sufficiently identified owner of property as other than defendant]; see also *People v. Anderson* (1889) 80 Cal. 205, 206-07 [same].)

2. Lesser Included Offense Analysis

Throughout over 140 years of jurisprudence this Court has consistently held that theft (Penal Code § 484) is a lesser included offense of robbery. (Penal Code § 211).[169] Hence, by definition, all of the elements of theft are necessarily also elements of robbery. (See *People v. Birks* (1998) 19 Cal.4th 108, 118; *People v. Lohbauer* (1981) 29 Cal.3d 364, 369; see also *Schmuck v. United States* (1989) 489 U.S. 705, 716 [elements of the lesser offense are a subset of the greater].)

From this it follows undeniably that the "property of another" element of the theft statute (Penal Code § 484)[170] is also an element of the robbery

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[169] See e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 110; *People v. Tufunga, supra*, 21 Cal.4th at 947-48; *People v. Ortega* (1998) 19 Cal.4th 686, 694; *People v. Bradford* (1997) 14 Cal.4th 1005,1055; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Melton* (1988) 44 Cal.3d 713, 746; *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351; *People v. Jones* (1878) 53 Cal. 58, 59; *People v. Vice, supra*, 21 Cal.344.

[170] The relevant language of Penal Code § 484 is as follows:

(continued...)

statute (Penal Code § 211.)

"As an allegation of ownership of the property in another person than defendant is by the statute made essential in larceny, and as to allege the crime of robbery there must be alleged every fact constituting larceny, it follows that [an allegation of ownership of the property must be proven for robbery]." (*People v. Ammerman, supra*, 118 Cal. at 25-26; see also *People v. Marshall* (1957) 48 Cal.2d 394, 400 ["The allegations of the information that the automobile was taken by robbery necessarily import the elements of theft, including the taking of the personal property of one other than defendant, with intent to steal"]; *People v. Anderson* (1889) 80 Cal. 205 ["Robbery includes larceny, and every fact constituting larceny must be alleged, including [the] name of the owner"]; *People v. Crowley* (1893) 100 Cal. 478, 479-80 [a charge of robbery must allege "every fact necessary to constitute larceny"].)

3. The CALCRIM Committee Corrected The CALJIC Omission Of The "Property-Of-Another" Element

The standard criminal jury instructions in California reflect the property of another requirement. Although the CALJIC robbery instruction (9.40) does not include the property-of-another element, the larceny instruction (14.02) does:

> Every person who steals, takes, carries, leads, or drives away the personal *property of another* with the specific intent to deprive the owner permanently of [his] [her] property is guilty of the crime of theft by larceny. .
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person took personal property of some value

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[170](...continued)

(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property *of another* . . . . [italics added.]

belonging to another . . . . (CALJIC 14.02.) [italics added.]

Therefore, because robbery is merely an "aggravated larceny," the "property of another" element of CALJIC 14.02 should also have been included in CALJIC 9.40 and the CALJIC Committee's failure to do so appears to have been an oversight.

This oversight was remedied by the Judicial Council's Blue Ribbon Jury Instruction Committee. The Committee's instruction on robbery (CALCRIM 1600) includes the following requirement as the first element:

> "The defendant took property that *was not (his/her) own.*" [italics added.]

B. The Court Was Obligated To Instruct The Jury On The "Property Of Another" Element Of Robbery Even Though The Defense Did Not Request Instruction On A Claim Of Right Defense

Elsewhere in this brief appellant argues that the judge was obligated to give a sua sponte instruction on the claim of right defense. (See Claim 12, pp.195-205, incorporated herein.) However, the present argument is independent of any claim of right issue because taking the "property of another" is a core element of robbery. Hence, the trial judge has a constitutional duty to instruct on that element regardless of whether or not a claim of right instructions is also given. (*People v. Ford, supra*, 60 Cal.2d at 792-93; see also generally *Apprendi v. New Jersey, supra*, 530 U.S. at 476-77; *People v. Figueroa, supra*, 41 Cal.3d 714.)

C. In The Present Case The Instructions Omitted The "Property of Another" Element Of Robbery

In appellant's trial the judge's instruction defined the elements of robbery as follows:

> The defendant is accused in Counts 6, 7, 8 of having committed the crime of robbery, a violation of Section 212 of the Penal Code.

> Every person who takes personal property in the possession of another against the will and from the person or immediate presence of that person accomplished by means of force or fear and with the specific intent to permanently deprive that person of the property is guilty of the crime of robbery in violation of Section Penal Code Section 212.
>
> . . .
>
> In order to prove this crime, each of the following elements must be proved:
>
> One, a person had possession of property of some value, however slight.
>
> Two, the property was taken from that person or from his or her immediate presence.
>
> Three, the property was taken against the will of that person.
>
> Four, the taking was accomplished either by force or by fear.
>
> And five, the property was taken with the specific intent permanently to deprive that person of the property.

(6 CT 1307-08; 53 RT 10463-64.)

Thus, the instruction erroneously omitted any requirement that the person "take property that was not his own." (Compare CALCRIM 1600, Element 1.)

D. Omission Of The "Property of Another" Element Was Constitutional Error

The omission of the "property of another" element from the jury instructions in appellant's trial violated the state (Article I, sections 7 and 15) and federal (6th and 14th Amendments) constitutional rights to due process and trial by impartial jury. (*In re Winship*, *supra*; 397 U.S. 358; *People v. Figueroa*, *supra,* 41 Cal.3rd 714.) The rights to due process and to a public trial before an impartial jury "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged . . . .' [Citation.]" *Apprendi v. New Jersey*, *supra*, 530 U.S. at

476-77; *People v. Figueroa*, *supra*, 41 Cal.3d 714.) Furthermore, the error also violated the Eighth Amendment requirements for heightened procedural protections and reliability at both the guilt and penalty phases of a capital trial. (See *Beck v. Ohio* (1964) 379 U.S. 891; *Kyles v. Whitley* (1995) 514 U.S. 419 [same].)

Additionally, the omission negated appellant's defense and thus deprived him of his federal constitutional right to a "meaningful opportunity to present a complete defense." (See generally *Holmes v. South Carolina*, *supra*, _____ U.S. _____ [126 S.Ct. 1727; 164 L.Ed.2d 503]; see also Claim 10 § H(2), pp. 157, incorporated herein.)

E. The Omission Of The "Property of Another" Element Was Prejudicial Error

1. Omission Of An Element Of The Charge Is Reversible If The Omitted Element Concerned A Contested Factual Issue

A trial court's failure to instruct the jury on an element of the crime requires reversal when "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding . . . ." (*Neder v. United States*, *supra*, 527 U.S. 1, 19.) On the other hand, the error is not prejudicial when on appeal it is clear "beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence . . . ." (*Id.* at p. 17; see also *People v. Garcia* (2001) 25 Cal.4th 744, 761.)[171] Or, stated otherwise, the error is harmless if there is "no record evidence that could lead to a contrary finding" with respect to the omitted element. (*People v. Davis* (2005) 36 Cal.4th 510, 564, internal citations and quotation marks omitted.)

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[171] See also Claim 10 § I(1), pp. 159-61, herein.

2. The "Property of Another" Element Was Contested And A Rational Juror Could Have Found That The Element Was Not Proved

The prosecution contended that Antonio Sanchez intended to rob [and murder[172]] the victims and that appellant knowingly and intentionally aided and abetted Sanchez in doing so. On the other hand, in a video taped statement presented to the jury,[173] appellant maintained that he did not know of any plan or intention by Antonio Sanchez to commit robbery and murder. Instead, appellant believed that Antonio was merely going to get some of his (Antonio's) "things" he had left at Ramon Morales' residence. (Exhibit 85A; 4 SCT 1037-39.)[174]

This factual conflict was further intensified by defense evidence and argument discrediting Ramirez' version and bolstering appellant's. (See Claim 10 § B(2), pp.141-46, incorporated herein.) The defense relied on numerous inconsistencies and false statements by Jose Luis Ramirez to discredit his testimony that appellant was aware of Antonio's plan to murder and rob.

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[172] It is unclear whether the jury found that Antonio intended to murder the victims because the jury could not agree on the conspiracy to commit murder allegation. However, it is clear that the jury accepted the prosecution's robbery theories because they found a conspiracy to commit robbery and convicted on the robbery count and on the robbery felony murder special circumstance. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 24-5 ["The robbery-murder special-circumstance finding also dictated a finding of first degree felony murder under section 189 and the corresponding felony-murder instruction . . ."]; *People v. Sanders* (1990) 51 Cal.3d 471, 509-10 [same].)

[173] This tape was offered into evidence by the prosecution. (51 RT 10018.)

[174] According to appellant, they took guns as a "precautionary measure" because Ramon Morales had threatened to kill Antonio Sanchez on a prior occasion. (Exhibit 85A, 4 SCT 1037.)

(*Ibid.*)

Thus, for numerous reasons, a rational juror could have found the property of another element was not proved beyond a reasonable doubt.

First, the evidence that appellant intended to steal was weak because it was based on the plea-bargained testimony of Jose Luis Ramirez, a lone accomplice-witness whose veracity was substantially discredited. In fact, the jurors unanimously rejected Jose Luis Ramirez' testimony that appellant used a knife. Moreover, the jurors failed to find two other crucial allegations based on the testimony of Jose Luis Ramirez: That appellant (1) intended to commit murder and (2) used a handgun. (See Claim 10 § D, pp. 149-50, incorporated herein [special verdicts demonstrating juror disbelief of Jose Luis Ramirez].)

Second, appellant disputed the existence of intent to steal in his video statement[175] which the prosecution acknowledged was "accurate and complete." (50 RT 9820.)

Third, appellant's disavowal of intent to steal was corroborated by the fact that, even though the house was thoroughly searched, numerous items of value were left behind such as three handguns, a Taser gun, five boxes of ammunition, jewelry, a television set and $378 in cash. (See Guilt Phase: Statement Of Facts § E(3), pp. 36-37, incorporated herein [numerous items of value were not taken].) This suggested an intent to recover specific items of property rather than a generalized intent to steal anything of value. (Compare *People v. Tufunga*, *supra*, 21 Cal.4th at 945, fn. 2 [claim of right not available when defendant had "indiscriminately taken items of value"]; *People v. Waidla* (2000) 22 Cal.4th 690 [same].)

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[175] See Claim 10 § B(2)(b)(i), pp.144, incorporated herein [appellant's video statement denied intent to steal the victims' property].

Fourth, the only things alleged to have been personally taken by appellant and Antonio Sanchez were handguns: a .32 handgun which Antonio Sanchez gave to Jose Luis Ramirez and two other handguns which appellant allegedly took from the wooden box in the kitchen. The other items were taken by Jose Luis Ramirez including a necklace which he sold the next day and a bottle of hair oil which was the brand that Jose Luis Ramirez used. (See Guilt Phase: Statement Of Facts § D(4), p. 31, incorporated herein].) This further corroborated appellant's contention that Jose Luis Ramirez was acting on his own when he took those items from the residence.

Fifth, appellant did not know the victims and had no involvement in the disagreement between victim Ramon Morales and Antonio Sanchez, which allegedly motivated the attack. In other words, as argued by defense counsel, appellant had no "stake in this matter" and no motive to take the victims' property. (52 RT 10268.)

3. The Error Was Not Cured By Jose Luis Ramirez' Taking Of The Victims' Property

The actual taking of the "property of another" by Jose Luis Ramirez did not resolve the issue of appellant's knowledge and intent in favor of the prosecution for two reasons.

First, Jose Luis Ramirez testified that he took the property at the direction of Antonio Sanchez. (See 41 RT 8020; 42 RT 8215.) In light of this testimony, appellant's liability for robbery still required proof beyond reasonable doubt that appellant knew Antonio intended that the property of another of another would be taken. (See *People v. Beeman* (1984) 35 Cal.3d 547 [aider and abettor liability requires knowledge of perpetrator's criminal purpose and intent to further that purpose].)

Second, as the defense argued, the jurors could rationally have

concluded that Jose Luis Ramirez simply saw this as "an opportunity" to take things he wanted as evidenced by his taking of the Tres Flores hair cream. (52 RT 10269) [that was the type of hair cream Jose Luis Ramirez used].) Moreover, appellant expressly denied any intent to aid and abet the looting by Jose Luis Ramirez. (4 SCT 1037 ["we didn't go there for that purpose . . ."].)

4. The Robbery Conviction Should Be Reversed

Because this error, together with the one described in Claim 10, above, removed the two most crucial contested elements of robbery from the jurors' consideration the error warrants reversal per se. (See Claim 10 § I(1), pp.159-61, incorporated herein.) Moreover, because the omitted "property of another" element was disputed by substantial record evidence – from which a rational juror could have found that the element was not proved – the robbery conviction should also be reversed under the applicable harmless error analysis. (See *Neder v. U.S.* (1999) 527 U.S. 1, 19; see also Claim 10 § I(1), pp. 159-61, incorporated herein.)[176]

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[176] The prosecution's alternative reliance on the theory that appellant personally perpetrated the robbery did not cure the error because the record does not show that all jurors relied on that theory to convict. (See *People v. Swain* (1996) 12 Cal.4th 593, 607 [reversing when record did not establish whether or not the jury relied on the incorrect theory]; *People v. Guiton* (1993) 4 Cal.4th 1116; *People v. Smith* (1984) 35 Cal.3d 798, 809; *People v. Green* (1980) 27 Cal.3d 1, 69-70; see also *Cabana v. Bullock* (1986) 474 U.S. 376, 383, fn 2; *Sandstrom v. Montana* (1979) 442 U.S. 510, 526; *Stromberg v. California* (1931) 283 U.S. 359, 369-70.) Reliance on an improper theory by even one juror requires reversal. (See *Fields v. Woodford* (9th Cir. 2002) 309 F.3d 1095, 1103; see also *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 669.) Neither the other verdicts nor the instructions as a whole show that no juror relied on the erroneous robbery instruction. To the contrary, the other verdicts suggested that the jurors rejected the theory that appellant was an actual perpetrator. (See e.g., 4 CT 969-70 [finding that appellant did not

(continued...)

Furthermore, the error also warrants reversal because it negated appellant's defense. (See Claim 10 § I(5), p. 165, incorporated herein.)

5. The Other Convictions And Special Findings Should Be Reversed

a. The Murder Convictions Should Be Reversed

As to the murder charges, there is no doubt that the jurors likely relied on felony murder in light of their true findings as to the felony murder special circumstances. (See *People v. Sanders* (1990) 51 Cal.3d 471, 509-10; *People v. Demetrulias* (2006) 39 Cal.4th 1.) Therefore, because both the robbery and burglary[177] felony murder and the conspiracy theory of murder liability were predicated on robbery, the error in withdrawing the contested "property of another" element of robbery in the jury instructions was reversible error as to the murder convictions. (*Neder v. United States, supra*, 527 U.S. 1; *People v. Flood, supra*, 18 Cal.4th 470.)[178]

b. The Burglary Conviction Should Be Reversed

The burglary conviction (Count 9; 4 CT 993-95) was predicated on the

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[176](...continued)
personally use a knife]; 4 CT 970 [jurors unable to find that appellant personally used the .38 handgun].)

[177] Entry with intent to commit robbery was an alternative theory of liability as to burglary. Therefore, because the verdicts do not demonstrate juror reliance on some other theory that was proper, the burglary and burglary-based verdicts should be reversed. (See Claim 10 § K, pp. 176-77, incorporated herein.)

[178] The prosecution's reliance on theories other than felony murder and co-conspiracy murder does not preclude reversal because it cannot be demonstrated that all jurors relied on a legally proper theory to convict appellant of murder. (See Claim 11, pp.190-91, fn. 176, incorporated herein.)

alternative theories of entry to "steal and take away someone else's property" or entry to commit "the crime of robbery or murder." (6 CT 1312.)[179] Therefore, removal of the contested "property of another" element from the definition of robbery was reversible error as to the burglary conviction because the verdicts do not demonstrate that no juror relied on the entry to commit robbery theory in voting to convict appellant of burglary. (See Claim 11, pp.190-91, fn. 176 and Claim 10 § K, pp. 176-77, incorporated herein.) To the contrary, the jurors' other verdicts all demonstrate that they likely relied on the robbery option to convict appellant of burglary. (See e.g., Counts 6, 7 & 8 [appellant convicted of substantive crime of robbery as to each adult victim] (4 CT 984-92); Count 10 [robbery found to be an object of the conspiracy] (CT 996-97); [robbery felony murder special circumstance found true as to Counts 1, 2 & 3] (4 CT 968; 972; 975.)

In sum, the record fails to demonstrate that no juror relied on the intent to rob option in convicting appellant of burglary.[180] Therefore, the failure to instruct on the contested "property of another" element of robbery was reversible error as to the burglary conviction.

c. The Conspiracy Conviction Should Be Reversed

The conspiracy conviction was based on the predicate objectives of robbery and burglary. (4 CT 996-97.) Hence, the omission of an essential

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[179] "[2. At the time of the entry, that person had the specific intent to steal and take away someone else's property, and intended to deprive the owner permanently of that property.]

[3. [handwritten in "Or"] At the time of the entry, that person had the specific intent to commit the crime of [handwritten in "robbery or murder"].] (6 CT 1311-12.)

[180] The jurors did not have to all agree on a single theory of burglary. (See Claim 10 § I, pp. 159-72, incorporated herein.)

contested element from the definition of robbery was reversible error as to the conspiracy conviction.[181] Robbery, as defined by the erroneous instruction, was obviously an improper predicate for the conspiracy conviction and conspiracy to commit burglary was also an improper predicate because it was alternatively defined in terms of intent to rob. (See Claim 10 § K, pp.176-77, incorporated herein.)

d. The Assault And Attempted Murder Convictions Should Be Reversed

The erroneous robbery instruction was also reversible error as to the attempted murder conviction. (Count 4; 4 CT 980-81.) This is so because the prosecution's theory as to the assault and attempted murder was based on vicarious liability premised on the allegation that appellant aided and abetted or conspired to commit robbery and/or burglary. (See Claim 16 § A, pp.241, herein.) Because both of those theories were legally flawed due to the withdrawal of a contested element from the definition of robbery, neither theory may be used to uphold the assault and attempted murder convictions.

e. The Special Circumstances Should Be Reversed

Because the error warrants reversal of the murder convictions, the special circumstance convictions should also be reversed. (See generally Penal Code § 190.2.)

f. The Error Was Cumulatively Prejudicial

Even if the failure to instruct on the property of another element of

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[181] The error also invalidated at least two of the alleged overt acts (Nos. 5 and 6) since they were predicated on the finding of an intent or plan to commit robbery. Hence, because the record does not disclose which overt act or acts the jurors found, submission of the erroneous robbery-based overt acts to the jurors was reversible error. (See Claim 11 § E(4), Claim 11, pp. 190-91, fn. 176, and Claim 10 § I(3), p. 165, fn. 148, incorporated herein.)

robbery was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with additional errors the judge committed – including but not limited to: failure to instruct on the intent to steal element (Claim 10); failure to instruct on claim of right (Claim 11); undermining appellant's defense theories (Claims 13 and 17-23), giving partisan instructions that favored the prosecution (Claims 24-28); diluting and misstating the prosecution's burden of proof (Claims 29-39); allowing the jurors to make up their minds about penalty before the penalty phase began (Claim 59); allowing the prosecutor to unduly emphasize certain inflammatory matters by use of an "audio-video slingshot" during closing argument at the penalty trial (Claim 60) – it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 12

THE JUDGE HAD A SUA SPONTE DUTY TO INSTRUCT ON CLAIM OF RIGHT

A. Overview

In Claims 10 and 11 above, appellant demonstrated that there is no need to decide whether a claim of right instruction should have been given since the instructional omission of two essential and contested elements of robbery independently warrants reversal. However, apart from the errors identified in Claims 10 and 11, the failure to instruct on the claim of right defense was also prejudicial error.

B. Instruction On Claim Of Right Is Required Sua Sponte When Warranted By The Evidence

"When a claim of right is supported by substantial evidence the trial court must instruct sua sponte on the defense." (CALCRIM 1863, Bench Notes, citing *People v. Creath* (1995) 17 Cal.4th 1044, 1145; see also *People v. Stewart* (1976) 16 Cal.3d 133, 138.) "[A] defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence [citation] – evidence sufficient for a reasonable jury to find in favor of the defendant [citation] – unless the defense is inconsistent with the defendant's theory of the case [citation]." (*People v. Salas* (2006) 37 Cal.4th 967, 982.)

"In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt . . . .' [Citations.]" (*People v. Salas*, *supra*, 37 Cal.4th at 982-983.) "[D]oubts as to the sufficiency of the evidence

to warrant instructions should be resolved in favor of the accused." (*People v. Marshall* (1996) 13 Cal.4th 799, 847; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1180, internal citations, punctuation and quotation marks omitted.)[182]

Whether there is substantial evidence to warrant a claim of right instruction turns on the evidence of the defendant's "subjective belief." (*People v. Tufunga, supra*, 21 Cal.4th at 944; see also *People v. Romo* (1990) 220 Cal.App.3d 514.) Hence, "the necessity of giving a claim-of-right instruction [should be evaluated] under the defendant's account of the events." (*People v. Tufunga, supra*; see also *People v. Barnett, supra*, 17 Cal.4th at 1145, fn. 69; *People v. Butler* (1967) 65 Cal.2d 569; *People v. Rosen* (1938) 11 Cal.2d 147.)[183] In other words, "if the defendant's version of the events was believed," could the jury have had a reasonable doubt that the defendant acted with the larcenous intent required by the robbery statute? (*People v. Tufunga, supra*, 21 Cal.4th at 944-45; see also *People v. Jeter* (1964) 60 Cal.2d 671, 674 ["however incredible the testimony of a defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true"]; *People v. Krantz* (1998) 67 Cal.App.4th 13, 24 ["defendant's testimony alone

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[182] Furthermore, in evaluating instructional error, the reviewing court must assume the jury could have believed the evidence of the party claiming error, if it rose to the level of substantial evidence. (See *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673-74; *Clement v. State Reclamation Bd.* (1950) 35 Cal.2d 628, 643-44; *Logacz v. Brea Community Hospital* (1999) 71 Cal.App.4th 1149, 1152; *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 298 [*Henderson/Clement* rule [that reviewing court must state the facts most favorable to the party alleging instructional error] is "the customary rule of appellate review"]; *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 322.)

[183] Of course, other evidence supporting the claim of right instruction should also be considered. (See *People v. Tufunga, supra*, 21 Cal.4th at 945.)

may constitute substantial evidence to warrant a requested instruction"]; *People v. Speaks* (1981) 120 Cal.App.3d 36, 40 ["the testimony of one witness, here, the defendant, may constitute substantial evidence. . ."].)

C. Instruction On Claim Of Right Was Required In The Present Case

1. Appellant's Account Of The Events Warranted A Claim Of Right Instruction

In the present case, appellant's account of the events evidenced a subjective belief that was inconsistent with larcenous intent, i.e., appellant thought he was helping Antonio Sanchez obtain his own property and, therefore, appellant did not intend to steal property belonging to the victims. (4 SCT 1036-39.) Hence, on this basis alone a claim of right instruction should have been given. (See *People v. Tufunga, supra*, 21 Cal.4th at 944-46; *People v. Jeter, supra*, 60 Cal.2d at 674.)

2. The Questionable Credibility Of Jose Luis Ramirez Corroborated Appellant's Account

Because the prosecution's allegation that appellant had larcenous intent depended primarily on the testimony of Jose Luis Ramirez, this witness' lack of credibility bolstered the defense theory that appellant acted without intent to steal. In other words, doubt about the credibility of Jose Luis Ramirez provided the jurors with a rational basis upon which to conclude that appellant did not intend to steal. (See *People v. Hill* (1998) 17 Cal.4th 800, 831 [jurors may be left with a reasonable doubt if they are "simply not persuaded by the prosecution evidence"].)

3. The Physical Evidence Further Corroborated Appellant's Account Of The Events

As the prosecutor suggested, the fact that the victim's house was rifled showed that "someone" was "looking for items" to take. (53 RT 10405.) This,

coupled with the fact that numerous items of value – including $378 in cash – were not taken, further corroborated appellant's claim that he only intended to take things that belonged to Antonio Sanchez. (Compare *People v. Tufunga*, *supra*, 21 Cal.4th at 945, fn. 2 [claim of right not available when defendant had "indiscriminately taken items of value"]; *People v. Waidla* (2000) 22 Cal.4th 690 [same].)

4. The Claim Of Right Instruction Should Have Been Given

In sum, appellant's account of the events – as corroborated by the questionable credibility of Jose Luis Ramirez, and the physical evidence – provided more than "minimal and insubstantial" evidence from which the jurors could rationally have been left with a reasonable doubt that appellant acted with intent to steal. (*People v. Tufunga*, *supra*, 21 Cal.4th at 945, fn. 2.) Accordingly, a claim of right instruction should have been given. (*Ibid.*)

D. Failure To Give A Claim Of Right Instruction Violated State Law And The Federal Constitution

Because the error both removed disputed factual issues from the jury and negated appellant's defense it violated the state and federal constitutions. (See generally *People v. Coria* (1999) 21 Cal.4th 868, 881; see also *People v. Beeman* (1984) 35 Cal.3d 547, 562 ["correct instruction on the element of intent was particularly important in this case because appellant's defense focused on the question of his intent more than on the nature of his acts"]; *People v. Pierson*, *supra*, 86 Cal.App.4th at 993-94 [failure to instruct on contested knowledge element was not harmless because the evidence was not "undisputed" and "overwhelming" and the defendant "was not allowed to present a full defense"].) Withdrawal of the claim of right defense violated the Due Process and Trial By Jury Clauses of the California Constitution (Article I, sections 7 and 15) and the federal constitution (5th, 6th and 14th

Amendments) as applied to California through the Incorporation Doctrine. (*Duncan v. Louisiana* (1968) 391 U.S. 145; see also *Tennessee v. Lane* (2004) 541 U.S. 509, 562.) Furthermore, the error also violated appellant's right to "a meaningful opportunity to present a complete defense. [Citations omitted.]" (*Holmes v. South Carolina, supra,* _____ U.S. _____ [126 S.Ct. 1727; 164 L.Ed.2d 503]; see also Claim 10 § H(2), pp. 157-58, incorporated herein.)

When an element which the defendant seeks to negate is omitted from the instructions the defendant's theory is nullified. (See e.g., *U.S. v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, 1414 [defendant has a due process right to have the jury consider defenses recognized by state law which negate elements of the defense].) Indeed, absent an appropriate instruction, the right to present evidence would be entirely meaningless. (*U.S. v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202 ["[p]ermitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal"]; see also *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-42 [same]; *People v. Cox* (1991) 53 Cal.3d 618, 695-96 [defendant has right to reasoned, considered judgment of the jury].)[184]

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[184] The error also violated the Trial by Jury and Due Process Clauses of the federal constitution upon which presumption of innocence is grounded. Under this presumption, a criminal defendant is presumed innocent unless and until the jury finds that every essential fact necessary to prove the charged crime and every element of the crime has been proved by the prosecution by a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466; *U.S. v. Gaudin* (1995) 515 U.S. 506; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-81; *Carella v. California* (1989) 491 U.S. 263, 265-66; *Sandstrom v. Montana* (1979) 442 U.S. 510; *In re Winship* (1970) 397 U.S. 358; *U.S. v. Voss* (8th Cir. 1986) 787 F2d 393; *People v. Hill* (1998) 17 Cal.4th 800; *People v. Figueroa* (1986) 41 Cal.3d 714.)

(continued...)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[185] The judge's erroneous failure to instruct on claim of right as to the robbery charge violated the above state law rules as well as the substantive California Constitutional

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[184](...continued)

Furthermore, because the error undermined the reliability of the jury's disposition of this case, reversal is required by the above provisions of the federal constitution. (See generally *Crawford v. Washington* (2004) 541 U.S. 36; *White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646; *Thompson v. City of Louisville* (1960) 362 U.S. 199, 204.

[185] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

and statutory rights identified in this claim. These arbitrary violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

1. The Error Was Reversible Because The Instructions Withdrew A Material Defense From The Jurors' Consideration

The failure to give an instruction upon a defense presented by substantial evidence is harmless only when the omitted issue is decided adversely to the defendant by the jury in another context. (*People v. Rivera* (1984) 157 Cal.App.3d 736, 743; see also *People v. Anderson* (1983) 144 Cal.App.3d 55, 63 [appellate court cannot cure the error in failing to instruct on a defense by weighing the evidence]; cf., *Holmes v. South Carolina*, *supra*, _____ U.S. _____ [126 S.Ct. 1727; 164 L.Ed.2d 503] [precluding defendant from presenting third party guilt defense warranted reversal].) In other words, an instruction that prevents the jury from considering the factual question raised by a defense theory cannot be considered harmless. (*People v. Baker* (1954) 42 Cal.2d 550, 575-76; *People v. Cameron* (1994) 30 Cal.App.4th 591 602; see also Claim 10 § H(2), pp. 157-58, incorporated herein [denial of federal constitutional right to a meaningful opportunity to present a complete defense].)

2. Alternatively The Error Was Prejudicial Under Harmless Error Analysis

a. The Guilt Trial Was Closely Balanced

A number of factors demonstrate that the guilt trial was closely balanced.

First, the crucial factual issues in the trial turned on a credibility contest

between appellant and the prosecution's accomplice witness, Jose Luis Ramirez whom the defense thoroughly and effectively discredited. (See Claim 10 § B(2), pp.141-46, and § D, pp.147-50, incorporated herein.) For this reason alone, it is fair to characterize the case as closely balanced. [186]

Second, the communications received from the jurors during deliberations further suggested that the case was close.[187] The jurors' request for a readback of testimony (54 RT 10601-03; 6 CT 1196), to view the exhibits (55 RT 10804; CT 1198), for additional sets of the written instructions (6 CT 1205; 1209), for a listing of the charged overt acts (55 RT 10801-02; 6 CT 1200), and for clarification of the jury instructions (56 RT 11001-03; 11007-18; 6 CT 1201-05) all reinforced the reasonable inference that this was far from an open and shut case. (See generally *People v. Guiton*, *supra*, 4 Cal.4th at 1130 [in deciding whether instruction on erroneous theory was harmless the

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[186] See e.g., *People v. Briggs* (1962) 58 Cal.2d 385, 404 [in a case which turns on the credibility of witnesses, anything which tends to discredit the defense witnesses in the eyes of the jury or to bolster the story told by the prosecution witness, "requires close scrutiny when determining the prejudicial nature of any error."]; *People v. Lopez* (2005) 129 Cal.App.4th 1508 [judgement reversed due to evidentiary error when the case was a credibility contest between the prosecution's witnesses and the defense witnesses]; *People v. Taylor* (1986) 180 Cal.App.3d 622, 626 [error requires reversal in "close case where credibility was the key issue"]; *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1151 [close case that boiled down to a battle over credibility]; *U.S. v. Carroll* (6th Cir. 1994) 26 F.3d 1380, 1384 [curative instruction not sufficient where conflicting testimony was virtually the only evidence]; *U.S. v. Simtob* (9th Cir. 1990) 901 F.2d 799, 806 [improper vouching for a key witness' credibility by the prosecutor in a close case]; *U.S. v. Bess* (6th Cir. 1979) 593 F.2d 749, 753 [close case in which credibility was the key issue]; *Van Buren v. State* (MN 1996) 556 N.W.2d 548, 551; *Cohn v. Meyers* (NY 1986) 509 N.Y.S.2d 603, 607 [125 AD2d 524].

[187] See Statement Of Case § C, pp.11-12, incorporated herein [juror notes].

reviewing court considers, inter alia, any communications from the jury]; *People v. Hernandez* (1988) 47 Cal.3d 315, 352-53 [absence of request for clarification cited a factor supporting harmless error finding]; *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852 [jury's request for additional instructions indicated that it was "troubled" by the issues addressed by those instructions]; *People v. Markus* (1978) 82 Cal.App.3d 477, 480 [147 CR 151] [request for further instruction indicated jury was giving serious consideration to the defense]; *Osborne v. United States* (8th Cir. 1965) 351 F.2d 111, 118 ["The fact that the jury deliberated some sixteen hours, covering two full working days, that they requested an additional exhibit and the re-reading of the instructions, lends credence to the view that the case was a close and a difficult one."].)[188]

Third, the special verdicts demonstrate that the jurors accepted, at least in part, the defense theory that the Jose Luis Ramirez was not credible. The jurors unanimously rejected Jose Luis Ramirez' testimony that appellant used a knife and they could not agree as to the witness' allegations that appellant used a firearm and conspired to commit murder. (See Statement Of Case § C, p. 11, incorporated herein.) It goes without saying that the jurors' rejection of

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[188] The fact that the jurors deliberated for approximately18 hours over four days should further reinforce the inference that the case was closely balanced. (See e.g., *In re Martin* (1987) 44 Cal.3d 1, 51; *People v. Cardenas* (1982) 31 Cal.3d 897; *People v. Rucker* (1980) 26 Cal.3d 368; *People v. Woodard* (1979) 23 Cal.3d 329; *People v. Collins* (1968) 68 Cal.2d 319.) However, this Court has been reticent to apply this analysis to the guilt phase of a capital trial. (See e.g., *People v. Taylor* (1990) 52 Cal.3d 719, 732; *People v. Cooper* (1991) 53 Cal.3d 771, 837;but see *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1140-41 [three days of penalty phase deliberations]; *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 932 [death case overturned in light of defense counsel's incompetence, a jury question, and one and a half days of juror deliberations].)

and/or failure to unanimously credit important parts of the key prosecution testimony reasonably demonstrates that the case was closely balanced. (See generally, *People v. Guiton*, *supra,* 4 Cal.4th 1116, 1130 ["In determining whether there was prejudice, the entire record should be examined, including the . . . entire verdict"]; *People v. Filson*, *supra*, 22 Cal.App.4th 1841, 1852 [jury was able to reach a verdict on only one of three charges]; *People v. Epps* (1981) 122 Cal.App.3d 691, 698 [evidentiary error was prejudicial where jury's verdict convicting on one count and acquitting on two others reflected a "selective belief in the evidence"]; see also CALJIC 2.21.2 (6 CT 1240) ["A witness who is willfully false in one material part of his or her testimony, is to be distrusted in others."]; CALJIC 2.20 (6 CT 1237-38) [untruthful or inconsistent statements by a witness are factors for the jurors to consider].)

b. The Error Was Substantial And Prejudicial

The failure to instruct on claim of right was devastatingly prejudicial to appellant because it both removed a central disputed factual issue from the jury's consideration and negated appellant's defense. (See *People v. Pierson*, *supra*, 86 Cal.App.4th at 993-94.) Accordingly, the error was substantial and should be viewed as prejudicial under the state standard (*People v. Watson* (1956) 46 Cal.2d 818) because – as discussed in § a, above – the case was closely balanced. (See *People v. VonVillas* (1992) 11 Cal.App.4th 175, 249.)

Moreover, under the *Chapman* test, which applies to such federal constitutional errors, the prosecution must demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) Because the prosecution cannot meet that burden here, the robbery convictions should be reversed.

Finally, because all of the jurors' verdicts could all have been founded on robbery-based theories of liability, they should also be reversed. (see pp.

Claim 10 § E(2), pp. 150-51, incorporated herein [robbery based theories of liability to all ten counts and felony murder special circumstances].)

E. The Error Was Cumulatively Prejudicial

Even if the failure to instruct on claim of right was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with additional errors the judge committed – including but not limited to: failure to instruct on the intent to steal element (Claim 10); failure to instruct on property of another element (Claim 11); undermining appellant's defense theories (Claims 13 and 17-23); giving partisan instructions that favored the prosecution (Claims 24-28); diluting and misstating the prosecution's burden of proof (Claims 29-39); allowing the jurors to make up their minds about penalty before the penalty phase began (Claim 59); allowing the prosecutor to unduly emphasize certain inflammatory matters by use of an "audio-video slingshot" during closing argument at the penalty trial (Claim 60) – it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo, supra,* 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIMS 13-16: ADDITIONAL ERRORS INVALIDATING THE NON-MURDER CONVICTIONS IN COUNTS 4-10 AND THE MURDER CONVICTIONS PREDICATED ON THOSE COUNTS

CLAIM 13

THE ROBBERY AND RELATED CONVICTIONS SHOULD BE REVERSED BECAUSE THE JUDGE FAILED TO REQUIRE JUROR UNANIMITY AS TO WHICH ALLEGED TAKING CONSTITUTED ROBBERY

A. Overview

Even if the robbery and related verdicts are not reversed under Claims 9-11 above, they should also be reversed under the well established law of juror unanimity as articulated by this Court in *People v. Davis* (2005) 36 Cal.4th 510, 563.

The prosecution presented evidence of four discrete takings, any one of which could have been the basis for convicting appellant of robbery. However, because the prosecutor did not elect a specific taking and the judge failed to require juror unanimity as to a single taking, the robbery conviction – and the other counts which were based on robbery – should be reversed.

B. Prosecutorial Election Or A Unanimity Instruction Is Required When There Are Multiple Takings Alleged As The Basis For A Robbery Allegation

"It is fundamental that a criminal conviction requires a unanimous jury verdict. [Citations].)." (*People v. McNeill* (1980) 112 Cal.App.3d 330, 335.) What is required is that the jurors unanimously agree defendant is criminally responsible for "one discrete criminal event." (*People v. Davis* (1992) 8 Cal.App.4th 28, 41.) "[W]hen the accusatory pleading charges a single criminal act and the evidence shows more than one such unlawful act, either the prosecution must select the specific act relied upon to prove the charge or

the jury must be instructed in the words of CALJIC 17.01 or 4.71.5 or their equivalent that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act." (*People v. Gordon* (1985) 165 Cal.App.3d 839, 853, fn. omitted, original italics; see also *People v. Thompson* (1995) 36 Cal.App.4th 843, 854.)

When robbery is charged the defendant is entitled to a unanimity instruction where the evidence discloses "two distinct takings." (*People v. Davis, supra*, 36 Cal.4th at 563; see also *People v. Sapp* (2003) 31 Cal.4th 240, 283; *People v. Beardslee* (1991) 53 Cal.3d 68, 93 [unanimity instruction is required if the jurors could disagree which act a defendant committed and yet convict him of the crime charged]; *People v. Diedrich* (1982) 31 Cal.3d 263, 280-282.)

However, no unanimity instruction is required (or, if required, is not prejudicial) when "the defendant offered the same defense to both acts constituting the charged crime, so no juror could have believed defendant committed one act but disbelieved that he committed the other, or, . . .'there [is] no evidence . . .from which, the jury could [find] defendant [is] guilty of' the crime based on one act but not the other. [Citation.]" (*People v. Davis, supra*, 36 Cal.4th at 562.)

C. In The Present Case There Were Four Distinct Takings Alleged

The jurors could have based their robbery verdict – and the other counts predicated on robbery or intent to rob – on any or all of the following takings:

1. VCR and stereo equipment that Jose Luis Ramirez said he put in the trunk of the car. (41 RT 8019-20.)

2. .32 handgun that Ramirez said Antonio Sanchez gave him inside the Morales residence. (41 RT 8022-23; 42 RT 8238-39.)

3. Two handguns Ramirez said appellant took out of the locked box in

the kitchen. Appellant allegedly kept one and put the other in Antonio Sanchez' pocket. (41 RT 8025-33.)

4. The gold necklace and hair oil that Ramirez took from the night-stand in the bedroom and carried with him when he fled from the Morales residence. (41 RT 8044-45; 44 RT 8635-37.)

D. The Failure To Require Unanimity Was Prejudicial Error Because The Evidence And Defenses Were Different As To Each Taking

Failure to require unanimity as to distinct takings offered to prove a charge of robbery is prejudicial error where there is evidence from which the jury "could have found defendant guilty of robbery based on [one act] but not [the other]." (*People v. Davis*, *supra*, 36 Cal.4th at 563; compare *People v. Riel* (2000) 22 Cal.4th 1153, 1199-1200 [no juror could have believed defendant committed one act but not the other]; *People v. Carrera* (1989) 49 Cal.3d 291, 311-312 [same].)

Here the record contained variations in the evidence and defenses as to the various alleged taking incidents; these variations meant that jurors could rationally have disagreed about the basis for the robbery conviction.

1. Some Acts Were Corroborated By Physical Evidence While Others Were Not

Evidence as to the acts varied as to nature and quality. For example, there was no corroborating physical evidence concerning the alleged taking of the VCR and stereo equipment by Jose Luis Ramirez and the handguns by appellant. To believe those takings actually happened, the jury had to rely solely on the testimony of Ramirez which the defense vigorously impeached and which the jury found to be not credible as to other specific allegations. (See Claim 10 § B(2), pp.141-46, and § D, pp.147-50, incorporated herein.) On the other hand, the takings of the .32 handgun, the necklace and the hair oil

were corroborated by independent witnesses who saw Ramirez with those items shortly after the murders. (See 44 RT 8630-37.)

2. As To The Alleged Taking Of The Handguns By Appellant Ramirez Made Multiple Inconsistent Statements To The Police And Admitted That He Deliberately Lied To The Police

Ramirez testified that he saw appellant take two handguns and put one in Antonio Sanchez' pocket. However, he deliberately lied when he told the police he was looking through the window when he saw appellant take the guns; he later testified that he actually saw appellant with the guns through the partially open door. (42 RT 8217-18.) Furthermore, his testimony regarding how many guns appellant took and what he did with them was inconsistent with his statements to the police. (See Claim 10 § B(2)(b), pp.143-47, incorporated herein.) In light of the above inconsistencies, some jurors could have rejected the alleged taking of the handguns as a basis for robbery and instead relied on the taking of the VCR etc., and/or the taking of the necklace and hair oil. Indeed, the fact that the jurors could not agree as to the allegation that appellant used a .38 handgun (see Statement Of Case § C, pp.11-12, incorporated herein) suggests that one or more jurors did not believe Jose Luis Ramirez' testimony about seeing appellant with the guns.

3. The Evidence Provided A Different Defense To The Taking Of The Necklace And Hair Oil

Based on appellant's video statement and the fact that many items of value – including $378 in cash – were not taken, the jurors could have had a reasonable doubt about whether appellant intended to take the victims' property. (See Guilt Phase: Statement Of Facts § E(3), pp. 30-31, incorporated herein.) Although lack of intent to take the victims' property was not a defense under the instructions (see Claims 10-12, herein), the jurors could still

have relied on this notion to conclude that Ramirez was acting independently when he took the necklace and hair oil.[189] Such a conclusion would also have been corroborated by appellant's video statement denying an intent to aid and abet in the looting by Jose Luis Ramirez. (See 4 SCT 1037.) Thus, the jurors could have found that the taking of those items could not be the basis for finding appellant guilty as an aider and abettor.

Furthermore, according to his testimony, Jose Luis Ramirez had already left when Ramon and Martha Morales were shot. Therefore, the jurors could also have rejected Ramirez' taking of the necklace and hair oil as the basis for the robberies charged with respect to Ramon Morales (Count 6) and Martha Morales (Count 7). (See 6 CT 1202 [Juror note asking "If property is taken from a place before a person arrives is it robbery or burglary or both?"].)[190]

E. The Error Violated The Federal Constitution

The erroneous omission of a unanimity instruction is a violation of the Due Process Clauses of the California and federal constitutions. (See *People v. Deletto* (1983) 147 Cal.App.3d 458, 471-72; see also *People v. Brown* (1996) 42 Cal.App.4th 1493, 1501-02; *People v. Thompson* (1995) 36 Cal.App.4th 843, 853.) "[S]ubstantial agreement on a discrete set of actions is essential to insure that the defendant is guilty beyond a reasonable doubt of some specific illegal conduct." (*U.S. v. Edmonds* (3d Cir. 1996) 80 F.3d 810, 819; *U.S. v. Echeverri* (3rd Cir. 1988) 854 F.2d 638.)

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[189] Defense counsel so argued, emphasizing that the hair oil was the brand Ramirez used. (52 RT 10271.)

[190] The judge responded to this note by re-reading robbery and burglary instructions including the definition of immediate presence. (56 RT 11003-06.)

As explained in *People v. Smith* (2005) 132 Cal.App.4th 1537, 1545:

> "Federal due process requires that before one can be convicted of a crime the prosecution must convince a jury that the evidence establishes the defendant's guilt of the crime beyond a reasonable doubt. [Citing *In re Winship* (1970) 397 U.S. 358 [90 S.Ct. 1068; 25 L.Ed.2d 368].] If a jury ... is permitted to amalgamate evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt to all of the jurors required to agree on the verdict, the prosecution's burden is lessened and defendant is denied due process. [Footnote omitted.] Such significant lessening of the prosecution's burden of proof compels reversal unless we are able to declare a belief that it was harmless beyond a reasonable doubt."

Furthermore, the common-law underpinnings of the unanimity rule are a basis for finding that the rule is embraced within the due process provisions of the 14th Amendment. As recognized by the United States Supreme Court, the courts should look to the common law to determine whether the defendant has a vested due process right in a particular defense. (See *Montana v. Egelhoff* (1996) 518 U.S. 37 [plurality opinion]; see also *Schad v. Arizona* (1991) 501 U.S. 624.)

"The applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case . . ." (*Patterson v. New York* (1977) 432 U.S. 197, 211, fn. 12 [53 L.Ed.2d 281; 97 S.Ct. 2319].) "However, once state law has defined what constitutes a single instance of a crime – the unit of prosecution – the federal Constitution requires proof beyond a reasonable doubt that the defendant committed *that crime*." (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 186.)

"When the trial court erroneously fails to give a unanimity instruction, it allows a conviction even if all 12 jurors (as required by state law) are not convinced that the defendant is guilty of any one criminal event (as defined by

state law)." (*People v. Wolfe, supra*, 114 Cal.App.4th 177-188.) This lowers the prosecution's burden of proof and therefore violates federal constitutional law. (See *Rose v. Clark* (1986) 478 U.S. 570, 579 [106 S.Ct. 3101; 92 L.Ed.2d 460]; *Francis v. Franklin* (1985) 471 U.S. 307, 326 [105 S.Ct. 1965; 85 L.Ed.2d 344]; *Sandstrom v. Montana* (1979) 442 U.S. 510, 521 [99 S.Ct. 2450; 61 L.Ed.2d 39].)

Moreover, the Due Process Clause of the federal constitution requires juror unanimity as to every element of the charged offense.(See *U.S. v. Fawley* (7th Cir. 1998) 137 F.3d 458 [due process requires juror unanimity as to every element of the charge]; see also *Richardson v. U.S.* (1999) 526 U.S. 813; *McKoy v. North Carolina* (1990) 494 U.S. 433, 445 (Blackmun, concurring) [there is no general requirement that the jury reach unanimous agreement on the preliminary factual issues, but there is a general consensus among the federal circuits that there must be substantial agreement as to the principle factual elements underlying a specified offense]; *U.S. v. Duncan* (6th Cir. 1988) 850 F.2d 1104.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court

has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[191] The judge's erroneous failure to require juror unanimity as to the robbery charge violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These arbitrary violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

For all of the above reasons, the failure of the instructions in the present case to require juror unanimity as to which property was stolen violated appellant's state and federal due process principles.

F. The Error Was Prejudicial

Because the prosecutor failed to elect among the four alleged takings, the jurors were permitted to make that election themselves. And, the takings were not "substantially similar in nature" (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184), the potential defenses to the acts were different (*People v. Davis*, *supra*, 36 Cal.4th at 563) and there was evidence from which the jurors could have found some acts and not others. (*Ibid.*) Accordingly, the robbery convictions should be reversed.

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[191] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

Additionally, the other charges should also be reversed because the jurors could have convicted appellant of those other charges under theories predicated on commission of robbery. (See e.g., *People v. Faila* (1966) 64 Cal.2d 560 [failure to instruct on a contested element of a predicate offense is reversible as to all convictions which are based on that predicate]; compare *People v. Cash* (2002) 28 Cal.4th 703.) For example, as to felony murder there is "a requirement of proof beyond a reasonable doubt of the underlying felony. [citation]" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1085; see also *In re Nourn* (2006) 145 Cal.App.4th 820 [duress is a defense to felony murder if it negates the underlying felony].) Therefore, the failure to require juror unanimity was prejudicial as to the murder and felony murder special circumstance verdicts.[192] Furthermore, the error was prejudicial as to the conspiracy verdict because conspiracy requires juror unanimity as to the object of the conspiracy. (*People v. Russo* (2001) 25 Cal.4th 1124.) Finally, the error was prejudicial as to the assault and attempted murder verdicts because the natural and probable consequences doctrine which required a completed robbery or burglary as the target offense. (See *People v. Prettyman* (1996) 14 Cal.4th 248.)

Additionally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty. This is so because the error was substantial and the penalty trial was closely balanced. (See Claim 59 § G(2), pp. 550-51[close balance of penalty trial].) Therefore, the prosecution cannot demonstrate that the error was harmless beyond a reasonable doubt under the federal standard or that the error was harmless under the "any reasonable possibility" state

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[192] The availability of the burglary felony murder theory cannot cure the error because that theory was also legally erroneous under *People v. Ireland* (1969) 70 Cal.2d 522. (See Claim 14, pp. 216-21, herein.)

standard. (See Claim 58 § G(1), pp. 148-50[standards of prejudice for penalty] incorporated herein.)

CLAIM 14

THE BURGLARY, FIRST DEGREE MURDER AND BURGLARY SPECIAL CIRCUMSTANCE SHOULD BE REVERSED DUE TO *IRELAND* ERROR

A. Overview

The jury was instructed – and the prosecutor argued – that appellant could be convicted of burglary, first degree felony murder and the burglary felony murder special circumstance based on entry of the residence with an intent to commit murder. (6 CT 1311-12 [written instruction (CALJIC 14.50)]; 53 RT 10465-66 [oral instruction]; 52 RT 10231, 10254 [prosecutor argument].) This was a legally erroneous theory of burglary and felony murder under the long established *Ireland* doctrine. (*People v. Ireland* (1969) 70 Cal.2d 522, 539.) And, because the record does not demonstrate juror reliance on any other legally valid theory of burglary and felony murder, all the burglary-based verdicts should be reversed.

B. The Law

Entry with intent to kill or murder is an invalid theory of murder under the "merger doctrine" first articulated in *People v. Ireland, supra*, 70 Cal.2d 522, 539, which prohibits a felony-murder conviction predicated on the crime of assault or assault with a deadly weapon. (See also *People v. Wilson* (1969) 1 Cal.3d 431, 436-442 [extending the merger doctrine to first-degree felony-murder, where the underlying felony was based on burglary with the intent to assault with a deadly weapon].) This Court has also found that the merger doctrine prohibits a felony-murder conviction based on burglary in a case where at the time of entry the perpetrator had the specific intent to commit murder. (*People v. Garrison* (1989) 47 Cal.3d 746, 778, citing *People v. Ireland, supra*, and *People v. Wilson, supra*.)

C. In The Present Case The Burglary Instruction Erroneously Allowed Conviction Of Burglary Based On Entry With Intent To Murder

In the present case, the burglary instruction erroneously included a theory of guilt which violated the merger doctrine because the jury was allowed to convict based on an "intent to commit murder."[193] Moreover, the prosecutor specifically relied on entry with intent to murder as a theory of burglary.[194]

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[193] The jurors were instructed as follows:

> Every person who enters any building with the specific intent to steal, take away, carry away the personal property of another of any value and with the further specific intent to deprive the owner permanently of that property or with the specific intent to commit robbery or murder is guilty of the crime of burglary in violation of Penal Code Section 459.
>
> A building is a structure.
>
> It does not matter whether the intent with which the entry was made was thereafter carried out.
>
> In order to prove this crime, each of the following elements must be proved:
>
> One, a person entered a building.
>
> And two, at the time of the entry that person had the specific intent to steal and take away someone else's property, and intended to deprive the owner permanently of that property. Or at the time of the entry, that person had the specific intent to commit the crime of robbery or murder. (53 RT 10465-66.)

[194] "So there's two elements. Entering a structure with the intent to steal or entering the structure with the intent to commit a felony; in this case, murder." (52 RT 10231:11-14.)

. . .

"Remember, burglary is an unlawful entry with an intent to commit, to steal something when you're inside, or to commit

(continued...)

D. The Error Violated State Law And The Federal Constitution

By allowing conviction of appellant for burglary based on the invalid intent to murder theory the instructions violated the federal constitution by failed to require a jury finding as to an essential element of the charges. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466; *In re Winship* (1970) 397 U.S. 358; *People v. Figueroa* (1986) 41 Cal.3d 714.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[195] The judge's

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[194](...continued)

> another felony. In this case, it could be murder." (52 RT 10254:2-5.)
>
> . . .
>
> "There also was an intent to commit murder." (52 RT 10254:27-27.)

[195] Thus, under California law "it is the duty of the trial judge to see that a case (continued...)

erroneous instruction defining burglary as an entry with intent to commit murder violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. This arbitrary violation of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

E. The Error Was Prejudicial

The burglary conviction should be reversed due to the erroneous instruction because the record does not show juror reliance on a proper theory of burglary. (See *Sandstrom v. Montana, supra,* 442 U.S. at 526; *People v. Perez* (2005) 35 Cal.4th 1219, 1232-34; *People v. Swain* (1996) 12 Cal.4th 593, 607.)[196] It is true that intent to rob was one of the alternative theories of burglary and it is also true that the jurors specially found appellant guilty of conspiracy to commit robbery.[197] However, as discussed in Claims 10-13, above, robbery was not a valid theory due to fatal instructional defects.

Moreover, even if robbery had been defined correctly, the only evidence

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[195](...continued)
is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

[196] The jurors did not need to agree on the predicate for burglary. (See Claim 10 § I(3), p. 165, fn. 148, herein.)

[197] The jurors could not agree on the special allegation that an objective of the conspiracy was to murder. Thus, this special verdict does not cure the *Ireland* error because one or more jurors presumably did find an intent to murder.

of an intent to "rob" before the entry came from the accomplice-witness Jose Luis Ramirez whose credibility was suspect. (See Claim 10 § B(2), pp.141-46, and § D, pp.147-50, incorporated herein.) Thus, the jurors could rationally have concluded that appellant did not join the conspiracy to rob until after the entry as suggested by the jurors' question about joining a conspiracy after its formation.[198]

In sum, the verdicts do not demonstrate exclusive juror reliance on any valid theory of burglary. Accordingly, the *Ireland* error warrants reversal of the burglary convictions.

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[198] On September 8, 1998 – after four days of deliberation – the jurors sent out a note asking: "Is a person guilty [of conspiracy] if he was not one of the 2 or more person(s) that made the agreement to conspire." [emphasis by jurors] (6 CT 1216.) The judge, after discussion with counsel, responded by reading CALJIC 6.19 ["Joining Conspiracy After Its Formation"] to the jurors. (56 RT 11009-12.) The jurors subsequently sent out a note requesting a written copy of CALJIC 6.19. (6 CT 1205; see also 6 CT 1327 copy of 6.19 included in written set of instructions in Clerk's Transcript].)

The version of CALJIC 6.19 given to the jurors provided as follows:

> Every person who joins a conspiracy after its formation is liable for and bound by the acts done and declarations made by other members in pursuance and furtherance of the conspiracy during the time that [he] [she] is a member of the conspiracy.
>
> A person who joins a conspiracy after its formation is not liable or bound by the acts of the co-conspirators or for any crime committed by the co-conspirators before that person joins and becomes a member of the conspiracy.
>
> [Evidence of any acts done or declarations made by other conspirators prior to the time that person becomes a member of the conspiracy may be considered by you in determining the nature, objectives and purposes of the conspiracy, but for no other purpose.] (6 CT 1327.)

Moreover, the jurors' burglary felony murder verdict demonstrates that they relied on this theory to convict appellant of first-degree murder. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 24-5 ["The robbery-murder special-circumstance finding also dictated a finding of first degree felony murder under section 189 and the corresponding felony-murder instruction . . ."]; *People v. Sanders* (1990) 51 Cal.3d 471, 509-10 [same].) Therefore, the murder convictions should be reversed because the verdicts do not demonstrate juror reliance on a proper theory of first-degree murder. (*Sandstrom v. Montana*, *supra*, 442 U.S. at 526; *People v. Swain*, *supra*,12 Cal.4th at 607; see also Claim 11, pp.190-91, fn. 176, incorporated herein.)[199]

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty. This is so because the error was substantial and the penalty trial was closely balanced. (See Claim 59 § G(2), pp.550-51, incorporated herein [close balance of penalty trial].) Therefore, the prosecution cannot demonstrate that the error was harmless beyond a reasonable doubt under the federal standard or that the error was harmless under the "any reasonable possibility" state standard. (See Claim 59 § G(1), pp.548-50, incorporated herein [standards of prejudice for penalty].)

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[199] See Claims 10-13 and 15 for multiple reasons why robbery felony murder and conspiracy to commit robbery were legally erroneous.

CLAIM 15

THE CONSPIRACY CONVICTION SHOULD BE REVERSED BECAUSE THE JUDGE ERRONEOUSLY ADMITTED HEARSAY TO PROVE THE VEHICULAR ARSON WHICH WAS THE PREDICATE FOR TWO OF THE CHARGED OVERT ACTS

A. Introduction

Two of the overt acts charged in support of the conspiracy count were based on an alleged arson of a vehicle owned by Juan Martinez Avalos. (6 CT 1329, Overt Acts No. 3 and 4.)[200] The prosecution established, through the properly admissible testimony of Juan Martinez Avalos, that his truck was burned in the early morning hours of November 16, 1994. (Guilt Phase: Statement Of Facts § B(6), p. 24, incorporated herein.) However, no admissible evidence was presented which connected appellant, Antonio Sanchez and/or Joaquin Nuñez with the truck arson. The only evidence from which the jurors could reasonably have inferred the alleged connection was the inadmissible hearsay testimony of D.A. investigator Richard Moore. Moore was allowed to testify, over defense objection, that (1) Avalos told him he

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[200] The information alleged:

> OVERT ACT NO. 3: On or about November 15, 1994, Francisco Antonio Sanchez, Daniel Sanchez Covarrubias, and Joaquin Nuñez **committed an arson for hire and received $100 for committing the arson.**
>
> OVERT ACT NO. 4: On or about November 16, 1994 Francisco Antonio Sanchez, Daniel Sanchez Covarrubias, Joaquin Nuñez, and Jose Luis Ramirez drove to JKD Shooting Sports in the City of Salinas to purchased (**with the $100 received from the arson**) ammunition and supplies for the rifles to be used in the residential robbery, burglary and killing at the Morales residence at 1022 East Market Street in the City of Salinas. [Emphasis added.] (6 CT 1329, Overt Act No. 3 and 4.)

suspected the party responsible for the arson resided in Trailer 35 at the 101 Trailer Park and (2) Jose Luis Ramirez identified Trailer 35 as the one where Antonio Sanchez obtained the $100 used to buy ammunition. These out-of-court identifications by Avalos and Jose Luis Ramirez should have been excluded because they were hearsay assertions improperly admitted for the truth of the matter asserted. Thus, the arson-based overt acts were legally erroneous theories of conspiracy and, because the record fails to show juror reliance on a valid overt act, the conspiracy conviction should be reversed. Furthermore, the error was prejudicial as to all the other convictions.

B. Procedural And Factual Background

In the early morning hours of November 16, 1994, Juan Martinez Avalos' produce truck was set on fire.[201] Avalos did not know who burned his truck. However, he had parted on bad terms with his business partner, Angel Martinez, who lived with his wife in the 101 Trailer Park in North Salinas. (RT 8486-91.) Avalos reported the fire to the police. (RT 8492.)

Jose Luis Ramirez told investigator Richard Moore that on November 16, 1994 Antonio Sanchez picked up a $100 bill from the 101 Trailer Park in payment for burning a vehicle the night before. (RT 8495-96.)[202] In response to Ramirez' statement, Moore had Ramirez show him the trailer where Antonio Sanchez had obtained the $100. (43 RT 8498-99; see also 40 RT 7852.) Moore testified that Ramirez identified Trailer 35. (*Ibid.*)

Moore also testified that Avalos identified the trailer where Angel Martinez and his wife lived. According to Moore, Avalos identified the same

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[201] In the police report Avalos was referred to as Martinez. (43 RT 8498.)

[202] However, this testimony was <u>not</u> admitted for the truth of the matter asserted. (43 RT 8494-96.)

trailer, Number 35, which Ramirez had identified. (43 RT 8499-8500.)

Hence, Moore's testimony linked Antonio Sanchez (and appellant) with the arson of Avalos' truck because: (1) Jose Luis Ramirez identified Trailer 35 as the one where Antonio Sanchez obtained the $100 and (2) Avalos identified the same Trailer 35 as the residence of his produce partner, Angel Martinez, with whom Avalos had parted on bad terms. The prosecution relied on this evidence to allege that Angel Martinez had hired Antonio Sanchez to burn Avalos' truck.

However, as demonstrated below, Moore's testimony regarding the out-of-court identifications of Trailer 35 by Ramirez and Avalos was inadmissible hearsay. Hence, the two arson-based overt acts were legally erroneous. The jurors' consideration of this hearsay led to a capital verdict on an improper basis, as the evidence was also available to jurors at the penalty trial.

C. The Hearsay Objections To The Identifications Of Trailer 35 Should Have Been Sustained

Moore's testimony as to the out-of-court identifications of Trailer 35 by Avalos and Jose Luis Ramirez was inadmissible hearsay. As defense counsel noted in his hearsay objection, by "pointing" to a specific trailer, Avalos was "communicating." The colloquy as to Avalos was as follows:

> [D.D.A. Lombardo:] Did you ask Mr. [Avalos] if he knew anyone that lived at the 101 Trailer Park?
> [Moore:] Yes, I did.
> [Lombardo:] Did you take [him] to the 101 Trailer Park?
> [Moore:] Yes, I did.
> [Lombardo:] Did he point out any trailers in that park as being trailers that he knew people that lived there?
> [Defense Counsel West:] **Objection; calls for hearsay.**
> THE COURT: **Overruled.**
> [Moore:] Yes, he did.
> [Lombardo:] And which trailer did he point out to you?
> [West:] **Objection; that's hearsay. That's communicating.**

THE COURT: **Overruled.**
[Moore:] I believe it was trailer number 35.
[Lombardo:] Was this the same one that Jose Luis Ramirez had pointed out to you as being where they collected the $100?
[West:] **Objection; hearsay.**
THE COURT: **Overruled.**
[Moore:] That's correct. [Emphasis added.] (43 RT 8499:13-8500:8.)

The colloquy as to Jose Luis Ramirez was as follows:

[Moore:] Mr. Ramirez told me that he was with his uncles and cousins when they went to a trailer park to pick up some money.
[Lombardo:] Did he tell you what the money was related to?
[Moore:] I believe it was in reference to a burning of a car in Salinas.
[Lombardo:] Did he tell you when this vehicle was supposed to have been burned?
[Moore:] Some time in the evening just prior to the triple homicide.
[Lombardo:] What did you do to follow up on this?
[Moore:] I took Mr. Ramirez in my vehicle and had him point out the trailer park and trailer where they had all gone prior to the homicides.
[Lombardo:] And this is the trailer where he told you they collected some money?
[Moore:] That's correct.
[Lombardo:] Did he tell you how much was collected there?
[Moore:] I believe it was $100.
[Lombardo:] Was Jose Ramirez able to point out to you a location where the $100 was collected?
[Moore:] Yes, he did.
[Lombardo:] What was that location?
[Defense Counsel West:] **Hearsay. Objection; hearsay.**
THE COURT: **Overruled.**
[Moore:] I believe it was trailer space number 35 at the trailer park at 101 Trailer Park in Salinas. [Emphasis added.] (43 RT 8496-97.)

Because Investigator Moore was relating assertive out-of-court

communications by both Avalos and Jose Luis Ramirez and the communication was considered for the truth of the matter asserted – indeed, the prosecution alleged no non-hearsay grounds for admitting it – the testimony was inadmissible hearsay:

> Acts such as . . . pointing to an object for identification . . . are equivalent to verbal statements and are equally subject to the hearsay rule when an attempt is made to prove them by the testimony of the witness. (Witkin, *California Evidence*, (4th Ed. 2000) § I(D)(4), p. 686; see also Imwinkelried and Hallahan, *California Evidence Code Annotated* (2005), pp. 281-84; *In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1126-27;[203] see also *Crawford v. Washington* (2004) 541 U.S. 36 [admission of hearsay without cross-examination violates the Sixth Amendment right to confrontation].)

In sum, the arson-based overt acts were "legally erroneous" because they were founded on inadmissible evidence. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1122 [theory "infected by prejudicial error such as inadmissible evidence . . ." is legally erroneous]; see also *People v. Green* (1980) 27 Cal.3d 1, 69.) Allowing the jury to convict appellant of conspiracy based on this legally erroneous theory was prejudicial error. (See Section D, below.) Such a conviction, in turn, improperly weighed, at penalty phase, toward a death verdict. The jurors' consideration of the improperly admitted evidence in weighing was also likely enhanced by the reporter of this communication – a police officer. Even though the evidence for conspiracy was improper, jurors were likely to give great weight based on the nature of the witness.[204]

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[203] This is also made clear by the definition of "statement" in Evidence Code § 225 to include "non-verbal conduct of a person intended by him as a substitute for oral or written verbal expression."

[204] The courts have recognized the danger that jurors will give greater weight (continued...)

D. The Error Violated State Law And The Federal Constitution

Due to the judge's error appellant may have been convicted of arson based on an overt act which was not proved beyond a reasonable doubt by legally sufficient evidence. Such a result violated appellant's state (Art 1, sections 7 & 15) and federal (6th and 14th Amendments) constitutional rights to due process and trial by jury. (*Apprendi v. New Jersey* (2000) 530 U.S. 466; (*In re Winship* (1970) 397 U.S. 358; *Jackson v. Virginia* (1979) 443 U.S. 307; *People v. Figueroa* (1986) 41 Cal.3d 714.)

The state and federal Due Process Clauses also protect a party from inflammatory and prejudicial matters that affect the fundamental fairness of the proceedings. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Dawson v. Delaware* (1992) 503 U.S. 159, 166-68; *Chambers v. Florida* (1940) 309 U.S. 227, 236-237; *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; *People v. Jones* (1996) 13 Cal.4th 535, 585; *People v. Olivas* (1976) 17 Cal.3d 236, 250; *People v. Sam* (1969) 71 Cal.2d 194, 206.) And the erroneous admission of other crimes evidence undermines fundamental fairness. (*People v. Alcala* (1984) 36 Cal.3d 604,

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[204](...continued)
to the testimony of law enforcement witnesses. (See *People v. Hill* (1998) 17 Cal.4th 800, 842-43 ["[T]he court should have instructed the jury sua sponte not to give [the officer's] testimony any artificial weight merely because he was a bailiff. . . . The trial court should have avoided these problems by . . . instructing the jury to give [the officer's] testimony no extra weight"]; *Espinoza v. Superior Court* (1994) 28 Cal.App.4th 957, 964 ["The trial court also has the option of providing, at the parties' request, further safeguards by way of voir dire, admonishment, or special instructions to jurors concerning how to view testimony of sheriff's deputy witnesses, and on jurors' "arms' length" relations with bailiffs"]; cf., *People v. Zambrano* (2004) 124 Cal.App.4th 228 [it is prosecutorial misconduct to ask a defendant whether the police officer witnesses are lying].)

631, citations omitted; see also, *People v. Holt* (1984) 37 Cal.3d 436, 451; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395.) Hence, by erroneously allowing evidence as to the arson of Avalos' truck, the judge violated appellant's federal constitutional due process rights under the Fourteenth Amendment. (See *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-85; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; see also *State v. Hawk* (Tenn. Crim. App. 1985) 688 S.W.2d 467, 474.)

The error also abridged appellant's rights under the Confrontation Clause (6th and 14th Amendments) of the federal constitution. (See *Crawford v. Washington, supra,* 541 U.S. 36; see also *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 973-974; *Sherley v. Seabold* (6th Cir. 1991) 929 F.2d 272; *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545, 548; *Gaines v. Thieret* (7th Cir. 1988) 846 F.2d 402, 405; *Ellison v. Sachs* (4th Cir. 1985) 769 F.2d 955; *United States v. Chu Kong* (9th Cir. 1991) 935 F.2d 990.)

In addition, the error violated the Cruel and Unusual Punishment and Due Process Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial.

[Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[205] The judge's erroneous failure to exclude inadmissible hearsay evidence under California Evidence Code Sections 225 and 1200 violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. This arbitrary violation of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

E. Under The *Green/Guiton* Rule The Error Was Prejudicial As To The Conspiracy Conviction

1. There Is No "Principled Way" To Determine Which Overt Act Or Acts The Jurors Found

The essential elements of the conspiracy charged in Count 10 included the commission of an overt act which furthered the objective of the conspiracy. (*People v. Russo* (2001) 25 Cal.4th 1124, 1131.) "No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement . . . ." (Penal Code § 184; *People v. Russo, supra*, 25 Cal.4th at 1131; *People v. Morante* (1999) 20 Cal.4th 403, 416.) In short, "the overt act requirement

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[205] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

is an element of conspiracy. [Citations.]" (*People v. Russo, supra*, 25 Cal.4th at 1134.)[206]

In the present case the jurors were instructed that they must find at least one of the six charged overt acts.[207] However, two of those six overt acts were legally erroneous as discussed above.[208]

Hence, the judgment should be reversed because the record demonstrates that no juror relied upon the erroneous overt acts. (*People v. Guiton, supra*, 4 Cal.4th at 1122; *People v. Green, supra*, 27 Cal.3d at 69; see also *Sandstrom v. Montana* (1979) 442 U.S. 510, 526; *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664; *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234, 1237-38.) In other words, there is no "principled way . . . to determine which [overt act or acts] the jury adopted. . . ." (*People v. Guerra* (1985) 40 Cal.3d 377, 387-88.)

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[206] However, the jurors do not have to unanimously agree as to any one of the charged overt acts. (*Id.* at 1135-37.)

[207] "In order to find a defendant guilty of conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one of the acts alleged in the information to be overt acts and that the act committed was an overt act. It is not necessary to the guilt of any particular defendant that defendant personally committed the overt act if [he] [she] was one of the conspirators when the alleged overt act was committed." (6 CT 1263, ¶ 2; 53 RT 10439-40.)

[208] The judge originally omitted the arson from the alleged overt acts which he read to the jury with the guilt phase jury instructions. (55 RT 10801; 6 CT 1329.) And, a list of the overt acts was not included in the original set of written guilt phase instructions given to the jurors. (55 RT 10801.)

However, in response to the jurors' request for a written list of overt acts the judge, over defense objection, sent a list of overt acts to the jurors which did include the arson overt act. (55 RT 10802; 6 CT 1328-30.)

2. The Presence Of Substantial Evidence In Support Of The Other "Valid" Overt Acts Does Not Preclude Reversal

Reversal is warranted under the *Green/Guiton* rule even if the valid theories are strongly supported by the evidence. "Overwhelming evidence" in support of a valid theory is not a "legitimate basis in the record" to conclude that the verdict was necessarily based on that theory. (*People v. Sanchez* (2001) 86 Cal.App.4th 970, 981; see also *People v. Smith* (1998) 62 Cal.App.4th 1233, 1238; *Suniga v. Bunnell, supra*, 998 F.2d 664, 670 [instruction on erroneous theory was reversible even though the theory was not argued by the prosecutor and the evidence as to the correct theory was "very strong"].)

3. The Jurors Had A Basis To Reject, Or Actually Did Reject, The Other Overt Acts

Even if the strength of the other acts could be considered (but see § 2, above), the jurors had a basis for rejecting or actually did reject, each of the "valid" overt acts:

Overt Act No. 1:[209] This overt act could easily have been rejected by one or more jurors because there was no evidence, beyond conjecture from the events of November 16, that there was a conspiracy at the time (November 11, 1994) and, if there was, that appellant was part of it. Indeed, the jurors apparently recognized this problem as reflected by their question about conspiratorial liability for one who did not participate in the original conspiratorial agreement. (56 RT 11009-11 [judge gives jurors CALJIC 6.19 on late joiners of a conspiracy].)

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[209] OVERT ACT NO. 1: On or about November 11, 1994 Daniel Sanchez Covarrubias, Francisco Antonio Sanchez, and Joaquin Nuñez drove from Southern California to the City of Salinas, California. (6 CT 1328.)

Moreover, appellant's stated intent to immediately return to Mexico (43 RT 8413-14), further suggested that he was not part of any conspiracy which may have existed prior to his arrival in Salinas.

Overt Act No. 2:[210] As with Overt Act 1, the jurors could have rejected this overt act on the basis that it happened before the alleged conspiratorial agreement.

In his video statement, appellant stated that Lorenzo Nuñez gave him two rifles two days before the shootings. However, according to appellant, Lorenzo gave him the rifles to sell in Mexico to raise money to bring Lorenzo's wife and daughter to Salinas. (4 SCT 1036.) Therefore, as with Overt Act 1, there was a basis for the jurors to find that this act predated the the alleged conspiratorial agreement.

Overt Act No. 3:[211] [This was the legally erroneous arson.]

Overt Act No. 4:[212] [This overt act was also legally erroneous because it was predicated on the arson.] Moreover, there was a major discrepancy in the evidence as to whether this overt act occurred on November 16, 1994 as

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[210] OVERT ACT NO. 2: On or about November 15, 1994, Lorenzo Martinez Nuñez went to the home of Bertha Sanchez and presented the two rifles to Daniel Sanchez Covarrubias, Francisco Antonio Sanchez, and Joaquin Nuñez. (6 CT 1329.)

[211] OVERT ACT NO. 3: On or about November 15, 1994, Francisco Antonio Sanchez, Daniel Sanchez Covarrubias, and Joaquin Nuñez committed an arson for hire and received $100 for committing the arson. (6 CT 1329.)

[212] OVERT ACT NO. 4: On or about November 16, 1994 Francisco Antonio Sanchez, Daniel Sanchez Covarrubias, Joaquin Nuñez, and Jose Luis Ramirez drove to JKD Shooting Sports in the City of Salinas to purchase (with the $100 received from the arson) ammunition and supplies for the rifles to be used in the residential robbery, burglary and killing at the Morales residence at 1022 East Market Street in the City of Salinas. (6 CT 1329.)

alleged. Jose Luis Ramirez testified that it did occur on November 16th but Ramirez' credibility was thoroughly undermined. (See Claim 10 § B(2),pp.141-46, and § D, pp.147-50, incorporated herein.) Moreover, the register receipt showed that the purchase had occurred on November 15th rather than on the afternoon of November 16th as testified to by Ramirez. (See Guilt Phase: Statement Of Facts § B(7), p. 25, incorporated herein.) And, the store manager, James Fletcher, was "absolutely" "bet-my-life-on-it" certain that November 15th was the correct date. (42 RT 8274.) Fletcher also testified that appellant was not one of the three people who purchased the ammunition. Thus, there was a factual question as to whether appellant was involved at all in the purchase of the ammunition.

Overt Act No. 5:[213] This overt act alleged that appellant and the three others "fired the rifles to be used in the residential robbery, burglary and killing. . . ." (6 CT 1329.) The jurors could easily have rejected this allegation because the prosecution did not alleged that appellant fired either of the rifles.

Furthermore, in light of the discrepancy as to when the ammunition was purchased, the jurors could rationally have questioned whether the test firing actually took place or, if it did, that it was done at the time and place alleged by the prosecution.

Moreover, this overt act included an allegation of a plan to commit "robbery, burglary *and* murder." (Italics added.) One or more jurors rejected the existence of such a plan as demonstrated by the jurors' inability to agree

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[213] OVERT ACT NO. 5: On or about November 16, 1994 Francisco Antonio Sanchez, Daniel Sanchez Covarrubias, Joaquin Nuñez, and Jose Luis Ramirez traveled to a location in the County of Monterey, near Old State Road and Natividad Road and fired the two rifles to be used in the residential robbery, burglary and killing at the Morales residence at 1022 East Market Street, in the City of Salinas. (6 CT 1329.)

that the conspiracy was for the purpose of murder. (4 CT 997.)[214]

Overt Act No. 6:[215] This overt act alleged a purpose or plan to commit "robbery, burglary *and* murder." (Italics added.) As with Overt Act No. 5, this allegation was rejected by one or more jurors who found that there was no plan or purpose to commit murder. (4 CT 997.)[216]

4. The Failure Of Counsel To Argue Any Specific Overt Acts Does Not Preclude Reversal

Nor can the arguments of counsel be utilized to establish juror reliance on a valid theory. Regardless of which theories were argued by the prosecutor, *People v. Green*, *supra*, 27 Cal.3rd 1, 69-70 and *People v. Guiton*, *supra*, 4 Cal.4th 1116, 1122 require the reviewing court to examine the validity of "all . . . theories before the jury." (*People v. Webster* (1991) 54 Cal.3d 411, 442-43, fn. 16 [emphasis by *Webster* Court]; see also *People v. Guerra, supra,* 40 Cal.3d at 387-88 [even had the prosecutor "expressly discounted" the felony-murder theory "[t]here is no principled way for us to determine which theory the jury adopted. . . ."]; see also *Suniga v. Bunnell*, *supra*, 998 F.2d 664, 670 [instruction on erroneous theory was reversible even though the theory was not argued by the prosecutor and the evidence as to the correct theory was "very

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[214] Overt Acts 5 and 6 were also legally erroneous because they were predicated on an intent or plan to commit robbery. Because essential contested elements of robbery were omitted from the instructions (see Claims 10-12, pp.136-215, incorporated herein) any overt act based on robbery was legally erroneous.

[215] OVERT ACT NO. 6: On November 16, 1994 Francisco Antonio Sanchez, Daniel Sanchez Covarrubias, Joaquin Nuñez and Jose Luis Ramirez traveled to the Morales residence at 1022 East Market Street, in the City of Salinas, for the purpose of committing residential robbery, burglary and murder. (CT 1330.)

[216] See Statement Of Case § C, pp.11-12, incorporated herein.

strong."].)

Moreover, even if the arguments could be considered, in the present case the arguments are of no help to respondent because no specific overt acts were discussed. The mere fact that the prosecutor did not argue the erroneous theory is not sufficient to establish that "no juror relied upon the erroneous instruction. . . ." (*People v. Smith* (1984) 35 Cal.3d 798, 809; see also *Stromberg v. California* (1931) 283 U.S. 359, 369-70; *Cabana v. Bullock* (1986) 474 U.S. 376, 383, fn 2; *Stromberg v. California* (1931) 283 U.S. 359, 369-70.)

5. Summary: The Conspiracy Conviction Should Be Reversed Because The Verdicts Do Not Show That The Jurors Found A Proper Overt Act

In sum, regardless of the strength of the evidence as to the other overt acts, there is "no way of telling" whether or not any juror relied on the arson overt act(s) in voting to convict appellant of conspiracy. (*Sandstrom v. Montana* (1979) 442 U.S. 510; *People v. Sanchez, supra*, 86 Cal.App.4th at 981; see also *People v. Green, supra*, 27 Cal.3d at 69-70; see also Claim 11, pp. 190-91, fn. 176, incorporated herein [instruction on erroneous theory is prejudicial unless verdicts demonstrate jurors relied on a proper theory].)

Accordingly, the conspiracy conviction should be reversed because (1) the arson-based overt acts were legally erroneous and (2) the record fails to demonstrate that all jurors relied on another valid overt act to convict. (*People v. Guiton, supra*, 4 Cal.4th at 1122.)

Moreover, the judge gave the arson undue emphasis by omitting it in the original instructions and then injecting it during deliberations after the jurors had asked for a list of the overt circumstances. (55 RT 10801-02; 6 CT 1328-30.) In such cases a cautionary instruction is necessary to avoid undue

emphasis. (See *Davis v. Erickson* (1960) 53 Cal.2d 860, 863-64.) Appellant's judge did not give such a cautionary instruction as to the arson overt acts.

Furthermore, the fact that the hearsay evidence came from a police officer was likely to give it even greater weight in the eyes of the jurors. (See § C, above, fn. 204, pp.226-27, incorporated herein.)

"In these circumstances the governing rule on appeal is both settled and clear: when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Green*, *supra*, 27 Cal.3d at 70.)

F. Reversal Of The Conspiracy Conviction Also Necessitates Reversal Of The Other Convictions

The prosecution heavily relied on the vicarious liability theories of conspiracy and aiding/abetting in arguing that appellant should be convicted of the murder, robbery, burglary and assault counts.

The prosecutor explained her theories to the judge as follows:

> MS. LOMBARDO: Well, there are four theories of murder. Four theories of first-degree murder.
> THE COURT: Okay.
> MS. LOMBARDO: There's premeditated murder. There's felony murder. There's aiding and abetting murder. And there's conspiracy. (45 RT 8871 [emphasis added].)

The prosecutor explained her theory of vicarious conspiratorial liability to the jurors as follows:

> In addition to aiding and abetting liability, there is another theory of liability that applies to crimes. And it's conspiratorial liability. Now, I'm going to talk to you about conspiracy. And one thing you must kind of think about in this case is conspiracy is a theory of liability. And, in this case, it also is a charged crime. (52 RT 10222:14-22.)

. . .

People who are involved in a conspiracy have liability that's very similar to aider and abettor liability. Conspirators are responsible, first of all, for each act and declaration of the other conspirators. (52 RT 10223:26-10224:3.)

. . .

Each member of the conspiracy is guilty of, not only the crime that they have intended, the crime that they have agreed to, but also, again – as it was with aiding and abetting – any natural and probable consequence, anything that's likely to occur afterwards. Even if that natural and probable consequence was not something they discussed, not something they agreed upon, not something that was necessarily anticipated, if it is a natural and probable consequence, all of the conspirators are also responsible for that. Okay. Conspiracy is a theory of liability. It also is a separate crime. (52 RT10224:10-23.)

. . .

If he's one of the people there that's conspired or agreed to or assisted in committing these murders, even if he's not a trigger man, even if he's a wheel man and not a triggerman, he's still as guilty of premeditated murder. So now we're going down this premeditated murder track. (52 RT 10243: 21-26.[217])

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[217] The judge instructed the jurors on vicarious conspiratorial liability as follows:

> Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if that act or declaration is in furtherance of the object of the conspiracy.
>
> The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators.
>
> A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is liable also for the natural and probable

(continued...)

. . .

> Now, it doesn't matter that the defendant, himself, at the outset, was not necessarily the one rifling through things. He stole some things later. But you know, remember, he's part of this group. He's an aider and abettor in this burglary. So -- and a co-conspirator. So what the other people do, he's responsible for. (52 RT 10254:13-19 [emphasis added].)

Moreover, in recognition of the fact that the jurors may not unanimously agree as to one or the other of the theories, the prosecutor emphasized that unanimous agreement was not necessary and that the jurors could actually "combine the theories of liability. . . ." (52 RT 10235-36; see also 52 RT 10249-50 [jurors do not have to unanimously agree whether appellant was an actor, aider and abettor or conspirator].)[218]

Under these circumstances, reversal of the conspiracy conviction also warrants reversal of the murder, robbery, burglary and assault convictions. As discussed above, to avoid reversal from submission of an erroneous theory to the jury, the prosecution must demonstrate that no juror relied on the erroneous

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[217](...continued)

> consequences of any crime or act of a co-conspirator to further the object of the conspiracy even though that crime or act was not intended as a part of the agreed upon objective, and even though he was not present at the time of the commission of that crime or act.
>
> You must determine whether the defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes, and if so, whether the crime or crimes alleged was or were perpetrated by a co-conspirator in furtherance of that conspiracy, and was or were a natural and probable consequence of the agreed upon criminal objective of that conspiracy. (53 RT 10440-41; 6 CT 1264.)

[218] Nor did the instructions preclude the jurors from convicting without unanimous agreement as to a theory of liability as the prosecutor emphasized in her argument. (52 RT 10235-36; 10252-53.)

theory. (See *Sandstrom v. Montana, supra*, 442 U.S. at 526; see also citations at Claim 11, pp. 190-91, fn. 176, incorporated herein.) The prosecution cannot do so in the present case because the district attorney urged the jurors to rely on the conspiracy and because the general verdicts fail to show that no juror accepted the prosecutor's invitation to rely on the conspiracy as a basis for voting to convict on the other counts.

G. Apart From The Erroneous Theory Analysis, The Inflammatory Impact Of The Arson Evidence Was Prejudicial

A number of factors demonstrate that the guilt trial was closely balanced. (See Claim 12 § D(2)(a), pp. 201-03, incorporated herein [the guilt trial was closely balanced].)

Moreover, the error in admitting hearsay evidence of the arson was highly prejudicial because the jury was improperly exposed to inflammatory evidence of an uncharged crime allegedly committed by appellant. Such other-crimes-evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314.) This is so because of the jurors' tendency to condemn the accused on the basis of a perceived disposition to commit criminal acts. (*People v. Thompson, supra*, 27 Cal.3d at 317.)

Furthermore, the testimony of Jose Luis Ramirez was the linchpin of the prosecution's case against appellant. Hence, the erroneously admitted arson evidence was also prejudicial because it bolstered the credibility of Jose Luis Ramirez in the eyes of the jurors. As recognized by the trial judge at the modification hearing, the arson corroborated Jose Luis Ramirez' testimony by verifying the source of the $100 bill which Ramirez said Antonio Sanchez obtained from the trailer park. (72 RT 14213:11-12.)

In sum, the judgment should be reversed under both the state (Art 1,

sections 7 & 15) and federal (6th and 14th Amendments) standards of prejudice.

H. The Penalty Judgment Should Be Reversed Even If Guilt Is Not

Even if the error was not prejudicial as to the guilt judgment, it was devastatingly prejudicial, individually and cumulatively, as to penalty. The penalty trial was closely balanced (see Claim 59 § G(2), pp. 550-51, incorporated herein [penalty trial was closely balanced]) and the error in allowing evidence of an inflammatory uncharged crime was substantial. In a capital trial "evidence of other crimes . . . may have a particularly damaging impact on the jury's determination whether the defendant should be executed. . . ." (*People v. McClellan* (1969) 71 Cal.2d 793, 805; *People v. Jones* (1996) 13 Cal.4th 535, 585.) Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless. (See Claim 59 § G , pp. 548-51[substantial error at penalty is prejudicial under *Chapman*], incorporated herein.) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, one or more jurors would not have voted for death. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

CLAIM 16

THE ASSAULT AND ATTEMPTED MURDER CONVICTIONS SHOULD BE REVERSED DUE TO INSUFFICIENT EVIDENCE

A. Overview

The charges of assault and attempted murder in Counts 4 and 5 (1 CT 126-129) were based on several alternative theories of liability. First, the prosecution alleged – based on the testimony of Jose Luis Ramirez – that appellant agreed with Antonio Sanchez to kill Ramon Morales and anyone else who could be a witness. (41 RT 8007-08; 52 RT 10254:26-27 [DA argument: "there also was an intent to commit murder"]; see also 52 RT 10257-58 ["They tried to kill her". . . "He shot her"].) Second, vicarious liability for the acts of a co-conspirator in furtherance of the conspiracy was also advanced as a theory liability. (52 RT 10224; 6 CT 1264.) Third, the prosecution maintained that appellant was guilty of assault and attempted murder of the infant as a natural and probable consequence of the burglary and robbery which appellant aided and abetted. (52 RT 10234-35; 6 CT 1285-86.)

However, the assault and attempted murder convictions cannot be upheld under any of these theories. This is so because one or more of the jurors rejected the theory that appellant personally shot the infant and there was insufficient evidence to support the natural and probable consequences theories. Therefore, the assault and attempted murder convictions should be reversed. Moreover, because the shooting of the infant was, in the words of the judge, the "great weight" in aggravation, the death sentence should also be reversed.

B. The Law

Due process requires the reviewing court to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, emphasis in original; *McMillan v. Gomez* (9th Cir. 1994) 19 F.3d 465, 469.) In making this determination, "all of the evidence is to be considered." (*Jackson v. Virginia*, *supra*, 443 U.S. at 319.)

"It is now the settled law of this state that in civil and criminal cases alike, 'substantial evidence' is such as was elaborated and defined in *Estate of Teed* (1952) 112 Cal.App.2d 638, 644." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873.) It is evidence "of ponderable legal significance, . . . reasonable in nature, credible and of solid value." (*People v. Murtishaw* (1981) 29 Cal.3d 733, 771, fn. 34; *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

Circumstantial evidence by itself may suffice to establish proof of guilt beyond a reasonable doubt. (See, e.g., *People v. Bloyd* (1987) 43 Cal.3d 333, 347; *People v. Pierce* (1979) 24 Cal.3d 199, 210.) "A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guesswork." [Internal quotation marks and citations omitted.] (*People v. Morris* (1988) 46 Cal.3d 1, 21.) "'A finding of fact must be an inference drawn from evidence rather than on a mere speculation as to probabilities without evidence.' [Citation.]" (*Reese v. Smith* (1937) 9 Cal.2d 324, 328; see also, *People v. Morris*, *supra*, 46 Cal.3d at 21.)

The following arguments establish, individually and cumulatively, that appellant was convicted of assault and attempted murder in violation of federal due process and jury trial principles due to insufficient evidence. (6th and 14th Amendments; *Jackson v. Virginia*, *supra*.)

Furthermore, use of such a conviction in the penalty phase of a capital trial violates the Due Process and Cruel and Unusual Punishment Clauses of the state (Article I, section 7, 15 and 17) and federal constitutions (8th and

14th Amendments) which require heightened reliability in the determination of guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also cases cited at Claim 10 § H(3), pp.158, incorporated herein.)

Accordingly, because the above principles were violated in the present case, the assault and attempted murder convictions should be revered. And, furthermore, the death judgment should be reversed.

C. The Allegation That Appellant Intentionally Shot The Infant Was Rejected By One Or More Jurors

The infant was shot with a .38 handgun. (See Guilt Phase: Statement Of Facts § D(7), pp. 32, incorporated herein.) The prosecution alleged that appellant was the person who used the .38 handgun and thus he was guilty of attempted murder. (52 RT 10257-58.) However, the jurors did not reach a unanimous verdict as to the special allegation that appellant used the .38 handgun. (4 CT 981; 983.) Accordingly, the personal shooting theory cannot be used to uphold the conviction. (See generally *Cunningham v. California* (2007) _____ U.S. ____ [127 S. Ct. 856; 2007 U.S. LEXIS 1324]; *Apprendi v. New Jersey* (2000) 530 U.S. 466.)

D. The Co-Conspirator Theory Does Not Support The Convictions Because There Is No Evidence That The Intentional Shooting Of An Infant Was In Furtherance Of The Conspiracy

To hold appellant liable for the shooting of the infant by either Antonio Sanchez or Joaquin Nuñez the prosecution needed to prove that such a shooting:

1. Was a natural and probable consequence of the burglary and robbery; and

2. Was committed in furtherance of the conspiratorial agreement. (6 CT 1264.)

However, the prosecution failed to prove either of these requirements. The insufficiency of the evidence as to the natural and probable consequences is discussed in § E, below. Moreover, notwithstanding that insufficiency, the evidence was also insufficient for a rational juror to conclude that the infant was intentionally shot in furtherance of the conspiracy.

Even if the testimony of Jose Luis Ramirez was taken at face value (but see Claim 10 § B(2), pp.141-46, and § D, pp.147-50, herein), the most that the evidence established was the existence of a conspiracy to enter the Morales residence, kill and rob Ramon Morales, and kill anybody else in the house who could be a witness.[219]

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[219] The only testimony regarding the alleged conspiratorial intent was the following:

Q. Did anyone talk about what would happen once they got into the house?
A. You mean outside the house?
Q. Before you went into the house.
A. When we were parked, they were talking about it.
Q. What was the plan once the group of you got inside the house?
A. That we were going to go in, get some drugs, steal stuff and kill them.
Q. Kill who?
A. Whoever was inside. (41 RT 8007.)

. . .

Q. Who made the statement about killing whoever was in the house?
A. Daniel and Antonio.
Q. Was there a reason that everyone inside the house was to be killed?
A. Because they were going to be witnesses. (41 RT 8008.)

. . .

Q. They did not want to leave any witnesses?

(continued...)

Thus, there is no substantial evidence that the intentional shooting of an infant was within the scope of the conspiracy. Obviously, a eight-month-old infant could not have been a witness so there was no need to shoot her for that reason. Nor was the infant an impediment to the alleged conspiratorial objectives of robbing and killing Ramon Morales. Thus, the only rational explanation is that the shooting of the infant was done by Antonio Sanchez or Joaquin Nuñez acting on their own. (See e.g., *U.S. v. Andrews* (9th Cir. 1996) 75 F.3d 552, 555-56.)

Accordingly, the assault and attempted murder convictions should be reversed because the verdicts fail to demonstrate that all the jurors relied on another theory that was legally valid. (As discussed below, the aiding and abetting theory was also improper.) (See *Sandstrom v. Montana* (1979) 442 U.S. 510; *Swain v. Alabama* (1965) 380 U.S. 202.)

Furthermore, because the assault and attempted murder were the "great weight" in aggravation of the penalty trial (RT 14214: 16-26 [comments of judge during modification motion]),[220] the death judgement should also be reversed.

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[219](...continued)

A. No.

Q. Who made the statement that there should be no witnesses left?

A. Antonio. (41 RT 8008.)

[220] See also Claim 59, pp. 537-53, incorporated herein [infant was featured in "audio-video slingshot" used by prosecutor during argument]; Penalty Phase: Statement Of Facts § B(3), p. 511, incorporated herein [infant was discussed during victim impact testimony]; 67 RT 13244-28 [references to infant during prosecution's argument].

E. Intentionally Shooting An Infant Was Not A Natural And Probable Consequence Of Aiding And Abetting A Burglary And Robbery

There is no substantial evidence that an intentional killing of an infant was a natural and probable consequences of aiding and abetting the alleged burglary and robbery. A reasonable person in appellant's position (see Claim 19, pp. 268-75, incorporated herein) would not have been reasonably foreseen that an infant would be either an impediment to completion of the robbery or a witness.[221] Thus, even if the plan had been to commit robbery and kill all potential witnesses – as argued by the prosecutor (52 RT 10216) – the intentional shooting of a eight-month-old infant would have been beyond the scope of such a plan. (See *U.S. v. Andrews, supra,* 75 F3d 552 [when a person aids and abets a plan to "get" or "trash" one person, the intentional killing of a third party by one of the accomplices is not a natural and probable consequence of the original plan].)[222] Thus, whether it was Antonio Sanchez or Joaquin Nuñez who shot the infant, they did so "on [their] own" and their actions and intent should not be imputed to appellant. (See *Id.* at 555-56; see also *Everritt v. State* (2003) 277 Ga. 457, 588 S.E.2d 691 ["natural and

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[221] Whether a result is reasonably foreseeable is a higher threshold than whether the result is "conceivable." (See La Fave and Scott, *Substantive Criminal Law* (2nd ed. 2003) § 13.3(b), p. 362 citing *Roy v. U.S.* (D.C. App. 1995) 652 A.2d 1098 [intent to aid in illegal gun sale did not make defendant an accomplice to armed robbery which principal instead committed; it is not enough defendant "should have known that it was conceivable" this might occur].)

[222] *Andrews* recognized that, when a person aids and abets a plan to kill or harm one person, the intentional killing of a third party by one of the accomplices is not a natural and probable consequence of the original plan. This is so because the actions of the accomplice in shooting the third party are beyond the natural and probable consequences of the plan to kill the other person. (*U.S. v. Andrews, supra,* 75 F3d at 556.)

probable consequences" requirement not met here, as it was not "reasonably foreseeable to *A*, in arson conspiracy with *B* and *C*, that *B* would kill *C* to conceal the conspiracy"]; *State v. Holloway* (Or.App. 1990) 795 P.2d 589, 591-92 [evidence showing that the defendant accompanied gang members on drive-by shooting insufficient to support conviction for aiding and abetting in the shooting]; LaFave & Scott, *Substantive Criminal Law* (2nd ed. 2003) § 13.3(b), at pp. 362-63.) [223]

Accordingly the assault and attempted murder convictions should be reversed because the verdicts fail to demonstrate juror reliance on a proper theory. (*Sandstrom v. Montana, supra*, 442 U.S. 510; *People v. Swain* (1996) 12 Cal.4th 593.)

Furthermore, the death verdict should also be reversed. This is so because the error was substantial and the penalty trial was closely balanced. (See § D, above.)

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[223] The actions of Antonio Sanchez or Joaquin Nuñez in shooting the infant were thus akin to those of a robber who, as part of an agreed scheme to steal a safe, robs the watchman in the building on his own. (See LaFave & Scott, *supra*, at p. 362 [asserting that those stealing the safe are not accomplices to the robbery of the watchman under the natural and probable consequences doctrine].)

CLAIMS 17-23: ERRORS WHICH UNDERMINED APPELLANT'S DEFENSE THEORIES

CLAIM 17

THE JUDGE UNDERMINED APPELLANT'S DEFENSE THEORIES BY ENCOURAGING THE JURORS TO DECIDE THE CASE BASED ON "WHAT OUR COMMUNITY WILL AND WILL NOT TOLERATE"

A. Overview

As she concluded her guilt phase argument the prosecutor stated:

> Again, as I mentioned, your job and your responsibility as jurors is to act as the litmus test, to apply the laws our society, and to determine what our community will and will not tolerate. (52 RT 10259.)

Defense counsel's objection to this statement as an improper statement of the law was overruled and the judge informed the jurors that the prosecutor's statement – although "somewhat beyond the law – was still "permissible comment." (52 RT 10259-60.) Thus, the judge effectively told the jurors that they should "determine what our community will and will not tolerate" as urged by the prosecutor. (See *People v. Woods* (2006) 146 Cal.App.4th 106, 113-14 [by overruling the defense objection the judge implied that the "responsibility" to which the prosecutor referred "actually existed"].)

By allowing the jurors to consider the prosecutor's statement, the judge violated appellant's state and federal constitutional rights to due process and fair trial by jury. It also violated Eighth amendment principles by undermining the fairness and reliability of the guilt and penalty verdicts.

B. The Prosecutor's Comment Violated State Law And The Federal Constitution

"A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear." (*States v. Koon* (9th Cir. 1994) 34 F.3d 1416, 1443; see also *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1149.)

Therefore, the Due Process and Jury Trial Clauses of the state (Art. I, §§ 7 and 15) and the federal constitution (6th and 14th Amendments) are violated when a prosecutor urges a jury to return a verdict based on perceived community feeling. (See, e.g., *Viereck v. United States* (1943) 318 U.S. 236, 247 [improper for the prosecutor to tell jurors, "The American people are relying on you"]; *United States v. Solivan* (6th Cir. 1991) 937 F.2d 1146, 1151, 1155 [prejudicial appeal to jury to act as the community's conscience and to send a message of zero tolerance for drugs]; *United States v. Johnson* (8th Cir. 1992) 968 F.2d 768-770 [exhorting jurors to "stand as a bulwark" against the proliferation of drugs]; *United States v. Monaghan* (D.C. Cir. 1984) 741 F.2d 1434, 1441 [prosecutor may not urge jurors to convict a criminal defendant in order to protect the community's values];*Commonwealth v. DeJesus* (Pa. 2004) 860 A.2d 102 [Appellant's death sentence vacated due to prosecutorial argument that jury should return a death sentence to "send a message" to "the street" and to the prisons that such behavior is not tolerated].)

The jury in a criminal trial is presumed to be representative of the community, but is not to act as the community's representative. (See S. Kraus, *Representing The Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing* (1989) 64 1nd.L.J. 617,651.) Capital sentencing decisions in particular (essentially normative judgments) are not supposed to be an expression of the community's will. Rather, jurors are to make a "personal moral judgment regarding which penalty is the appropriate one to be imposed." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1035; *People v. Allen* (1986) 42 Cal.3d 1222, 1227; *People v. Brown (Albert)* (1985) 40 Cal.3d 512, 541.)

Moreover, the error also violated the 8th Amendment by reducing the jurors' sense of personal responsibility for their verdict. In *Caldwell v. Mississippi* (1985) 472 U.S. 320, "the prosecutor argued to the jury that theirs was not the final decision as to life or death, but that the case would be reviewed by an appellate court. The United States Supreme Court reversed the penalty, holding that 'it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.'" (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1106 [quoting *Caldwell v. Mississippi, supra*, 472 U.S. 320, 328-329]; see also *People v. Young* (2005) 34 Cal.4th 1149, 1221.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342;

Maynard v. Cartwright (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[224] The judge's endorsement of the prosecutor's statement as "permissible comment" arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Further, state law 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. (See *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)[225]

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[224] "The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice."(*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [internal citations and quotation marks omitted].)

[225] Moreover, when errors of federal constitutional magnitude combine with nonconstitutional errors, the combined effect of the errors should be reviewed (continued...)

C. The Error Was Prejudicial

The error was prejudicial as to both guilt and penalty. This is so because the error was substantial and both phases of the trial were closely balanced. (See Claim 12 § D(2)(a), pp. 201-03, incorporated herein [guilt trial closely balanced]; Claim 59 § G(2), pp. 550-51, incorporated herein [penalty trial closely balanced].) Moreover, the error as especially prejudicial because the trial court impliedly endorsed the prosecutor's statement by overruling the defense objections to it. (See *People v. Woods, supra*, 146 Cal.App.4th at 113-14 [by overruling the defense objection the judge implied that the "responsibility" to which the prosecutor referred "actually existed"].) Therefore, the prosecution cannot demonstrate that the error was harmless beyond a reasonable doubt under the federal standard (*Chapman v. California* (1967) 386 U.S. 18) or that the error was harmless under the state's standards of prejudice as to the guilt trial (*People v. Watson* (1956) 46 Cal.2d 818)[226] or the penalty standard. (See Claim 59 § G(1), pp.548-50["any reasonable possibility" state standard of prejudice for penalty], incorporated herein.)

Moreover, even if the error was not individually prejudicial, it was cumulatively prejudicial with the other errors identified in this brief which undermined appellant's defense theories to the charges.

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[225](...continued)
under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470.)

[226] "In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249 [Internal citations and quote marks omitted].)

CLAIM 18

THE INSTRUCTIONS PRECLUDED THE JURORS FROM CONSIDERING APPELLANT'S INTOXICATION AS TO THE MENS REA ELEMENTS OF AIDING AND ABETTING

Appellant relied, *inter alia*, on his intoxication to negate the knowledge and intent elements of the aiding and abetting allegation relied on by the prosecution. However, the judge denied the defense request for an instruction relating intoxication to the intent element of aiding and abetting. (53 RT 10438-39; 2 SCT 343; 6 CT 1262.) Therefore, the instructions withdrew the factual issue of intoxication vis a vis the intent required for aiding and abetting. And, because the issue of appellant's intent to aid and abet murder and robbery was closely balanced, the error was prejudicial.

A. The Impact Of Voluntary Intoxication On The Knowledge And Intent Elements Of Aiding And Abetting Is A Factual Issue Which The Jury Must Resolve

Penal Code § 22 states that a required specific intent may be negated by intoxication, but the statute does not specifically refer to knowledge. However, the defendant's mental state cannot be "mechanically divide[d]. . . into knowledge and intent." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1131.) Therefore, "although knowledge 'may not fall literally within the *Hood* (*People v. Hood* (1969) 1 Cal.3d 444) formulation of specific intent, the element [of aiding and abetting liability] that requires that the defendant act with knowledge of [the perpetrator's criminal intent] is closely akin to *Hood*'s definition of specific intent, which requires proof that the defendant acted with a specific and particularly culpable mental state.' [Citation.]" (*People v. Mendoza, supra*, 18 Cal.4th at 1131; see also *People v. Whitfield* (1994) 7 Cal.4th 437, 450; *People v. Reyes* (1997) 52 Cal.App.4th 975 [evidence of voluntary intoxication or mental disease or defect may be presented per Penal

Code § 22 and Penal Code § 28 to negate knowledge element of receiving stolen property]; compare *People v. Atkins* (2001) 25 Cal.4th 76, 89 [evidence of voluntary intoxication does not negate intent required to prove mental state for arson; arson is a general intent crime, ergo voluntary intoxication not a defense].) Hence, this Court held as follows in *Mendoza*:

> We see no "other considerations" [citation] that would prohibit alleged aiders and abettors from presenting evidence they did not know of the perpetrator's purpose and did not intend to aid it because of intoxication. Awareness of the direct perpetrator's purpose is critical for the alleged aider and abettor to be culpable for that perpetrator's act. A person may lack such awareness for many reasons, including intoxication. A person who is actually unaware that his or her noncriminal act might help another person commit a crime should not be deemed guilty of that crime and all of its reasonably foreseeable consequences even if intoxication contributes to, or is the sole reason for, that lack of awareness. (*People v. Mendoza*, *supra*, 18 Cal.4th at 1130.)

In light of *Mendoza*, the California Judicial Council approved CALCRIM 404 which specifically relates intoxication to the elements of aider and abettor liability as follows:

> If you conclude that the defendant was intoxicated at the time of the alleged crime, you may consider this evidence in deciding whether the defendant:
>
> A. Knew that _____ <*insert name of perpetrator*> intended to commit _____ <*insert target offense*>;
>
> AND
>
> B. Intended to aid and abet _____ <*insert name of perpetrator*> in committing _____ <*insert target offense*>.
>
> (CALCRIM 404 [New January 2006].)

B. The Impact Of Intoxication On The Mental Elements Of Aiding And Abetting Was At Issue In The Present Case

1. Aiding And Abetting Was A Primary Prosecution Theory

The prosecution heavily relied on aiding and abetting as a theory of liability. (See e.g., 45 RT 8871.) Although the prosecution also relied on direct perpetrator and conspiratorial liability, clearly aiding and abetting was a major focus of the prosecution's case and it certainly cannot be shown from the record that no juror relied on aiding and abetting to convict appellant. (See Claim 11, pp. 190-91, fn. 176, incorporated herein.)[227]

2. There Was Sufficient Evidence of Appellant's Intoxication To Warrant Instruction On The Defense Theory That Voluntary Intoxication Negated The Mental State Elements Of Aiding And Abetting

a. Rules For Determining Sufficiency Of Evidence For Instruction

i. Substantial Evidence

A criminal defendant is entitled to have the jury instructed on any defense supported by substantial evidence. (*People v. Salas* (2006) 37 Cal.4th 967, 982; *People v. Mayberry* (1975) 15 Cal.3d 143, 151.) "Substantial evidence" in this specific context is defined as evidence which is sufficient to deserve consideration by the jury, that is evidence from which a jury composed of reasonable persons could have concluded that the particular facts underlying the instruction did exist. (*People v. Wickersham* (1982) 32 Cal.3d 307, 324.) In other words, the court should instruct the jury on every theory of the case,

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[227] In fact, the jurors could have relied on aiding and abetting to find appellant guilty of every charge since the aiding and abetting instruction was not limited to any specific offense. (6 CT 1255; 53 RT 10434.)

but only to the extent each is supported by substantial evidence. (*People v. Flannel* (1979) 25 Cal.3d 668, 685.) "The determination whether sufficient evidence supports the instruction must be made without reference to the credibility of that evidence. [Citation.]" (*People v. Marshall* (1996) 13 Cal.4th 799, 847.) "Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (*Id.* at 685.)

ii. Standard Of Review

The above principles also provide the correct standard of appellate review. In evaluating a claim of instructional error, the reviewing court must assume the jury could have believed the substantial evidence relied upon by the party claiming error. (See *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673-74; *Clement v. State Reclamation Bd.* (1950) 35 Cal.2d 628, 643-44; *Logacz v. Brea Community Hospital* (1999) 71 Cal.App.4th 1149, 1152; *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 298 [*Henderson/Clement* rule [that reviewing court must state the facts most favorable to the party alleging instructional error] is "the customary rule of appellate review"]; *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 322.)

b. In The Present Case There Was Substantial Evidence That Appellant Did Not Knowingly Aid And Abet The Charged Crimes Due, In Whole Or Part, To His Intoxication

In the present case, the record contained sufficient evidence of appellant's intoxication to "deserve consideration by the jurors" and upon which they could rationally have relied, in whole or part, to find a reasonable doubt that appellant had the knowledge and intent required for aiding and abetting liability.

Two prosecution witnesses testified that appellant was "drunk" or "intoxicated" on the night of the homicides. (See Guilt Phase: Statement Of Facts § B(9), p. 26.) Additionally, Jose Luis Ramirez testified that appellant had consumed as many as 12 beers on the day of the homicide. (*Ibid.*) Further, defense witness Jorge Acosta testified that when he saw appellant in the late afternoon on November 16, 1994, appellant was drinking and he appeared to be so intoxicated that Jorge worried that he might crash the car or get stopped for drunk driving. (50 RT 9837-38.)

C. The Judge Erroneously Denied Appellant's Requested Instructions And Precluded The Jurors From Considering The Impact Of Appellant's Intoxication On The Knowledge And Intent Elements Of Aiding And Abetting

Appellant's defense theory was based on his denial of any knowledge of or intent to further the alleged plan to rob and murder. (See Claim 10 § B(2), pp.141-46, incorporated herein [defense evidence negating alleged intent to steal the property of another].) Therefore, juror consideration of appellant's intoxication was important because it bolstered and corroborated appellant's claimed lack of knowledge and intent to further the alleged plan to rob and murder.

As a result, defense counsel cited the *Mendoza* appellate opinion[228] – which was before this Court at the time – and requested an instruction as to the impact of intoxication on the knowledge and intent element of aiding and abetting.[229] However, after reviewing this and other requested instructions (51

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[228] *People v. Mendoza* (1997) 55 CA4th 257.

[229] Appellant requested the following instruction:

> To aid and abet the crime of murder, the defendant must
>
> (continued...)

RT 10029-30), the judge gave an intoxication instruction which explicitly limited the jurors' consideration of intoxication to crimes requiring "specific intent."[230] Hence, the only reasonable interpretation the jurors could have reached was that they were precluded from considering intoxication as to any mental state other than those which were specifically identified as requiring a "specific intent." (See *People v. Holt* (1997) 15 Cal.4th 619, 662 [jurors

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[229](...continued)

> have 1) knowledge of the unlawful purpose of the perpetrator and 2) the specific intent or purpose of committing, encouraging, or facilitating the commission of the offense.
>
> If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider [his] [her] state of intoxication in determining if the defendant had such a specific intent.
>
> The defendant's intoxication, by itself, may raise a reasonable doubt that defendant formed the required specific intent. If from all the evidence you have a reasonable doubt whether the defendant formed such specific intent, you must give the defendant the benefit of that doubt and find that [he] [she] did not have such specific intent. (2 SCT 343.)

[230] The instruction stated:

> Thus, in the crime and enhancements alleged, where a necessary element is the existence in the mind of the defendant of a certain specific intent, that element will be included in the definition of the crimes set forth elsewhere in these instructions.
>
> If the evidence shows that a defendant was intoxicated at the time of the alleged crime, ***you should consider that fact in deciding whether or not the defendant had the required specific intent.***
>
> ***If from all evidence you have a reasonable doubt whether the defendant had that specific intent, you must find that the defendant did not have that specific intent.*** [Emphasis added.] (53 RT 10438-39; 6 CT 1262.)

presumed to follow the instructions].)[231] In fact, the written instructions given to the jurors actually had the term "mental state" lined out (6 CT 1262) thus eliminating any doubt that the scope of the instruction did not extend to mental elements other than those designated as "specific intent."[232] Moreover, the fact that the jurors requested additional sets of instructions (6 CT 1209)

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[231] When a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error. (See *People v. Dewberry* (1959) 51 Cal.2d 548, 557 [failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder]; *People v. Salas* (1976) 58 Cal.App.3d 460, 474; *Commonwealth v. Daley* (2002) 769 N.E.2d 322 [curative instruction focused on only one of several prosecutorial misstatements]; *U.S. v. Echeverri* (3rd Cir. 1988) 854 F.2d 638, 643 [giving a special unanimity instruction as to predicate acts under a RICO charge, but not as to predicate acts under a concurrent CCE (Continuing Criminal Enterprise) statute charge, violated due process, since jurors may have inferred from this discrepancy that unanimity was not required as to the CCE related predicate acts].) "Although the average layperson may not be familiar with the Latin phrase inclusio unius est exclusio alterius, the deductive concept is commonly understood . . . ." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.]; see also *U.S. v. Crane* (9th Cir. 1992) 979 F.2d 687, 690 [maxim expressio unius est exclusio alterius "is a product of logic and common sense"].)

[232] The the jurors were <u>not</u> given CALJIC 17.45 which admonishes against consideration of handwritten markings on the instructions. (Compare *People v. Beach* (1983) 147 Cal.App.3d 612, 624 [no reversible error from failing to fully obliterate portions of instructions that were not applicable because jury was instructed per CALJIC 17.45 not to consider any deleted part of any of the instructions given to them] with *People v. Dagnino* (1978) 80 Cal.App.3d 981 [judgement reversed where defense counsel denied opportunity request CALJIC 17.45]; *People v. Lozano* (1987) 192 Cal.App.3d 618, 625 [same].)

demonstrates that the jurors did rely on the written instructions. And, because the instructions on aiding and abetting did not include any such "specific intent" element, the only reasonable conclusion for the jurors was that intoxication could not be considered when deciding whether the prosecution had proved appellant guilty as an aider and abettor.[233]

In other words, giving the partial instruction was actually worse than giving no instruction at all, because the instruction affirmatively precluded the jurors from considering appellant's intoxication on the question of whether he formed the mental state necessary for aiding and abetting. For example, in *People v. Baker* (1954) 42 Cal.2d 550, the trial court gave misleading instructions by reciting only the first part of Penal Code § 22, to the effect that voluntary intoxication does not excuse criminal conduct, without informing the jury that jurors could nevertheless consider voluntary intoxication in

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[233] The aiding and abetting instruction given the jurors provided as follows:

> A person aids and abets the commission or attempted commission of a crime when he or she:
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> One, with knowledge of the unlawful purpose of the perpetrator;
>
> And two, with the intent or purpose of committing or encouraging or facilitating the commission of the crime;
>
> And three, by act or advise, aids, promotes, encourages, or instigates the commission of the crime.
>
> A person who aids and abets the commission or attempted commission of a crime need not be present at the scene of the crime.
>
> Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.
>
> Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting. (53 RT 10434; 6 CT 1255.)

determining whether the requisite intent had been shown. The *Baker* court stated: "Although we might hesitate before holding that the absence of any instruction on voluntary intoxication in a situation such as that presented in this case is prejudicial error, when a partial instruction has been given we cannot but hold that the failure to give complete instructions was prejudicial error." (*People v. Baker, supra*, 42 Cal.2d at 575-76; see also *People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Arriola* (1958) 164 Cal.App.2d 430 [giving only the first part of the intoxication instruction was misleading and erroneous]; *U.S. v. Pirouda* (9th Cir. 2005) 394 F.3d 683, 689 ["The omission of an instruction is 'less likely to be prejudicial than a misstatement of the law.'"].)

In sum, the incomplete instruction here erroneously precluded jurors from considering intoxication with respect to crucial mental state requirements and eliminated a crucial defense theory from the jurors' consideration as to aiding and abetting.

D. The Error Violated Appellant's State And Federal Constitutional Rights

The error violated the Due Process, Compulsory Process, Confrontation, and Trial by Jury clauses of the state (Article I, sections 7 and 15) and federal (5th, 6th and 14th amendments) constitutions. Under this constitutional provision, "as a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63 [citing *Stevenson v. United States* (1896) 162 U.S. 313 [refusal of voluntary manslaughter instruction in murder case where self defense was primary defense constituted reversible error]; see also *Holmes v. South Carolina, supra*, _____ U.S. _____ [126 S.Ct. 1727; 164 L.Ed.2d 503]

[precluding defendant from presenting third party guilt defense warranted reversal]; *Keeble v. United States* (1973) 412 U.S. 205, 213; *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664; *United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372; *Bennett v. Scroggy* (6th Cir. 1986) 793 F.2d 772, 777-79; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-02.) " . . . [T]he principle [is] established in American law . . . that a defendant is entitled to a properly phrased theory of defense instruction if there is some evidence to support that theory . . . [citations]." (*Virgilio v. State (Wyoming)* (1992) 834 P.2d 1125, 1130; *United States v. Kenny* (9th Cir. 1981) 645 F.2d 1323, 1337 ["jury must be instructed as to the defense theory of the case"]; see also *Taylor v. Withrow* (6th Cir. 2002) 288 F.3d 846, 851 [failure to instruct on self-defense when there is sufficient evidence violates defendant's fundamental due process rights, even though never explicitly stated by the Supreme Court]; *United States v. Oreto* (1st Cir. 1994) 37 F.3d 739, 748.) This is so because "a defendant's right to submit a defense for which he has an evidentiary foundation is fundamental to a fair trial. . . ." (*Whipple v. Duckworth* (7th Cir. 1992) 957 F.2d 418, 423 overruled on other grounds in *Eaglin v. Welborn* (7th Cir. 1995) 57 F.3d 496; *United States v. Douglas* (7th Cir. 1987) 818 F.3d 1317, 1320-21 ["the failure to include an instruction on the defendant's theory of the case ... would deny the defendant a fair trial. [Citation.]"]; *United States v. Hicks* (4th Cir. 1984) 748 F.2d 854, 857-858; *People v. Gurule* (2002) 28 Cal.4th 557, 660 ["criminal defendant has the right to instructions that pinpoint the theory of the defense case"].)

The constitutional right to present a defense is also specifically embodied in the Compulsory Process, Confrontation and Due Process Clauses of the federal constitution. (5th, 6th and 14th Amendments.) (See *People v. Cudjo* (1993) 6 Cal.4th 585, 637-43, Kennard, J. dissenting, for a discussion

of the defendant's constitutional right to present a defense under the compulsory process and due process clauses of the federal constitution]; see also *Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [erroneous exclusion of critical, corroborative defense evidence violates due process and the 6th Amendment right to present a defense]; *DePetris v. Kuykendall* (9th Cir. 2000) 239 F.3d 1057, 1061-63 [same]; *Richmond v. Embry* (10th Cir. 1997) 122 F.3dd 866, 871 ["...the right to present defense witness testimony . . . is a right arising not under the 6th Amendment's Confrontation Clause but is instead one arising under the 5th and 14th Amendment right to due process and the 6th Amendment right to compulsory process"]; *Taylor v. Singletary* (11th Cir. 1997) 122 F.3d 1390, 1394 [right to present defense witness testimony resides in the Compulsory Process Clause and the Due Process Clause of the federal constitution]; cf., *Crawford v. Washington* (2004) 541 U.S. 36 [recognizing importance of 6th Amendment right to confrontation]; see also Imwinkelried and Garland, *Exculpatory Evidence* (2d Ed. 1996) § 2-2(d) [6th Amendment right to confrontation]; *Id.* at § 2-2(e) [6th Amendment right to compulsory process].)

Moreover, the error also violated the Cruel and Unusual Punishment and Due Process Clauses of the federal Constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Additionally, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo, supra*, 416 U.S. 637, 646.)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[234] The judge's erroneous failure to instruct that appellant could be found guilty of a lessor offense than the crime committed by the other participants violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. This arbitrary violation of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

E. The Error Was Prejudicial

1. The Error Was Reversible Because The Instructions Withdrew A Material Defense From The Jurors' Consideration

The failure to give an instruction upon a defense presented by substantial evidence is harmless only when the omitted issue is decided adversely to the defendant by the jury in another context. (*People v. Rivera* (1984) 157 Cal.App.3d 736, 743; see also *People v. Anderson* (1983) 144 Cal.App.3d 55, 63 [appellate court cannot cure the error in failing to instruct on a defense by weighing the evidence]; cf., *Holmes v. South Carolina*, *supra*,

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[234] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

_____ U.S. _____ [126 S.Ct. 1727; 164 L.Ed.2d 503] [precluding defendant from presenting third party guilt defense warranted reversal].) In other words, whether the defendant's intoxication affected his formation of a required mental element of the charge should not be considered harmless. (*People v. Baker, supra*, 42 Cal.2d at 575-76; *People v. Cameron* (1994) 30 Cal.App.4th 591, 602; see also Claim 10 § H(2), pp. 157-58, incorporated herein [denial of federal constitutional right to a meaningful opportunity to present a complete defense].)

2. Alternatively, The Error Was Prejudicial Under Harmless Error Analysis

Aiding and abetting requires a discrete mental state which combines the intent and knowledge of the alleged aider and abettor. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117 ["guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's own acts and own mental state."]; see also *People v. Beeman* (1984) 35 Cal.3d 547, 560 [to prove that a defendant is an accomplice the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.'].) The evidence on this issue was closely balanced in light of the credibility problems with the prosecution's chief witness and the evidence that appellant did not intend that the victims be robbed and murdered. (See Claim 10 § B(2), pp.141-46, and § D, pp.147-50, incorporated herein.) In this context withdrawal of the defense theory of intoxication as to aiding and abetting was a substantial error which warrants reversal:

> In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249 [Internal citations and quote marks

omitted].)

Moreover, the effect of the withdrawal of this defense on the required mental state for aiding and abetting was substantial. The jurors could have relied on aiding and abetting to convict as to all ten counts. Yet on none of them would they have considered the effect of intoxication on the essential mental state elements of aiding and abetting.[235] Thus, all the convictions should be reversed under both the *Watson* and *Chapman* standards of prejudice.

Additionally, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the additional errors the judge committed – including but not limited to: failing to instruct on essential contested elements of the charges (Claims 10-12); undermining appellant's other defense theories (Claims 13 and 17-23); giving partisan instructions that favored the prosecution (Claim 24-28); diluting and misstating the prosecution's burden of proof (Claims 29-39); allowing the jurors to make up their minds about penalty before the penalty phase began (Claim 59); allowing the prosecutor to unduly emphasize certain inflammatory matters by use of an "audio-video slingshot" during closing argument at the penalty trial (Claim 60) – it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951,

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[235] Under the express language of the aiding and abetting instructions the jurors could have convicted on any or all of the charges based on aiding and abetting. (6 CT 1255; 53 RT 10434.)

962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo, supra*, 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

Furthermore, even if the error was not prejudicial as to guilt, it was highly prejudicial as to penalty – especially in combination with the erroneous intoxication instruction given at the penalty phase. (See Claim 69, pp.593-600, incorporated herein.) Thus, the error was prejudicial as to penalty under both the state and federal standards of prejudice because it undermined the fairness and reliability of the penalty trial which was closely balanced. (See Claim 59 § G(2), pp. 550-51, herein, incorporated herein [penalty trial was closely balanced].)

Finally, even if the error was not individually prejudicial, it was cumulatively prejudicial with other errors (e.g., Claims 17-23) which undermined appellant's defense theories to the charges.

CLAIM 19

THE VICARIOUS LIABILITY INSTRUCTIONS ERRONEOUSLY OMITTED THE REQUIREMENT THAT "A REASONABLE PERSON IN THE DEFENDANT'S POSITION" WOULD HAVE KNOWN THE NON-TARGET OFFENSE WAS A NATURAL AND PROBABLE CONSEQUENCE OF THE TARGET OFFENSE

A. Overview

The prosecutor relied, *inter alia*, on the natural and probable consequences doctrine as theories upon which appellant could be found guilty of murder in Counts 1-3, assault in Count 4 and attempted murder in Count 5. However, there was an essential omission in the jury instructions on these theories – the jury was not required to make the natural and probable consequences determination from the perspective of a reasonable person in the defendant's position. This was a crucial omission because it failed to require the jurors to determine what facts the defendant knew or should have known. For example, whether or not appellant knew or should have known that Antonio Sanchez wanted to kill Ramon Morales was an important consideration in evaluating whether the killing of Ramon Morales was a natural and probable consequence of appellant's actions.

In sum, because the instructions removed an essential contested issue from the jurors' consideration the judgment should be reversed.

C. The Law

This Court has concluded that the phrase "natural and probable consequences" would be commonly understood by jurors to mean "reasonably foreseeable" consequences. (*People v. Coffman* (2004) 34 Cal.4th 1, 107.) However, it is well established that "reasonable foreseeability" must be determined from the perspective of a "reasonable person in the defendant's

situation." (See e.g., *People v. Humphrey* (1996) 13 Cal.4th 1073, 1083; *People v. Ochoa* (1993) 6 Cal.4th 1199; CALCRIM 403.) In other words, objective reasonableness must not be determined in the abstract, it requires consideration of all the circumstances as they were "known by and appeared to" the defendant. (See *People v. Nguyen* (1993) 21 Cal.App.4th 518, 535; CALCRIM 505.)[236] This is so because what is objectively reasonable to one person in light of his or her knowledge may not appear reasonable to another person whose knowledge is different. Thus, as applied to the natural and probable consequences doctrine, this principle requires the prosecution to prove the following element:

> 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of _____ <*insert non-target offense*> was a natural and probable consequence of the commission of the _____ <*insert target offense*>. (CALCRIM 403, paragraph 3.)

For example, if A and B aid and abet C in burglarizing a house for purposes of theft, both A and B are vicariously guilty of burglary. If, however, in addition to committing theft C also sets fire to the house, the liability of A and/or B for arson should depend on what they knew. If A knew that C had a personal vendetta against the owner of the burglarized house and saw C carrying a can of gasoline into the house then this knowledge should be considered by the jurors in deciding the natural and probable consequences element of A's responsibility.

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[236] In making the objective determination of whether the charged offense is a natural and probable consequence of the target offense, the jury may only consider "the circumstances leading up to the last act by which the participant directly or indirectly aided or encouraged the principal actor in the commission of the crime. [Citation]." (*People v. Van Nguyen*, *supra*, 21 Cal.App.4th at 532.)

On the other hand, if B did not know about the vendetta and did not see the can of gasoline, then the objective reasonable foreseeability decision would be on a much different footing than it would be for A. In the case of A, the jurors could quite reasonably decide that a person in A's position would have known that arson was a natural and probable consequence of the burglary. Yet, from B's perspective the same jurors could quite reasonably decide that for B, the arson was not a reasonably foreseeable consequence of the burglary.[237]

In sum, the natural and probable consequences determination must be made from the perspective of what "a reasonable person in the defendant's position would have known. . . ." (CALCRIM 403; see also *People v. Van Nguyen, supra*, 21 Cal.App.4th at 532; see also *People v. Covino* (1980) 100 Cal.App.3d 660 [in determining objectively probable result of force used for assault (PC 245(a)) "trier of fact should not consider factors which the defendant does not know or would not reasonably be expected to know . . . "]; cf., *People v. Fauber* (1992) 2 Cal.4th 792; 2 LaFave & Scott, *Substantive Criminal Law* (1986) § 7.4, p. 201 ["it is what the defendant should realize to be the degree of risk, in the light of the surrounding circumstances which he knows"].)

D. The "Reasonable Person In The Defendant's Position" Element Was Omitted From The Instructions In The Present Case

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[237] Furthermore, the jurors should also be permitted to consider the defendant's intoxication. In *People v. Mendoza* (1998) 18 Cal.4th 1114 this Court held that intoxication could not be considered on this issue. However, this holding should be reconsidered in light of cases like *Humphrey* and *Ochoa* which hold that objective reasonableness must be considered in light of circumstances which may impair the defendant's perception. (See *People v. Ochoa* (1993) 6 Cal.4th 1199, 1204 [intoxication]; *People v. Humphrey* (1996) 13 Cal.4th 1083 [battered woman's syndrome].)

In the present case, the natural and probable consequences instructions – as to both the aider/abettor and conspiracy – omitted the reasonable person element.

The aider/abettor instruction[238] referred to "a natural and probable consequence" in three places without any mention of the requirement of considering a reasonable person in the defendant's position. (6 CT 1256.) Thus, the jurors were free to find appellant guilty on this theory based only on the charges in the abstract rather than from the perspective of what a

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[238] The written instructions stated the elements as follows:

> "One who aids and abets [another] in the commission of a crime [or crimes] is not only guilt of [that crime] [those crimes], but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime[s] originally aided and abetted.
>
> In order to find the defendant guilty of the crime[s] of murder, [as charged in Count[s] 1,2, 3 on this theory], you must be satisfied beyond a reasonable doubt that:
>
> 1. The crime [or crimes] of 459, 212 [was] [were] committed;
>
> 2. That the defendant aided and abetted [that] [those] crime[s];
>
> 3. That a co-principal in that crime committed the crime[s] of 187; and
>
> 4. The crime[s] of 187 [was] [were] a natural and probable consequence of the commission of the crime[s] of 212, 459.
>
> [You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified and defined target crime and that the crime of murder was a natural and probable consequence of the commission of that target crime.]" (CALJIC 3.02, 1997 Revision; 6 CT 1256; see also 53 RT 10435-36.)

reasonable person in the defendant's situation would have known. Compare CALCRIM 402, Element 3 with Element 4 of the instruction given in the present case. (6 CT 1256.)

Similarly, the instruction on natural and probable consequences vis-a-vis conspiracy also omitted the requirement of making the determination from the perspective of a reasonable person in the defendant's position.[239]

E. The Error Was A Prejudicial Violation Of The Federal Constitution

In the present case, the extent of appellant's knowledge about the plans and intentions of Antonio Sanchez, Joaquin Nuñez and Jose Luis Ramirez was subject to dispute.

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[239] The jurors were instructed as follows (6 CT 1264):

> Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if that act or declaration is in furtherance of the object of the conspiracy.
>
> The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators.
>
> [A member of a conspiracy is not only guilty of the particular crime that to [his] [her] knowledge [his] [her] confederates agreed to and did commit, but is also liable for the natural and probable consequences of any [crime] [act] of a co-conspirator to further the object of the conspiracy, even though that [crime] [act] was not intended as a part of the agreed upon objective and even though [he] [she] was not present at the time of the commission of that [crime] [act].
>
> You must determine whether the defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes[, and, if so, whether the crime or crimes alleged was perpetrated by [a] co-conspirator[s] in furtherance of that conspiracy and was or were a natural and probable consequence of the agreed upon criminal objective of that conspiracy].]

The prosecution suggested that appellant knew that Antonio Sanchez had threatened to kill Ramon Morales. The prosecution also suggested that appellant knew that Antonio Sanchez intended to take Ramon Morales' property.

On the other hand, the defense contended that appellant had no knowledge of Antonio Sanchez' threats against Ramon Morales or of any plan by Antonio Sanchez to kill or rob Ramon Morales. Appellant believed that Antonio Sanchez merely intended to recover his own property and that the guns were only "cautionary" because Ramon Morales had threatened Antonio Sanchez. (See Claim 10 § B(2)(b)(i), pp.144, incorporated herein.)

Hence, under the prosecution's view of what appellant knew, the circumstances applicable to the foreseeable consequences of the burglary would have been significantly different than under the defendant's version. It was crucial that the jurors determine foreseeability from the perspective of "a reasonable person in the defendant's position." Omission of this element allowed the jurors to make the natural and probable consequences finding based on circumstances which did not necessarily apply to appellant. For example, witnesses testified about Antonio Sanchez having threatened to kill Ramon Morales. (See 42 RT 8207; 44 RT 8721.) However, the prosecution did not establish that appellant knew about these threats. (Compare appellant's video statement indicating appellant's understanding that Ramon Morales threatened to kill Antonio Sanchez .) (4 SCT 1036-39.)

Accordingly, by omitting the objective knowledge element of natural and probable consequences liability – the element now included in CALCRIM 402 – the instructions violated the Due Process and Trial By Jury Clauses of the state (Article I, sections 7 and 15) and federal (6th and 14th Amendments) constitutions. (*In re Winship* (1970) 397 U.S. 358; *People v. Figueroa* (1986)

41 Cal.3d 714.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also cases cited at Claim 10 § H(3), p. 158, incorporated herein.)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[240] The judge's erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Further, state law 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. (See *Greer v. Miller* (1987) 483 U.S. 756, 765.)

Moreover, the error was prejudicial because the omitted element was contested. (*Neder v. U.S., supra*, 527 U.S. at 19; Claim 10 § I(1), pp. 159-61,

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[240] "The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice." (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [internal citations and quotation marks omitted].)

incorporated herein.)[241]

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[241] The error was reversible as to the murder charges because the verdicts do not show that jurors relied on a proper theory of murder. (See Claim 10 § J(5), pp. 175-76, incorporated herein.)

Similarly the verdicts do not demonstrate juror reliance on a proper theory of assault and attempted murder. The charges of assault and attempted murder in Counts 4 and 5 (1 CT 126-129) were based on several alternative theories of liability. First, the prosecution alleged that appellant personally shot the infant. (41 RT 8007-08; 52 RT 10254:26-27 [DA argument: "there also was an intent to commit murder"]; see also 52 RT 10257-58 ["They tried to kill her". . . "He shot her"].) Second, the prosecution also relied on vicarious liability for the acts of a co-conspirator in furtherance of the conspiracy. (52 RT 10224; 6 CT 1264.) Third, the prosecution maintained that appellant was guilty of assault and attempted murder of the infant as a natural and probable consequence of the burglary and robbery which appellant aided and abetted. (52 RT 10234-35; 6 CT 1285-86.)

Because one or more jurors rejected the theory that appellant personally shot the infant, the validity of the assault and attempted murder convictions depends on the validity of the natural and probable consequences theories. However, those theories were legally erroneous because the jury instructions failed to require the jurors to determine "reasonable foreseeability" from the perspective of a "reasonable person in the defendant's situation." For this reason, the assault and attempted murder convictions – as well as the death sentence – should be reversed.

CLAIM 20

THE INSTRUCTIONS PRECLUDED THE JURORS FROM APPLYING THE SALUTARY PRINCIPLES OF CALJIC 2.02 TO AIDING AND ABETTING

A. The Principles Of CALJIC 2.02 Should Be Applicable To Mental State Elements Such As The Knowledge And Intent Elements Of Aiding And Abetting

It is well established that the principles set forth in CALJIC 2.01 and 2.02 are applicable to a mental state such as knowledge and/or intent, which may be a necessary element of the charged offense. (See e.g., *People v. Marshall* (1996) 13 Cal.4th 799, 849.)

B. Appellant's Jurors Were Precluded From Applying The Principles Of CALJIC 2.02 In Resolving The Mental State Issues Regarding Aiding And Abetting

In the present case the jury instructions, when taken as a whole, informed the jurors that the principles embodied in CALJIC 2.02 were not applicable to the determination of mental state in Counts 4, 6, 7, 8, 9 and 10. Moreover, the instructions informed the jurors that CALJIC 2.02 was not applicable to either specific intent or mental state as to Counts 1, 2, 3, and 5. This is so because CALJIC 2.02 was made specifically applicable only to "specific intent" and not to "mental state." Moreover, the language of CALJIC 2.02 was limited to "Counts 4, 6, 7, 8, 9, 10." (6 CT 1231.)

Therefore, the only reasonable conclusion the jurors could have reached was that the principles of CALJIC 2.02 were limited to the specific intent elements of the specific counts enumerated in the instruction. When a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another, the jurors will reasonably assume that the instruction is applicable only as to the specifically

referenced matter. (See Claim 18 § C, p. 259, fn. 231, incorporated herein.)

Accordingly, because CALJIC 2.02 was made applicable only as to specific intent and not mental state as likely understood by reasonable jurors (*Estelle v. McGuire* (1991) 502 U.S. 62, 72) CALJIC 2.02 would not have been applied to a determination of any mental state issues not explicitly identified as a "specific intent."

Nor was the error cured by the giving of CALJIC 2.01. (6 CT 1229.) Because CALJIC 2.02 was more specific than 2.01, the jurors would reasonably have relied on CALJIC 2.02 as governing its consideration of specific intent and mental state issues. (See Claim 38 pp. 386-90 and Claim 67, pp. 579-80, incorporated herein [specific instruction controls over general instruction].)

C. The Error Violated Appellant's Federal Constitutional Rights

It is axiomatic that due process "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.) This requires the state to prove "'every ingredient of the offense beyond a reasonable doubt. . . .'" (*Sandstrom v. Montana* (1979) 442 U.S. 510, 524.) Moreover, it is a violation of due process for a statutory scheme to relieve or shift the burden of the prosecution to prove each of the statutory required elements. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 699.)

Because the nature of a burden of proof is to require one party to produce more evidence than the other (see *People v. Nixon* (1990) 225 Cal.App.3d 147, 148), when the evidence is evenly balanced, "the party with the burden of proof loses." (*Simmons v. Blodgett* (9th Cir. 1997) 110 F.3d 39, 41-42; see also *Wilson v. Caskey* (1979) 91 Cal.App.3d 124, 129 see also generally *Nishikawa v. Dulles* (1958) 356 U.S. 129, 137 [equally probable

inferences of intent from the act committed created an "evidentiary gap"]; *U.S. v. Ramirez-Rodriguez* (9th Cir. 1977) 552 F.2d 883, 884 citing *Turner v. U.S.* (1970) 396 U.S. 398.) In the context of proof beyond a reasonable doubt, this principle was long conveyed to the jury in terms of instructions such as the following:

> If the evidence in this case is susceptible of two constructions or interpretations each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

This instruction, which is the predicate for CALJIC 2.02, was given in *People v. Bender* (1995) 27 Cal.2d 164, 175-177 and this Court held that it was "eminently proper. . . ." (See also *People v. Naumcheff* (1952) 114 Cal.App.2nd 278, 281 ["If from the evidence you can with equal propriety draw two conclusions, the one of guilt, the other of innocence, then in such a case it is your duty to adopt the one of innocence and find the defendant not guilty"]; *People v. Foster* (1926) 198 Cal.112, 127 [jury instructed "that, considering the evidence as a whole, if it was susceptible of two reasonable interpretations, one looking 'toward guilt and the other towards the innocence of the defendant, it was their duty to give such facts and evidence the interpretation which makes for the innocence of the defendant'"]; *People v. Barthleman* (1898) 120 Cal.7, 10 ["if the evidence points to two conclusions, one consistent with the defendant's guilt, the other consistent with the defendant's innocence, the jury are bound to reject the one of guilt and adopt the one of innocence, and acquit the defendant"]; *People v. Haywood* (1952) 107 Cal.App.2nd 867, 872 ["The testimony in this case if its weight and effect be such as two conclusions can be reasonably drawn from it, the one favoring

the defendant's innocence, and the other tending to establish his guilt, law, justice and humanity alike demand that the jury shall adopt the former and find the accused not guilty"]; *People v. Carol* (1947) 79 Cal.App.2nd 146, 150 ["You are instructed that if from the evidence you can with equal propriety draw two conclusions, the one of guilt, the other of innocence, it is your duty to adopt the one of innocence and find the defendant not guilty"]; *United States v. James* (9th Cir. 1978) 576 F.2d 323, 327.)

Hence, the instruction in the present case, which precluded the jurors from applying the above principles in deciding whether essential mental state elements of the charge had been proven beyond a reasonable doubt abridged appellant's federal constitutional rights.

The failure to properly instruct on the prosecution's burden of proof violated appellant's state (Article I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship, supra*, 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Cruel and Unusual Punishment and Due Process Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Further, because the error arbitrarily violated appellant's state created right to proper instruction on the burden of proof, under the California Constitution (Article I, sections 1, 7, 15, 16 and 17) and Evidence Code (sections 500, 501 and 502), the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

D. The Error Was Prejudicial

1. Structural Error

The error was structural because it precluded the jury from applying fundamental principles underlying the presumption of innocence as to the murder charges in Counts 1, 2 and 3. (See *Sullivan v. Louisiana, supra*, 508 U.S. 275, 279-281 [failure to properly instruct the jury on the prosecution's burden of proving guilt beyond a reasonable doubt is fundamental structural error which requires reversal per se].) In the present case the deficiencies in the burden instructions individually and cumulatively undermined the presumption of innocence ane therefore were reversible structural error.

2. *Chapman* Standard

Because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18; 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be

reversed under the federal harmless error standard.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice, because it undermined the fairness and reliability of the penalty determination. (See Claim 1 § F, pp.61-62, incorporated herein.)

3. *Watson* Standard

The judgment should be reversed under the state harmless error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

In the present case the error was substantial and essential issues regarding appellant's knowledge and intent were closely balanced. (See Claim 12 § D(2)(a), pp. 201-03, incorporated herein.) For example, the prosecution relied, *inter alia*, on aiding and abetting as a theory of liability for all 10 counts. Aiding and abetting requires a discrete mental state which combines the intent and knowledge of the alleged aider and abettor. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117 ["guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's own acts and own mental state"]; see also *People v. Beeman* (1984) 35 Cal.3d 547,] 560 [to prove that a defendant is an accomplice the prosecution must show that the defendant acted "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense."].)

The defense contended that appellant did not form this required mental state because he only intended to help Antonio Sanchez obtain his own property and, hence, appellant did not intend to rob or murder the victims.

(See Claim 10 § B(2), pp., 141-46, incorporated herein.) To resolve the factual issues raised by th is defense theory, the jurors were required to evaluate the circumstantial evidence for and against the existence of the required mental state. However, because the mental state elements for aiding and abetting were not described as a "specific" intent (6 CT 1255; 53 RT 10434), the jurors were precluded by the express terms of CALJIC 2.02 from applying it to the determination of whether the prosecution had proven aiding and abetting beyond a reasonable doubt.

"Jurors are presumed to understand and follow the court's instructions." (*People v. Holt* (1997) 15 Cal.4th 619, 662.) Hence, it must be presumed that the jurors did *not* consider the salutary principles embodied in CALJIC 2.02 when deciding the closely contested questions of appellant's knowledge and intent vis a vis aiding and abetting. Therefore, the judgment should be reversed under the *Watson* standard. (See *People v. Von Villas*, *supra*, 11 Cal.App.4th at 249; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474-75 [great bodily injury finding reversed because the jury was misled into believing that the principles stated in CALJIC 2.02 did not apply to that allegation].)[242]

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[242] For example, in *People v. Baker* (1954) 42 Cal.2d 550, the trial court gave misleading instructions by reciting only the first part of Penal Code § 22 to the effect that voluntary intoxication does not excuse criminal conduct without informing the jury that it could nevertheless consider voluntary intoxication in determining whether the requisite intent had been shown. This Court stated: "Although we might hesitate before holding that the absence of any instruction on voluntary intoxication in a situation such as that presented in this case is prejudicial error, when a partial instruction has been given we cannot but hold that the failure to give complete instructions was prejudicial error." (*People v. Baker*, *supra*, 42 Cal.2d at 575-76; see also *People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Arriola* (1958) 164 Cal.App.2d 430 [giving of only the (continued...)

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty. This is so because the error was substantial and the penalty trial was closely balanced. (See Claim 59 § G(2), pp. 550-51[close balance of penalty trial].) Therefore, the prosecution cannot demonstrate that the error was harmless beyond a reasonable doubt under the federal standard or that the error was harmless under the "any reasonable possibility" state standard. (See Claim 59 § G(1), pp.548-50, incorporated herein [standards of prejudice for penalty].)

4. The Error Was Cumulatively Prejudicial

Even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the additional errors the judge committed – including but not limited to: failing to instruct on essential contested elements of the charges (Claims 10-12); undermining appellant's other defense theories (Claims 13 and 17-23); giving partisan instructions that favored the prosecution (Claim 24-28); diluting and misstating the prosecution's burden of proof (Claims 29-39); allowing the jurors to make up their minds about penalty before the penalty phase began (Claim 59); allowing the prosecutor to unduly emphasize certain inflammatory matters by use of an "audio-video slingshot" during closing argument at the penalty trial (Claim 60) – it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756,

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[242](...continued)
first part of the intoxication instruction was misleading and erroneous].)

765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 21

THE JUDGE ERRONEOUSLY FAILED TO INSTRUCT THE JURORS THAT APPELLANT COULD BE CONVICTED OF LESSER OFFENSES THAN THOSE COMMITTED BY ANTONIO SANCHEZ AND JOAQUIN NUÑEZ

A. Overview

In the preceding claims it was shown that the robbery, burglary, and conspiracy based theories of murder liability – i.e., felony murder, murder during a conspiracy, and murder as a natural and probable consequence of robbery and burglary – were erroneous. However, even if the jury had been correctly instructed on those theories, the jury's verdict should be reversed because the instructions did not allow the jurors to find appellant guilty of second degree murder unless they also concluded that Antonio Sanchez and Joaquin Nuñez were only guilty of second degree murder.

There was substantial record evidence from which the jurors could have rationally concluded that appellant – without any intent to kill or rob – aided and abetted the armed entry of the victims' home. (See Claim 10 § B(2), pp.141-46, and § D, pp. 147-50, incorporated herein) Based on such a conclusion the jurors could have found appellant guilty of second degree implied malice murder based on the rationale that the armed entry was dangerous to human life. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117 ["guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's own acts and own mental state."]; see also *People v. Beeman* (1984) 35 Cal.3d 547, 560 [to prove that a defendant is an accomplice the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense']; *People v. Woods* (1992) 8 Cal.App.4th 1570 [aider and abettor may be

convicted of lesser offense than the perpetrator]; see also 6 CT 1275, 1282 [implied malice murder instruction given].) However, the jurors were precluded from returning such a verdict because the instructions erroneously required the jurors to find that all the participants were "equally guilty." For example, the instructions did not allow the jurors to find appellant guilty of second degree murder unless they also found that the perpetrators of the crimes – Antonio Sanchez and Joaquin Nuñez – were also guilty of only second degree. And because the jurors were likely to have found Antonio Sanchez and Joaquin Nuñez guilty of first degree murder, the error prejudiced appellant.

B. An Aider And Abettor Can Be Convicted Of A Lesser Offense Than The Perpetrator

As this Court explained in *People v. McCoy, supra*, 25 Cal.4th at 1111, 1119, an aider and abettor is "liable for her mens rea, not the other person's." "That is, although joint participants in a crime are tied to a single and common actus reus, the individual mentes reae or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way. If their mentes reae are different, their independent levels of guilt . . . will necessarily be different as well." (*Ibid*, quoting Dressler, *Understanding Criminal Law* (2d ed. 1995) §§ 30.06[C], p. 450 [interior punctuation and quotation marks omitted]; see also *People v. Woods, supra*, 8 Cal.App.4th at 1585-86 [". . . in enacting section 31, the Legislature intended that an aider and abettor may be found guilty of a lesser crime or lesser degree of crime than the ultimate offense the perpetrator is found to have committed."].) Accordingly, the jury should be permitted to convict an aider and abettor of a lesser offense than the offense committed by the perpetrator.

C. In The Present Case, The Instructions Erroneously Told The Jurors That As An Aider And Abettor Appellant Was "Equally Guilty" With Antonio Sanchez And Failed To Affirmatively Instruct That Appellant Could Be Found Guilty Of A Lesser Offense Than Antonio Sanchez

The jury was instructed that: "Each principal, regardless of the extent or manner of participation is equally guilty." (6 CT 1254.) This instruction alone was prejudicial error because it precluded the jurors from finding appellant guilty of second degree murder without also finding that Antonio Sanchez committed only second degree murder.

Moreover, the instructions also failed to affirmatively inform the jurors that they could convict appellant of a lesser offense than that committed by Antonio Sanchez. That is, the court gave no law to the jury that would have permitted conviction of appellant of a lesser offense than the offense committed by Antonio Sanchez.

The trial court is obligated to instruct *sua sponte* on each essential element of the charged offense as defined by law. (*People v. Enriquez* (1996) 42 Cal.App.4th 661, 665.) More generally, it is required to instruct *sua sponte* on the general principles of law relevant to the issues raised by the evidence, "those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Wickersham* (1982) 32 Cal.3d 307, 323-324.)

Thus, because it is a general principle of law that an aider and abettor may be convicted of a lesser charge than the perpetrator (*People v. McCoy*, *supra*, 25 Cal.4th 1117), the jury should have been so instructed.

D. The Error Violated The Federal Constitution

The error violated the Due Process, Compulsory Process, Confrontation, and Trial by Jury clauses of the state (Article I, § 7 and 15) and

federal (5th, 6th and 14th amendments) constitutions. Under this constitutional provision, "as a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63 [citing *Stevenson v. United States* (1896) 162 U.S. 313 [refusal of voluntary manslaughter instruction in murder case where self defense was primary defense constituted reversible error]; see also *Holmes v. South Carolina, supra*, _____ U.S. _____ [126 S.Ct. 1727; 164 L.Ed.2d 503]; see also Claim 10 § H(2), pp.157-58, incorporated herein.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[243] The judge's

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[243] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 (continued...)

erroneous failure to instruct that appellant could be found guilty of a lessor offense than the crime committed by the other participants violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. This arbitrary violation of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Error Was Prejudicial

The error was prejudicial under the state (*People v. Watson* (1956) 46 Cal.2d 818) and federal (*Chapman v. California* (1967) 386 U.S. 18) standards of prejudice. This is so because the error was substantial – it undermined a central defense theory of the case – and because the case was closely balanced. (See Claim 12 § D(2)(a), pp. 201-03.) Under such circumstances th error should be reversible even under the *Watson* standard. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

Moreover, the error also warrants reversal because it effectively withdrew appellant's defense theory – that he was less culpable than Antonio Sanchez – from the jurors' consideration. (See *People v. Rivera* (1984) 157 Cal.App.3d 736.)

The error was also prejudicial at the penalty phase – especially in combination with Claim 67 [jurors precluded from considering accomplice

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[243](...continued)
Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

status of appellant] – because appellant's lesser culpability should have been considered as mitigation.

Moreover, even if the error was not individually prejudicial, it was cumulatively prejudicial with the other errors (e.g., Claims 17-23) which undermined appellant's defense theories to the charges.

CLAIM 22

THE TRIAL COURT ERRED BY GIVING INSTRUCTIONS WHICH PERMITTED THE JURY TO FIND APPELLANT GUILTY OF FIRST-DEGREE MURDER IF THE ONLY NATURAL AND PROBABLE CONSEQUENCE OF THE OFFENSE HE AIDED AND ABETTED WAS SECOND-DEGREE MURDER

A. An Aider And Abettor Can Be Convicted Of A Lesser Offense Than The Perpetrator

See Claim 21, pp. 285-90, incorporated herein.

B. The Instruction In the Present Case Allowed The Jury To Find Appellant Guilty Of First-Degree Murder Even If Second-Degree Murder Was A Natural And Probable Consequence Of His Aiding And Abetting

The trial court instructed the jury as follows:

> One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime or crimes, but is ***also guilty of any other crime committed by a principal*** which is a natural and probable consequence of the crimes originally aided and abetted.
>
> In order to find the defendant guilty of the crime of murder as charged in Counts 1, 2 and 3 on this theory, you must be satisfied beyond a reasonable doubt, that:
>
> One, the crimes of burglary or robbery were committed;
>
> Two, that the defendant aided and abetted those crimes -- I'm sorry. That the crimes of burglary, robbery, or murder were committed;
>
> That the defendant aided and abetted in those crimes;
>
> That a co-principal in one of those – one or more of those crimes ***committed a murder***.
>
> And four, that ***the crime of murder*** was a natural and probable consequence of the commission of the crimes of robbery or burglary.
>
> You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you were satisfied beyond a reasonable doubt and unanimously agreed that the defendant aided and abetted the

> commission of an identified target crime and that ***the crime of murder*** was a natural and probable consequence of the commission of that target crime. [Emphasis added.] (6 CT 1256-57; 53 RT 10435-36.)

This instruction erroneously failed to specify what degree of murder had to be the natural and probable consequence of the robbery or burglary. Thus, the instruction permitted the jury to convict appellant of a first-degree murder committed by Antonio Sanchez even if appellant did not reasonably know and appreciate that first degree murder – as opposed to second degree murder – was a natural and probable consequence. Therefore, even though the jury could rationally have concluded that second-degree murder was a natural and probable consequence of the robbery or burglary, the jury was still permitted to find appellant guilty of first-degree murder. This was so because according to the plain wording of the instruction, if any type of murder was a natural and probable consequence of the target crime that appellant aided and abetted, then appellant could be convicted of whatever type of murder was committed by the perpetrator, because appellant would have been "guilty of any other crime committed by a principal" which was a natural and probable consequence of the target crime.

And, because first-degree murder would have been "any other crime committed by a principal" (Antonio Sanchez), the jury would therefore have found appellant guilty of it. That would have been so even if the jury would have found the lower degree was the most severe "natural and probable consequence" of appellant's aiding and abetting. (See Claim 21, above [explaining how jurors could rationally have found appellant guilty of second degree murder based on an aiding and abetting theory], incorporated herein.)

C. The Error Violated State Law And The Federal Constitution

The error violated the Due Process, Compulsory Process,

Confrontation, and Trial by Jury clauses of the state (Article I, sections 7 and 15) and federal (5th, 6th and 14th amendments) constitutions. Under this constitutional provision, "as a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63 [citing *Stevenson v. United States* (1896) 162 U.S. 313 [refusal of voluntary manslaughter instruction in murder case where self defense was primary defense constituted reversible error]; see also *Holmes v. South Carolina, supra,* _____ U.S. _____ [126 S.Ct. 1727; 164 L.Ed.2d 503] [precluding defendant from presenting third party guilt defense warranted reversal]; *Keeble v. United States* (1973) 412 U.S. 205, 213; *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664; *United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372; *Bennett v. Scroggy* (6th Cir. 1986) 793 F.2d 772, 777-79; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-02.) " . . . [T]he principle [is] established in American law . . . that a defendant is entitled to a properly phrased theory of defense instruction if there is some evidence to support that theory . . . [citations]." (*Virgilio v. State (Wyoming)* (1992) 834 P.2d 1125, 1130; *United States v. Kenny* (9th Cir. 1981) 645 F.2d 1323, 1337 ["jury must be instructed as to the defense theory of the case"]; see also *Taylor v. Withrow* (6th Cir. 2002) 288 F.3d 846, 851 [failure to instruct on self-defense when there is sufficient evidence violates defendant's fundamental due process rights, even though never explicitly stated by the Supreme Court]; *United States v. Oreto* (1st Cir. 1994) 37 F.3d 739, 748.) This is so because "a defendant's right to submit a defense for which he has an evidentiary foundation is fundamental to a fair trial. . . ." (*Whipple v. Duckworth* (7th Cir. 1992) 957 F.2d 418, 423 overruled on other grounds in *Eaglin v. Welborn* (7th Cir. 1995) 57 F.3d 496; *United States v. Douglas* (7th Cir. 1987) 818 F.3d

1317, 1320-21 ["the failure to include an instruction on the defendant's theory of the case ... would deny the defendant a fair trial. [Citation.]"]; *United States v. Hicks* (4th Cir. 1984) 748 F.2d 854, 857-858; *People v. Gurule* (2002) 28 Cal.4th 557, 660 ["criminal defendant has the right to instructions that pinpoint the theory of the defense case"].)

The constitutional right to present a defense is also specifically embodied in the Compulsory Process, Confrontation and Due Process Clauses of the federal constitution. (5th, 6th and 14th Amendments.) (See *People v. Cudjo* (1993) 6 Cal.4th 585, 637-43, Kennard, J. dissenting, for a discussion of the defendant's constitutional right to present a defense under the compulsory process and due process clauses of the federal constitution]; see also *Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [erroneous exclusion of critical, corroborative defense evidence violates due process and the 6th Amendment right to present a defense]; *DePetris v. Kuykendall* (9th Cir. 2000) 239 F.3d 1057, 1061-63 [same]; *Richmond v. Embry* (10th Cir. 1997) 122 F.3dd 866, 871 ["...the right to present defense witness testimony . . . is a right arising not under the 6th Amendment's confrontation clause but is instead one arising under the 5th and 14th Amendment right to due process and the 6th Amendment right to compulsory process"]; *Taylor v. Singletary* (11th Cir. 1997) 122 F.3d 1390, 1394 [right to present defense witness testimony resides in the compulsory process clause and the due process clause of the federal constitution]; cf., *Crawford v. Washington* (2004) 541 U.S. 36 [recognizing importance of 6th Amendment right to confrontation]; see also Imwinkelried and Garland, *Exculpatory Evidence* (2d Ed. 1996) § 2-2(d) [6th Amendment right to confrontation]; *Id.* at § 2-2(e) [6th Amendment right to compulsory process].)

Moreover, the error also violated the Cruel and Unusual Punishment

and Due Process Clauses of the federal Constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Additionally, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo, supra*, 416 U.S. 637, 646.)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[244] The judge's erroneous failure to instruct that appellant could be found guilty of a lessor offense than the crime committed by the other participants violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. This arbitrary violation of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

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[244] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

D. The Error Was Reversible Because It Withdrew A Material Defense From The Jury's Consideration

The failure to give an instruction upon a defense presented by substantial evidence is harmless only when the omitted issue is decided adversely to the defendant by the jury in another context. (*People v. Rivera* (1984) 157 Cal.App.3d 736, 743; see also *People v. Anderson* (1983) 144 Cal.App.3d 55, 63 [appellate court cannot cure the error in failing to instruct on a defense by weighing the evidence]; cf., *Holmes v. South Carolina*, *supra*, _____ U.S. _____ [126 S.Ct. 1727; 164 L.Ed.2d 503] [precluding defendant from presenting third party guilt defense warranted reversal].) In other words, whether the defendant's intoxication affected his formation of a required mental element of the charge should not be considered harmless. (*People v. Baker*, *supra*, 42 Cal.2d at 575-76; *People v. Cameron* (1994) 30 Cal.App.4th 591, 602; see also Claim 10 § H(2), pp. 158 [denial of federal constitutional right to a meaningful opportunity to present a complete defense], incorporated herein.)

E. The Error Was Cumulatively Prejudicial

Even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the additional errors the judge committed – including but not limited to: failing to instruct on essential contested elements of the charges (Claims 10-12); undermining appellant's defense theories (Claim 13 and 17-23); giving partisan instructions that favored the prosecution (Claim 24-28); diluting and misstating the prosecution's burden of proof (Claims 29-39); allowing the jurors to make up their minds about penalty before the penalty phase began (Claim 58); allowing the prosecutor to unduly emphasize certain

inflammatory matters by use of an "audio-video slingshot" during closing argument at the penalty trial (Claim 59) – it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 23

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT IT COULD NOT RETURN A VERDICT OF SECOND DEGREE MURDER UNLESS IT FIRST UNANIMOUSLY ACQUITTED APPELLANT OF FIRST DEGREE MURDER

The jury was instructed with CALJIC No. 8.75 (Step 3) that "The court cannot accept a verdict of guilty of second degree murder as to Counts 1,2, or 3 unless the jury also unanimously finds and returns a signed verdict form of not guilty as to murder of the first degree in the same count. (CT1291.)

This Court has held that a jury must unanimously agree to acquit a defendant of a greater charge before returning a verdict on a lesser charge. (*People v. Nakahara* (2003) 30 Cal.4th 705, 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.) However, the Court should reconsider the propriety of this rule. (See Claim 7, p. 105, fn. 100 [re: incomplete briefing of this issue] incorporated herein.) Reconsideration is necessary because the acquittal first instruction precludes full jury consideration of lesser included offenses, and thereby implicates the due process and jury trial guarantees of the Sixth and Fourteenth Amendments and the Eighth Amendment's requirement for heightened reliability in capital cases. (*Zant v. Stephens*, *supra*, 462 U.S. 862, 884-885; *Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305.)

"Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." (*Beck v. Alabama*, *supra*, 447 U.S. 625, 634.) Because "[s]uch risk cannot be tolerated in a case in which the defendant's life is at stake" (*id.* at p. 637), the United States Supreme Court has held that a defendant accused of capital murder has a due process and Eighth Amendment right to lesser included offense instructions. (*Id.* at pp.

637-638.) "[P]roviding the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." (*Id.* at p. 634.) An instruction that the jury cannot convict on the lesser charge unless it unanimously votes to acquit on the greater charge prevents the jury from making use of lesser included offense instructions in the way contemplated by *Beck,* and subjects jurors to the same pressure to ignore the reasonable doubt standard that they would face if no lesser included offense instruction were given at all. (See also *Jones v. United States* (D.C. 1988) 544 A.2d 1250, 1253; *United States v. Tsanas* (2nd Cir. 1978) 572 F.2d 340, 346; *Cantrell v. State* (Ga. 1996) 469 S.E.2d 660, 662.)

The unanimity requirement also prevents the jury from giving effect to lesser included offense instructions because it gives an unfair advantage to the prosecution. (*Cantrell v. State, supra*, 469 S.E.2d at p. 662 [acquittal-first instruction "gives the prosecution an unfair advantage"].)

Accordingly, the acquittal-first instruction violates the settled principle that "[t]here should be absolute impartiality as between the People and the defendant in the matter of instructions." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instruction that favors one party over the other deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon* (1973) 412 U.S. 470, 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law. (*Lindsay v. Normet* (1972) 405 U.S. 56, 77.)

CLAIMS 24-28: JURY INSTRUCTIONS WHICH UNFAIRLY FAVORED THE PROSECUTION

CLAIM 24

THE MOTIVE AND CONFESSION/ADMISSION INSTRUCTIONS IMPROPERLY APPLIED ONLY TO APPELLANT AND NOT TO THE CO-PARTICIPANTS

A. Overview

Appellant contended that he did not know about and/or join in the alleged plan by the other to rob and kill. Thus, the defense contended that when Jose Luis Ramirez looted the victims' residence he was doing so on his own. (See Guilt Phase: Statement Of Facts § C, p. 28, incorporated herein.) Similarly, the defense contended that Antonio Sanchez shot the victims on his own due to a personal grudge Sanchez had with Ramon Morales. (See Claim 10 § B(2)(b)(ii), pp.144, incorporated herein.)

In light of these defense theories, the motive and admission/ confession instructions were prejudicially argumentative and one-sided because they only applied to appellant.

The motive instruction[245] improperly applied only to appellant and did not encompass the defense theory that Jose Luis Ramirez committed robbery for his own motives – i.e., the hair oil he took was his brand – and that Antonio Sanchez killed Ramon Morales and the others for his own motives – i.e., his

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[245] CALJIC 2.51 provided:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty. (6 CT 1244.)

grudge against Ramon Morales.

Similarly, the instruction on admissions and confessions[246] improperly applied only to out-of-court statements of appellant and not to those of Antonio Sanchez and Jose Luis Ramirez.

B. The Motive And Admissions/Confessions Instructions Improperly Duplicated The Circumstantial Evidence Instructions

See Claim 24, pp. 300-04, incorporated herein.

C. Argumentative And One-Sided Instructions Violate State Law And The Federal Constitution

"There should be absolute impartiality as between the People and defendant in the matter of instructions . . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatcheit* (1944) 63 Cal.App.2d 144, 158; accord *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon*

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[246] CALJIC 2.70 provided:

> A confession is a statement made by a defendant in which [he] [she] has acknowledged [his] [her] guilt of the crime[s] for which [he] [she] is on trial. In order to constitute a confession, the statement must acknowledge participation in the crime[s] as well as the required [criminal intent] [state of mind].
>
> An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence.
>
> You are the exclusive judges as to whether the defendant made a confession [or an admission], and if so, whether that statement is true in whole or in part. (6 CT 1248.)

(1973) 412 U.S. 470, 474), and of equal protection of the law. (*Lindsay v. Normet* (1972) 405 U.S. 56, 77.)

Even if judicial comment does not directly express an opinion about the defendant's guilt, an instruction that is one-sided or unbalanced violates the defendant's federal constitutional rights under the 5th, 6th and 14th Amendments to due process and a fair, impartial trial by jury. (See *Starr v. U.S.* (1894) 153 U.S. 614, 626 [trial judge must use great care so that judicial comment does not mislead and "especially that it [is] not . . . one-sided"]; see also *Quercia v. U.S.* (1933) 289 U.S. 466, 470; *U.S. v. Laurins* (9th Cir. 1988) 857 F.2d 529, 537 [judge's comments require a new trial if they show actual bias or the jury "perceived an appearance of advocacy or partiality"].)

"Instructions must not, therefore, be argumentative or slanted in favor of either side [and the instructions] should neither 'unduly emphasize the theory of the prosecution, thereby de-emphasizing proportionally the defendant's theory' . . . nor overemphasize the importance of certain evidence or certain parts of the case." (*U.S. v. McCracken* (5th Cir. 1974) 488 F.2d 406, 414; see also *U.S. v. Neujahr* (4th Cir. 1999) 173 F.3d 853; *U.S. v. Dove* (2nd Cir. 1990) 916 F.2d 41, 45; *State v. Pecora* (MT 1980) 619 P.2d 173, 175.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process];

Donnelly v. DeChristoforo (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[247] The judge's partisan and one-sided instructions violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. This arbitrary violation of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

D. The Errors Were Prejudicial

Because the guilt trial was closely balanced (see Claim 12 § D(2)(a), pp. 201-03, incorporated herein [the guilt trial was closely balanced]), any substantial error should be considered prejudicial. (See *People v. Von Villas* (1992) 11 Cal.App.4th 175.) The argumentative and one-side instructions on motive and admissions/confessions constituted substantial errors because they bolstered the prosecution's case and undermined the defense theory that Jose Luis Ramirez and Antonio Sanchez committed crimes which were the product of their own independent motives. (See *People v. Roldan* (2005) 33 Cal.4th

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[247] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

646 at 707 ["evidence of motive makes the crime understandable and renders the inferences regarding intent more reasonable"]; see also *People v. Heishman* (1988) 45 Cal.3d 147, 167-171.)

Moreover, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the other partisan and one-sided instructions which the judge gave (see Claims 22-25), it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo, supra*, 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

Furthermore the error was prejudicial as to penalty – especially in combination with Claim 67 [Factor (j) precluded consideration of relative culpability as mitigation] – because it undermined appellant's mitigation theme that he was merely an accomplice who did not take part in the plan to rob and murder and did not personally shoot the victims. Therefore, because the penalty trial was closely balanced, the error was prejudicial. (See Claim 59 § G(1), pp.548-50, incorporated herein.)

CLAIM 25

THE TRIAL COURT ERRONEOUSLY DIRECTED THE JURY TO ONLY FOCUS ON APPELLANT'S ALLEGED CONSCIOUSNESS OF GUILT AND NOT THE CONSCIOUSNESS OF GUILT OF THE OTHER PARTICIPANTS

A. Introduction

At the request of the prosecution (4 CT 949), the trial court delivered instructions regarding acts the jury could consider as evidence of appellant's consciousness of guilt which were misleading, allowed inferences unsupported by the evidence, and constituted improper pinpoint instructions.

The trial court instructed the jury pursuant to CALJIC 2.03 and 2.52. The version of CALJIC 2.03 given to the jury read as follows:

> If you find that before this trial the defendant made a willfully false or misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that statement is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration. (6 CT 1232; 53 RT 10424-25.)

The version of CALJIC 2.52 given to the jury read as follows:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by destroying evidence or concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration. (6 CT 1245; 53 RT 10430.)

Giving these instructions was error, because they were unnecessary and improperly partisan and argumentative because they failed to inform the jury that it could consider similar inferences about the consciousness of guilt of Antonio Sanchez and Joaquin Nuñez whom appellant contended were the ring

leaders and actual perpetrators of the shootings and of Jose Luis Ramirez, whose own guilt was relevant to his credibility. (See Claim 10 § B(2)(b)(ii), pp. 144, incorporated herein.)

B. Instructions Which Unfairly Favor The Prosecution Violate State Law And The Federal Constitution

The trial court must refuse to deliver argumentative instructions. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly single out and bring into prominence before the jury isolated facts favorable to one party, thereby effectively "intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as ones which "invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People v. Mincey* (1992) 2 Cal.4th 408, 437 [citations omitted].) Even neutrally phrased instructions which "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871), or which "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9), are argumentative and must be refused. (*Ibid.*)

Moreover, "[t]here should be absolute impartiality as between the People and defendant in the matter of instructions . . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatcheit* (1944) 63 Cal.App.2d 144, 158; accord *Reagan v. United States* (1895) 157 U.S. 301, 310.) Instructions which distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green*

v. Bock Laundry Machine Co. (1989) 490 U.S. 504, 510; *Wardius v. Oregon, supra,* 412 U.S. at p. 474), and to equal protection of the law. (*Lindsay v. Normet, supra,* 405 U.S. at p. 77.) Although *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions. (See *Cool v. United States* (1972) 409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based on accomplice testimony]; see also *United States v. Harbin* (7th Cir. 2001) 250 F.3d 532; *People v. Moore, supra,* 43 C2d 517, 526-27.) Therefore, instructions which give an unfair advantage to the prosecution violate the "balance" required by the authorities. In sum, to apply one set of instructional rules to the prosecution and another to the defendant creates an imbalance which violates the state (Article 1, sections 7 and 15) and federal (14th Amendment) Due Process and Equal Protection Clauses.

C. The Consciousness Of Guilt Instructions In The Present Case Were Unfairly Applied To Appellant And Not The Other Participants

Appellant's guilt and penalty phase defenses focused on minimizing his own guilt and emphasizing the greater culpability of the other participants– Jose Luis Ramirez, Antonio Sanchez and Joaquin Nuñez. (See Claim 10 § B(2)(b)(ii), pp.144, incorporated herein.)

However, the unfairly partisan instructions in the present case directed the jury's attention only to appellant's acts which supposedly demonstrated a consciousness of guilt. By their terms these instructions were not applicable to any acts by Jose Luis Ramirez, Antonio Sanchez or Joaquin Nuñez which may have demonstrated *their* consciousness of guilt. For example, all three of these co-participants fled immediately after the shootings. And, Jose Luis Ramirez admitted to making a false statement to the police. Thus, the consciousness of guilt instructions were impermissibly argumentative and

partisan because they presented the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright, supra*, 45 Cal.3d 1126, 1135-1137.)

D. Giving These Partisan Pinpoint Instructions On Consciousness Of Guilt Was Reversible Error

Giving these consciousness of guilt instructions was reversible error under both the state (*People v. Watson* (1956) 46 Cal.2d 818) and federal (*Chapman v. California* (1967) 386 U.S. 18) standards of prejudice. This is so because an important defense theory in this case was that Antonio Sanchez, Joaquin Nuñez and Jose Luis Ramirez committed the charged robberies and murders and that appellant did not knowingly intend to aid and abet those crimes. Thus, the partisan consciousness of guilt instructions – which focused the jury's attention on the evidence allegedly showing *appellant's* consciousness of guilt while not giving equivalent instructions concerning the actions of Antonio Sanchez and Jose Luis Ramirez – unfairly hindered the defense. In sum, it was prejudicial error to give the partisan consciousness of guilt instructions.

Moreover, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the other partisan and one-sided instructions which the judge gave (see Claims 21, 23-25), it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly*

v. DeChristoforo (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 26

BECAUSE CALJIC 2.21.1 AND 2.21.2 OBVIOUSLY APPLIED ONLY TO THE TESTIMONY OF JOSE LUIS RAMIREZ THEY WERE IMPROPER PARTISAN COMMENTS ON THE EVIDENCE

The defense contended that there were crucial discrepancies between the testimony of Jose Luis Ramirez and his prior statements to the police. (See Claim 10 § B(2)(a), pp.141-46, incorporated herein.) However, the judge improperly commented on the defense evidence by only instructing the jurors on discrepancies in a witness's "testimony."[248]

The judge also unfairly limited the jurors' consideration of willful false statements to testimony.[249]

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[248] The following version of CALJIC 2.21.1 was given at both the guilt and penalty trials:

> Discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily mean that [any] [a] witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to an important matter or only to something trivial should be considered by you. (6 CT 1239 [guilt]; 6 CT 1187 [penalty].)

[249] The judge gave the following instruction:

> "WITNESS WILLFULLY FALSE"
>
> A witness who was willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the entire testimony of a witness who willfully has testified falsely as to a material point, unless from all the evidence you believe the probability of truth favors his or her testimony in

(continued...)

"There should be absolute impartiality as between the People and defendant in the matter of instructions . . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatcheit* (1944) 63 Cal.App.2d 144, 158; accord *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instruction that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon, supra,* 412 U.S. at p. 474), and of equal protection of the law. (*Lindsay v. Normet, supra,* 405 U.S. at p. 77.)

Even if judicial comment does not directly express an opinion about the defendant's guilt, an instruction that is one-sided or unbalanced violates the defendant's federal constitutional rights under the 5th, 6th and 14th Amendments to due process and a fair, impartial trial by jury. (See *Cool v. United States* (1972) 409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based on accomplice testimony]; *Starr v. U.S.* (1894) 153 U.S.

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[249](...continued)

other particulars. (53 RT 10428; 6 CT 1240; CALJIC 2.21.2.)

An important focus of the appellant's defense was to argue that the testimony of Jose Luis Ramirez should be distrusted because he made "willfully false" statements to the police. In fact, Jose Luis Ramirez expressly admitted that he had lied to the police. (42 RT 8217-18.)

CALJIC 2.21.2 undermined the defense theory about Jose Luis Ramirez' false statements to the police because it only addressed willfully false "testimony."

Thus, the instruction prejudicially commented on the evidence and lessened the evidentiary weight of Jose Luis Ramirez' false statements to the police.

614, 626 [trial judge must use great care so that judicial comment does not mislead and "especially that it [is] not . . . one-sided"]; see also *Quercia v. U.S.* (1933) 289 U.S. 466, 470; *U.S. v. Laurins* (9th Cir. 1988) 857 F.2d 529, 537 [judge's comments require a new trial if they show actual bias or the jury "perceived an appearance of advocacy or partiality"].)

CALJIC 2.21.1 and 2.21.2, as given in the present case, violated the above principles because they minimized the defense theory that the testimony of Jose Luis Ramirez was inconsistent with his prior statements.

And, because the guilt trial was closely balanced the error – which bolstered the prosecution's case and undermined the defense theory that Jose Luis Ramirez' testimony should not be credited – was prejudicial under both the state (*People v. Watson* (1956) 46 Cal.2d 818) and federal (*Chapman v. California* (1967) 386 U.S. 18) standards of prejudice.

Moreover, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the other partisan and one-sided instructions which the judge gave (see Claims 21, 22, 24 and 25), it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

Finally, even if not prejudicial as to the guilt trial, the error was prejudicial as to penalty because it undermined appellant's crucial contention

in mitigation that he was an accomplice who did not intend to kill and did not personally shoot the victims. Therefore, because the penalty trial was closely balanced the error was prejudicial. (See Claim 59 § G(2), pp. 550-51, incorporated herein [penalty trial was closely balanced].)

CLAIM 27

THE INSTRUCTIONS ERRONEOUSLY IMPLIED THAT APPELLANT'S VIDEO STATEMENT WAS INSUFFICIENT TO PROVE ANY FACT

Important defense evidence at both the guilt and penalty trials was based on out-of-court statements. (See 4 SCT 1036-39 [defendant's video statement]; 2 SCT 352-59 [out of courts statements of penalty witnesses].) However, the evidentiary impact of this evidence was unfairly minimized by the following instruction:

> "SUFFICIENCY OF TESTIMONY OF ONE WITNESS"
>
> You should give the uncorroborated testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact whose testimony about that fact does not require corroboration is sufficient for the proof of that fact. You should carefully review all of the evidence upon which the proof of that fact depends. (53 RT 10429; 6 CT 1243; CALJIC 2.27.)[250]

This instruction told the jurors that the uncorroborated "testimony" of a single "witness" was sufficient to prove any fact while implying that the uncorroborated out-of-court statement of a single person was not. In other words, by making the instruction applicable to "testimony" – and not out-of-court statements – the judge effectively told the jury that one class of evidence should generally be treated differently from the other.

Hence, the instructions were unbalanced in violation of the defendant's federal constitutional rights under the 6th and 14th Amendments to due process and a fair, impartial trial by jury. (See *Cool v. United States* (1972)

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[250] This instruction was also repeated at the penalty trial. (6 CT 1188.)

409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based on accomplice testimony]; *Starr v. United States* (1894) 153 U.S. 614, 626 [trial judge must use great care so that judicial comment does not mislead and "especially that it [is] not . . . one-sided"]; see also *Quercia v. United States* (1933) 289 U.S. 466, 470; see also generally *Wardius v. Oregon* (1973) 412 U.S. 470; *United States v. Laurins* (9th Cir. 1988) 857 F.2d 529, 537.)

"Instructions must not, therefore, be argumentative or slanted in favor of either side, [citation] . . . [the instructions] should neither unduly emphasize the theory of the prosecution, thereby deemphasizing proportionally the defendant's theory'. . . nor overemphasize the importance of certain evidence or certain parts of the case." (*United States v. McCracken* (5th Cir. 1974) 488 F.2d 406, 414; see also *United States v. Neujahr* (4th Cir. 1999) 173 F.3d 853; *United States v. Dove* (2nd Cir. 1990) 916 F.2d 41, 45; *State v. Pecora* (Mont. 1980) 190 Mont. 115 [619 P.2d 173, 175].)

Moreover, by improperly restricting the jurors' consideration of important salutary principles to "witnesses" the instructions undermined the reliability of the jurors' verdicts and violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

Further, because appellant was arbitrarily denied his state created right to full and correct instruction of the jury, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution.

(*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

The error was prejudicial as to both guilt and penalty because both phases of the trial were closely balanced. (See Claim 12 § D(2)(a), pp. 201-03, incorporated herein [guilt]; Claim 59 § G(2), pp. 550-51, incorporated herein [penalty].) Since the error substantially favored the prosecution and undermined the defense, it was prejudicial both as to guilt and penalty under either the state (*People v. Watson* (1956) 46 Cal.2d 818) or federal (*Chapman v. California* (1967) 386 U.S. 18) standard of prejudice.

Moreover, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the other partisan and one-sided instructions which the judge gave (see Claims 21-23, 25), it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 28

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY INSTRUCTING THE JURY PURSUANT TO CALJIC 2.13 WHICH UNFAIRLY, UNCONSTITUTIONALLY AND PREJUDICIALLY BOLSTERED THE CREDIBILITY OF THE KEY PROSECUTION WITNESS

A. Overview

Jose Luis Ramirez gave testimony at the guilt phase upon which the prosecution heavily relied. Because Jose Luis Ramirez gave a number of prior statements to the police – some of which were consistent with his testimony and some of which were inconsistent – the judge gave CALJIC 2.13 (Prior Consistent or Inconsistent Statements as Evidence).[251] However this instruction prejudicially favored the prosecution by improperly bolstering the credibility of Jose Luis Ramirez. This was so because the instruction directed the jury to consider prior inconsistent or consistent statements of witnesses as evidence of "the truth" of the prior statement but not of its falsity. Thus, the instruction unfairly skewed the jury's credibility determination in favor of Jose Luis Ramirez.

Because this error unfairly affected the jury's evaluation of the witness' credibility and strengthened the prosecution's case against appellant, the

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[251] The written instruction given at appellant's trial provided as follows:

> "Evidence that on some former occasion, a witness made a statement or statements that were inconsistent or consistent with his or her testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, *but also as evidence of the truth of the facts as stated by the witness on such former occasion.*" (6 CT 1236, italics added; see also 53 RT 10426.)

judgment should be reversed.

B. Giving CALJIC 2.13 Unfairly Tilted The Balance In Favor Of The Prosecution

The United States Supreme Court has long recognized the unfairness of state procedures which create a playing field tilted in favor of the prosecution. Thus, in *Wardius v. Oregon* (1973) 412 U.S. 470, the High Court found a violation of due process in a state procedure which unfairly skewed discovery obligations in favor of the prosecution. Sending a not-so-subtle message to the states, the Court warned that "[t]his Court has . . . been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." (*Id.* at p. 475, fn. 6, citing, inter alia, *Washington v. Texas* (1967) 388 U.S. 14, 22, and *Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) Referring to the constitutional underpinnings of its decision, the Court explained: "Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, . . . it does speak to the balance of forces between the accused and the accuser." (412 U.S. at p. 474, citation omitted.) Adverting to the unfairness of the state rule at issue, the Court held "that in the absence of a strong showing of state interests to the contrary, discovery must be a *two-way street.*" (*Id.* at p. 475, italics added.)

The *Wardius* principle has long resonated in California law, where it has been specifically applied to the giving of one-sided jury instructions. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions must "avoid misleading the jury or in any way overemphasizing either party's theory"]; *People v. Mata* (1955) 133 Cal.App.2d 18, 21 [instructions must not "strongly present the theory of the prosecution and minimize that of the defense"].) In *People v. Moore, supra,*

this Court reversed a manslaughter conviction because of one-sided self-defense instructions favoring the prosecution's view of the case, finding fault with the instructions for the same reason that underpins appellant's challenge to CALJIC 2.13:

> "It is true that the four instructions . . . do not incorrectly state the law . . . , but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but *that principle should not have been left to implication. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions*, including the phraseology employed in the statement of familiar principles." (43 Cal.2d at pp. 526-527, internal quotation marks omitted, italics added.)

In the present case, instructing appellant's jury in the language of CALJIC 2.13 violated the Due Process Clause of the Fourteenth Amendment and California case law by creating an uneven playing field – in favor of the prosecution – with respect to the jury's evaluation of the credibility – or lack thereof – of the key witness, Jose Luis Ramirez.

This instruction obviously applied with the most relevance to the testimony of Jose Luis Ramirez, who gave statements to the police which were consistent in part and inconsistent in other parts with his testimony at trial. (See Claim 10 § B(2)(a), pp. 141-43, incorporated herein.)

Thus, CALJIC 2.13 unfairly buttressed the prosecution's contentions while simultaneously undermining appellant's position, in at least two ways. First, the instruction informed the jurors only that they could consider the prior inconsistent or consistent statements for their "truth," but did not tell them that they could also consider those statements for their "falsity." Thus, the instruction unfairly skewed those credibility determinations to the prosecution's advantage. Second, by telling the jurors to consider the prior

statements as evidence of the truth of "the facts" as stated by the witnesses on those former occasions, by definition the instruction strongly implied that the prior statements were factual. Thus, the use of the two terms "the truth" and "the facts" in the instruction effectively, and prejudicially, constituted the kind of "one-way street" deemed by the Supreme Court in *Wardius* to offend due process, and by this Court to be improperly stated "from the viewpoint solely of the prosecution." (*People v. Moore*, *supra*, 43 Cal.2d at p. 526.)

In sum, the instructions prejudicially denied appellant his state (Article I, sections 7 and 15) and federal (6th and 14th Amendment) rights to a fair jury trial and to due process.

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law, "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[252] The judge's

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[252] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (continued...)

partisan and one-sided instructions violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. This arbitrary violation of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

C. The Instructional Error Was Prejudicial

The court's instructional error, as discussed above, tilted what should have been a level playing field in favor of the prosecution, thereby skewing "the balance of forces between the accused and the accuser." (*Wardius, supra*, 412 U.S. at p. 474.) Jose Luis Ramirez was vulnerable to an attack upon his credibility in a number of significant respects. (See Claim 10 §B(2), pp. 141-46, incorporated herein.) However, the instructional error unfairly assisted the prosecution in bolstering the credibility of Jose Luis Ramirez while at the same time subverting appellant's efforts to attack their credibility.

Therefore, because the trial was closely balanced (see Claim 12 § D(2)(a), pp. 201-03, incorporated herein [guilt]; Claim 59 § G(2), pp. 550-51, incorporated herein [penalty]), the error was prejudicial as to guilt and penalty under both the state (*People v. Watson* (1956) 46 Cal.2d 818) and federal (*Chapman v. California* (1967) 386 U.S. 18, 24) standards of review. (See *Wardius v. Oregon, supra*, 412 U.S. at p. 479 [conviction reversed because of

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[252](...continued)
(1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

"a substantial possibility" that the error "may have infected the verdict"]; *People v. Moore*, *supra*, 43 Cal.2d at pp. 530-531; *People v. Mata*, *supra*, 133 Cal.App.2d at pp. 21-24.)

Moreover, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the other partisan and one-sided instructions which the judge gave (see Claims 21-24), it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments, California Constitution, Article 1, sections 7 & 15, *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; see also *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIMS 29-39: ERRORS REGARDING THE PROSECUTION'S BURDEN OF PROOF

CLAIM 29

THE BURDEN OF PROOF INSTRUCTION ERRONEOUSLY FAILED TO REQUIRE THE JURORS TO FIND "EVERY ELEMENT" OF THE CHARGES

A. Overview

The judge instructed the jurors on the burden of proof in the following language:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. (53 RT 10433; 6 CT 1253.)

This definition was inadequate because it failed to instruct the jurors that the prosecution must prove every element of the charge. (Compare CALCRIM 220 [New January 2006] and the August 2006 version of CALCRIM 103.)[253]

B. The Federal Constitution Requires The Prosecution To Prove Every Element

Any person accused of a crime is presumed innocent unless and until

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[253] Even though CALCRIM has subsequently modified CALCRIM 220, the January 2006 version – which was the product of years of study and input from literally hundreds of experience legal prosecutors and defense attorneys as well as knowledgeable legal scholars – correctly and accurately defines the burden of proof as follows:

> **This presumption requires that the prosecution prove each element of a crime [and special allegation] beyond a reasonable doubt.**

the jury finds that every essential fact necessary to prove the charged crime and every element of the crime has been proved by the prosecution beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466; *U.S. v. Gaudin* (1995) 515 U.S. 506; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-81; *Carella v. California* (1989) 491 U.S. 263, 265-66; *Sandstrom v. Montana* (1979) 442 U.S. 510; *In re Winship* (1970) 397 U.S. 358; *U.S. v. Voss* (8th Cir. 1986) 787 F.2d 393; *People v. Hill* (1998) 17 Cal.4th 800, 831; *People v. Figueroa* (1986) 41 Cal.3d 714.)

C. California Case Law Requires The Prosecution To Prove Every Element

The California courts have consistently expressed the prosecution's burden in terms proving each or every element of the charge. (See e.g., *People v. Cole* (2004) 33 Cal.4th 1158, 1208 (main charge) ["The prosecution has the burden of proving beyond a reasonable doubt each element of the charged offense."]; *People v. Flores* (January 31, 2007, D047249) 147 Cal.App.4th 199 [judgement reversed because instructions given by the trial court in this case, whether considered individually or together, did not "[inform] the jury it had to acquit [Flores] of [the charged offenses] unless each and every element [of those offenses] was proved beyond a reasonable doubt."]; *People v. Rodriguez* (2004) 122 Cal.App.4th 121, 128 (special allegation) ["The prosecution has the burden of proving beyond a reasonable doubt each element of a prior conviction used to enhance a defendant's sentence."].)

The need to instruct in such language was emphasized in *People v. Phillips* (1997) 59 Cal.App.4th 952, in which the trial court failed to give adequate jury instructions regarding reasonable doubt and the presumption of innocence. The prosecution argued that it was harmless error because the jury received instruction from counsel, but the Court of Appeal reversed, finding

that the jurors had to specifically be advised that each element had to be proved beyond a reasonable doubt in order to convict on a charge:

> In our view, the trial court's error suffered no less a constitutional defect than did the trial court in *Sullivan* [*v. Louisiana* (1993) 508 U.S. 275]. The reversal per se rule of *Sullivan* does not allow for exceptions where counsel refer to the reasonable doubt instruction in argument. The structural infirmity present in *Sullivan* is present here as well.
>
> The attorneys' references to the requirement of proof beyond a reasonable doubt fell "short of apprising the jurors that defendants were entitled to acquittal unless each element of the crimes charged was proved to the jurors' satisfaction beyond a reasonable doubt buttressed by additional instructions on the meaning of that phrase." (*People v. Phillips*, *supra*, 59 Cal.App.4th 952, 957-958; quoting *People v. Vann* (1974) 12 Cal.3d 220, 227; emphasis added.)

In sum, the California cases stand for the proposition that jury instructions which do not specifically require proof beyond a reasonable doubt of each element are inadequate. (*People v. Harris* (1994) 9 Cal.4th 407, 438; see also *People v. Vann*, *supra*, 12 Cal.3d 220.)

D. California Evidence Code Section 502 Requires Correct Instruction On The Burden Of Proof

The requested instruction is also justified by Evidence Code Section 502 which provides as follows:

> The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on *each issue* and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. [Emphasis added.]

E. The Language Of The Requested Instruction Was Approved By The CALCRIM Committee After Nine Years Of Input From Respected Judges, Practitioners And Scholars

A Blue Ribbon committee of judges, practitioners and scholars labored for 9 years to produce the original set of CALCRIM instructions. Moreover, the instructions were vetted to the public and numerous members of the legal community submitted input. Finally, the CALCRIM instructions were officially "endorsed" by the Judicial Council. (Rule 855(b), Calif. Rules of Court.)

Accordingly, CALCRIM 220 was a proper and accurate instruction when initially written by the CALCRIM Committee and endorsed by the Judicial Council. Therefore, the request to instruct using this original and correct language should be granted.

F. The Requested Language Is Widely Used And Approved In Other Jurisdictions

A substantial majority of other jurisdictions – state, federal and military – use the "every element" or "each element" construction when defining the presumption of innocence. (See Jury Instruction Survey, appendix to this Claim below [only 4 out 34 jurisdictions randomly surveyed did not use the "every element" or "each element" formulation.) This fact further demonstrates that the January 2006 language of CALCRIM 220 is preferable to the revised version and should be given when requested.

G. The Judgement Should Be Reversed

The failure to properly instruct the jury on the prosecution's burden of proving guilt beyond a reasonable doubt is fundamental structural error which requires reversal per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279-281.) In the present case the deficiencies in the burden instructions individually and cumulatively require reversal because they fundamentally

undermine the presumption of innocence.

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) In the present case the error was substantial and the question of whether appellant knowingly and intentionally committed or aided and abetted robbery and murder was closely balanced. (See Claim 12 § D(2)(a), pp. 201-03, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

Moreover, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Additionally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice, because it undermined the fairness and reliability of the penalty determination. (See Claim 59 § G(1), pp.548-50, and § G(2), pp.550-51, incorporated herein.)

Finally, even if the error identified in this claim was not individually

prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the other deficiencies in the burden of proof instructions (Claims 26-36, incorporated herein), it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments; California Constitution, Article 1, sections 7 and 15; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-81; *Carella v. California* (1989) 491 U.S. 263, 265-66; *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Sandstrom v. Montana* (1979) 442 U.S. 510; *Taylor v. Kentucky* (1978) 436 U.S. 478; *In re Winship* (1970) 397 U.S. 358; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Hill* (1998) 17 Cal.4th 800, 845.)

H. Appendix to Claim 29:Other Jurisdictions Instruct Jurors On The Prosecution's Burden To Prove Every Element

1. State Jurisdictions

In a random partial survey of state jurisdictions only 2 out of 23 (Alabama and Montana) did not use the "each element" or "every element" formulation when defining the presumption of innocence.

Alaska: "every essential element" (*Alaska Pattern Criminal Jury Instructions*, 1.06 (Alaska Bar Association, 1987).)

Colorado: "each and every element" (*State of Colorado Unofficial Draft for Review and Comment* (September 2003).)

Connecticut: "the essential elements" (*Connecticut Selected Jury Instructions - Criminal* A. Preliminary Instructions to Voir Dire Panel, § 1.6 Burden of Proof (The Commission on Official Legal Publications - Judicial Branch, 3rd ed. 1996).)

Florida: "[The presumption of innocence] stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt."] (*Florida Standard Jury Instructions Online* 3.7 [Plea Of Not Guilty; Reasonable Doubt; And Burden Of Proof]; see also *Florida Standard Jury Instructions in Criminal Cases* 2.03. [Plea Of Not Guilty; Reasonable Doubt; And Burden Of Proof] (Florida Bar, 1987).)

Hawaii: "every material element" (*Hawaii Pattern Jury Instructions - Criminal*, HAWJIC 3.02 Presumption of Innocence; Reasonable Doubt(West, 1998).)

Kansas: "doubt as to any of the claims required to be proved" *(Pattern Instructions for Kansas - Criminal*, PIK - Criminal 3d, 52.02 para 2 (Kansas Judicial Council, 3rd ed. 1999).)

Kentucky: "every element of the case"(Cooper, *Kentucky Instructions to Juries*, 1.01 para 1 (Anderson, 4th ed. 1999).)

Louisiana: "each element of the crime" (Joseph & LaMonica, *Louisiana Civil Law Treatise Criminal Jury Instructions*, 3.02, para 1 (West, 1994).)

Maryland: "each of the elements"(Aaronson, *Maryland Criminal Jury Instructions and Commentary*, 1.02 para 1 (Lexis, 2nd ed. 1988).)

Massachusetts: "each element of each charge" (Hrones & Homans, *Massachusetts Jury Instructions – Criminal* Form 1-1. Presumption of Innocence (Lexis, 2nd ed. 1999).)

Maine: "each and every Element"(Alexander, *Maine Jury Instructions Manual*, 3rd ed. 4-2 para 2 (Lexis, 1999).)

Michigan: "each element" (*Michigan Criminal Jury Instructions* (ICLE, 2nd ed. 1999).)

Minnesota: "each element" *(Minnesota Jury Instruction Guides –*

Criminal, CRIMJIG 3.20 (West, 4th ed. 1999).)

New Jersey: "each and every essential element" *(New Jersey Model Jury Charges – Criminal*, Presumption of Innocence, Burden of Proof, Reasonable Doubt (New Jersey ICLE 4th ed. 1997).)

New York: "every element" (*Criminal Jury Instructions – New York*, CJI (NY) 2d Presumption of Innocence, Burden of Proof, Reasonable Doubt (New York Office of Court Administration 1996).)

Oklahoma: "each element" (*Oklahoma Uniform Jury Instructions – Criminal*, OUJI—CR 10-4 General Closing Charge - Presumption of Innocence (Oklahoma Center for Criminal Justice, 2nd ed. 1996 (2000 Supp.).)

Pennsylvania: "each and every element of the crime charged" (*Pennsylvania Suggested Standard Criminal Jury Instructions*, Pa.SSJI (Crim) 7.01 (Pennsylvania Bar Institute, PBI Press, 2000)

South Carolina: "each and every essential element" (Ervin's, *South Carolina Criminal Jury Instructions* 1-14, [Reasonable Doubt Charge] ¶ 1. (South Carolina Bar, 1995).)

Tennessee: "all of the elements" (*Tennessee Pattern Instructions - Criminal*, 2.04 Burden of Proof: Elements and Date of the Offense, T.P.I.-Crim (West, 5th ed. 2000).)

Texas: "each and every element of the offense" (McClung, & Carpenter, *Texas Criminal Jury Charges* 1:350 [General Instruction-Reasonable Doubt, Presumption Of Innocence] (James Publishing, 2000).)

Washington: "each element of every crime charged' (*Washington Pattern Jury Instructions – Criminal*, WPIC 31.01 (West, 2nd ed. 1994).)

2. Federal Circuit, Military, District Of Columbia

A random survey of eight federal circuit (1st, 5th, 6th, 7th, 8th, 9th, 10th and 11th), the four Military Justice Courts and the District of Columbia

revealed that only three out of the thirteen jurisdictions (5th, 10th and 11th[254] Circuits) did not use the "each element" or "every element" formulation.

1st Circuit: "each of the elements of the crime[s]" (*1st Circuit Pattern Jury Instructions – Criminal*, 3.02 Presumption of Innocence; Proof Beyond a Reasonable Doubt (2002).)

1st Circuit: "each essential element of the offense" (*1st Circuit Pattern Jury Instructions – Criminal*, 6.06 Charge to a Hung Jury (2002).)

6th Circuit: "every element of the crime charged" *(6th Circuit Pattern Jury Instructions – Criminal*, 1.03 Presumption of Innocence, Burden of Proof, Reasonable Doubt (1991).)

7th Circuit: "each of these propositions" (*7th Circuit Federal Jury Instructions – Criminal* 4.01 Elements of Offense--Single Offense Cases (1999).)

8th Circuit: "each essential element" (*8th Circuit Model Jury Instructions - Criminal*, 3.05 Description of Charge; Indictment Not Evidence; Presumption of Innocence; Burden of Proof(2000).)

8th Circuit: "all of [these] [the] essential elements" (*8th Circuit Model Jury Instructions – Criminal* 3.09 Elements of Offense; Burden of Proof (2000).)

9th Circuit: "every element of the charge" (*9th Circuit Model Jury Instructions – Criminal* 3.2 Charge Against Defendant Not Evidence – Presumption of Innocence – Burden of Proof (2000).)

11th Circuit: "each of the essential elements of the offense" *(11th Circuit Pattern Jury Instructions – Criminal*, SI 14 Alibi (2003), but see BI 3

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[254] The 11th Circuit used the "each element" formulation in its alibi instruction but not in the general burden of proof instruction.

Definition Of Reasonable Doubt.)

District of Columbia: "every element" (*Criminal Jury Instructions for the District of Columbia*, 2.08 para 2 (Bar Association of the District of Columbia, 4th ed. 1993).)

Military: "every element" (*Military Judge's Benchbook* — 2001, 2-5-12 [used by all four military jurisdictions].)

3. Miscellaneous

Federal Pattern/Model Instructions: "each and every element of the offense charged" (O'Malley Grenig, & Lee, *Federal Jury Practice and Instructions*, 12.10 para 4 (West, 5th ed. 2000).)

CLAIM 30

THE PRESUMPTION OF INNOCENCE INSTRUCTION IMPROPERLY USED THE TERM "UNTIL" INSTEAD OF "UNLESS"

A. The Instruction Was Erroneous

The jurors were instructed on the presumption of innocence using the first paragraph CALJIC 2.90 which provided:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. (53 RT 10433; 6 CT 1253.)

CALJIC 2.90 is a two-paragraph instruction which serves two separate purposes. The second paragraph defines "reasonable doubt" while the first paragraph explains the presumption of innocence.

The validity of the second paragraph of CALJIC 2.90 has been extensively litigated, to say the least. Although criticized at times, including by our High Court (and amended thereafter), the second paragraph's validity has been consistently upheld, and this Court, evidently weary of endless attacks on the proffered definition of "reasonable doubt," has issued a well-known admonition against appellate arguments on that subject. (*People v. Hearon* (1999) 72 Cal.App.4th 1285; see *Victor v. Nebraska* (1994) 511 U.S. 1; *Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997, 999-1000; *People v. Freeman* (1994) 8 Cal.4th 450, 504-505.)

The issue raised here by trial counsel, however, involved the first paragraph of CALJIC 2.90 and its explanation of the presumption of innocence. Specifically, it involved the question of whether, by telling jurors to presume the defendant innocent until the contrary is proven, instead of

unless the contrary is proven, CALJIC 2.90 prejudicially undermines the constitutionally mandated presumption of innocence. For reasons which follow, it does.

While the two paragraphs of CALJIC 2.90 explain distinct concepts – reasonable doubt and the presumption of innocence – those concepts are legally intertwined. It is a bedrock principle of our criminal jurisprudence that under the Fourteenth Amendment's Due Process Clause, the accused cannot be convicted unless the government presents proof beyond a reasonable doubt of every fact needed to constitute the crime with which the accused is charged. (*Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *Jackson v. Virginia* (1979) 443 U.S. 307, 315-316; *In re Winship* (1970) 397 U.S. 358, 364.) Any instructional language which dilutes or reduces this burden of proof is constitutionally defective. (*Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40.)

As defense counsel argued, CALJIC 2.90 undermines the presumption of the defendant's innocence by using the word "until" instead of the word "unless." The word "until" is not merely less clear or definitive. Rather, it affirmatively implies the described proof will be forthcoming, whereas "unless" leaves clear the possibility sufficient proof may never be presented.

In apparent recognition of how the word "until" fails to comply with *Winship*, and thus risks misleading jurors and diluting the prosecution's burden of proof, the Judicial Council's Blue Ribbon CALCRIM Committee replaced CALJIC 2.90 with CALCRIM 103 and 220, and, in the process, replaced "until" with "unless."[255]

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[255] CALCRIM 103, paragraph4 and CALCRIM 220, paragraph 4 provide as follows:

(continued...)

Furthermore, numerous other jurisdictions' pattern instructions on reasonable doubt use either "unless" or "unless and until." (See, e.g., ICJI No. 1501 (Idaho, "unless"); OUJIC No. 1 (Oklahoma, "unless"); *State v. Hutchinson* (Tenn. 1994) 898 S.W.2d 161 ("unless"); CJI (New York) (1st Ed. 1983) No. 3.05, par. 2, sent. 2 ("unless and until"); KRS 532.025 (Kentucky, "unless and until"); CJI (Wash., D.C.) (4th Ed.) 1.03 ("unless and until"); UcrJI (Oregon) No. 1006 ("unless and until"); 1st Circuit Model Instructions Criminal No. 1.01 ("unless and until"); 8th Circuit Model Instructions Criminal No. 1.01 ("unless and until").)

One scholar has suggested jurors be more directly instructed on this point, to wit:

> The law presumes the defendant to be innocent of all the charges against him. I therefore instruct you that the defendant is to be presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt. (Leonard B. Sand, et al., 1 Modern Federal Jury instructions, sec. 4.01; Form 4-1, emphasis added (1994).)

Alternatively, one federal case has quoted the following jury instruction on the presumption of innocence and reasonable doubt:

> The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you

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[255](...continued)

> In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.

> are convinced beyond a reasonable doubt that the defendant is guilty. (*United States v. Walker* (7th Cir. 1993) 9 F.3d 1245, 1250, emphasis added.)

Moreover the dictionary definitions of the terms at issue corroborate the wisdom of the CALCRIM committee in modifying the CALJIC wording.

Until is defined as: "up to the time that or when." [256]

Unless is defined as: "except under the circumstances that." [257]

The above definition of "until," is anticipatory, suggesting that a moment in time or a physical location will be reached. On the other hand, the definition of "unless," is conditional. Thus, in the context of a reasonable-doubt instruction, "until" implies that the described quantum of proof is forthcoming, whereas "unless" tells the jury that the described quantum of proof may never be presented.

Accordingly, CALCRIM's modification of CALJIC 2.90 was meritorious

B. The Error Violated The Federal Constitution

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated appellant's state (Article I, sections 7 and 15) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship*, *supra*, 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

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[256] "Until." Dictionary.com Unabridged (v 1.1). Random House, Inc. 20 Feb. 2007. <Dictionary.com http://dictionary.reference.com/browse/until>

[257] "Unless." Dictionary.com Unabridged (v 1.1). Random House, Inc. 20 Feb. 2007. <Dictionary.com http://dictionary.reference.com/browse/until>

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Further, because appellant was arbitrarily denied his state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code including Evidence Code sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

C. The Error Was Prejudicial

The failure to properly instruct the jury on the prosecution's burden of proving guilt beyond a reasonable doubt is fundamental structural error which requires reversal per se. (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 279-281.) In the present case the deficiencies in the burden instructions individually and cumulatively require reversal because they fundamentally undermine the presumption of innocence.

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to

its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) In the present case the error was substantial and the question of whether appellant knowingly and intentionally committed or aided and abetted robbery and murder was closely balanced. (See Claim 12 § D(2)(a), pp. 201-03, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

Moreover, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Additionally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice, because it undermined the fairness and reliability of the penalty determination. (See Claim 13 § F, pp. 213-15, and Claim 59 § G, pp.548-51, incorporated herein.)

Finally, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the other deficiencies in the burden of proof instructions (Claims 26-36, incorporated herein), it is apparent that appellant's trial was

fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments; California Constitution, Article 1, sections 7 and 15; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-81; *Carella v. California* (1989) 491 U.S. 263, 265-66; *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Sandstrom v. Montana* (1979) 442 U.S. 510; *Taylor v. Kentucky* (1978) 436 U.S. 478; *In re Winship* (1970) 397 U.S. 358; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 31

THE INSTRUCTIONS FAILED TO ADEQUATELY EXPLAIN THE WORKINGS OF THE PRESUMPTION OF INNOCENCE IN TERMS THAT LAY PERSONS WOULD UNDERSTAND

A. Introduction

The basic burden of proof instruction (53 RT 10433; 6 CT 1253) and other crucial instructions given in the present case used the term "burden" or "burden of proof" in defining the presumption of innocence and the prosecution's burden of proof. However, while these terms may be well known and understood by lawyers and judges, they should have been further defined and explained to the jury.

B. The Instructions Were Deficient And Misleading Because They Failed To Affirmatively Instruct That The Defense Had No Obligation To Present Or Refute Evidence

See Claim 32, pp. 349-58, incorporated herein.[258]

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[258] Nor were instructions addressing appellant's failure to testify sufficient. These instructions provided as follows:

> A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way. (53 RT 10430; 6 CT 1246.)
>
> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of each of the charges against him. No lack of testimony on the defendant's part will make up for a failure of proof by the People so has to support a finding against him on any such essential element. (53 RT 10430; 6 CT 1247.)

C. The Instructions Failed To Explain That Appellant's Attempt To Refute Prosecution Evidence Did Not Shift The Burden Of Proof

Given the instructional failure to explain that appellant had no obligation to present affirmative evidence, it follows, *a fortiori*, that the instructions erroneously failed to explain that appellant's presentation of evidence did not alter the burden.

Simply stated, the prosecution's burden of proof is not satisfied merely by the rejection or disbelief of the defense evidence. "[D]isbelief of a witness does not establish that the contrary is true, only that the witness is not credible. [Citations]." (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 704.) In other words, "rejection of testimony 'does not create affirmative evidence to the contrary of that which is discarded.' [Citation]." (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343; see also *Nishikawa v. Dulles* (1958) 356 U.S. 129, 137 ["disbelief of petitioner's story . . . [cannot] fill the evidentiary gap in the Government's case"]; *Moore v. Chesapeake & O.R. Co.* (1951) 340 U.S. 573, 576 [disbelief of a witness will "not supply a want of proof"]; *Mandelbaum v. United States* (2nd Cir. 1958) 251 F.2d 748, 752 ["the disbelief of a witness does not necessarily establish an affirmative case"]; *People v. Goodchild* (1976) 242 N.W.2d 465, 469-70 ["mere disbelief in a witness's testimony does not justify a conclusion that the opposite is true without other sufficient evidence supporting that conclusion"].)

Accordingly, when the prosecution has failed to present sufficient credible evidence to meet its burden of proof, the jury should not be permitted to utilize its disbelief of the defendant's testimony or other defense evidence to conclude that the prosecution's burden has been met. The failure to adequately inform the jury concerning this principle violated appellant's federal constitutional rights to trial by jury and due process (6th and 14th

Amendments) by allowing the jury to convict appellant even though the prosecution did not meet its burden of proving him guilty beyond a reasonable doubt.[259]

D. The Jurors Should Have Been Told That A Conflict In The Evidence And/Or A Lack Of Evidence Could Leave Them With A Reasonable Doubt As To Guilt

CALJIC 2.90 was incomplete and misleading because it failed to expressly inform the jury that reasonable doubt could be based on a conflict in the evidence and/or a lack of evidence. Reasonable doubt may arise from a conflict in the evidence, lack of evidence or a combination of the two. (See *Georgia Suggested Pattern Jury Instructions - Criminal Cases* part 2 (D) p. 7 [Instruction D] (Carl Vinson Institute of Government, University of Georgia, 2nd ed. 2000).) This is so because two equally probable conflicting inferences do not overcome a burden of proof. When conflicting inferences are equally probable or, in other words, when the evidence is in equipoise, "the party with the burden of proof loses." (*Simmons v. Blodgett* (9th Cir. 1997) 110 F.3d 39, 41-42; see also *Rexall v. Nihill* (9th Cir. 1960) 276 F.2d 637, 644; *Reliance Ins. v. McGrath* (N.D. Cal. 1987) 671 F.Supp. 669, 675; *Wilson v. Caskey* (1979) 91 Cal.App.3d 124, 129 ["Equal probability does not satisfy a burden

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[259] Deering's California Evidence Code § 702 included a "suggested form" which instructs the jury on this issue:

> As I have instructed you, you are the sole judges of the credibility of witnesses and of the weight to be given the testimony of each. If, however, you should disbelieve the testimony of a witness, that circumstance does not warrant your finding that the direct opposite of such testimony is true, for disbelief in testimony, in whole or in part, is not the equivalent of affirmative evidence to the contrary of the disbelieved testimony.

of proof . . ."].)

Moreover, even if one of two inferences is more probable, it may still not rise to the level of proof beyond a reasonable doubt. (See Claim 36, pp.376-78, incorporated herein [CALJIC 2.01 and 2.02 improperly create a reasonable inference with proof beyond a reasonable doubt].)

E. CALJIC 2.90 Failed To Inform The Jury That The Presumption Of Innocence Continues Throughout The Entire Trial, Including Deliberations

It is well recognized that the presumption of innocence continues throughout the entire trial and applies to every stage, including deliberations. (See *Clarke v. Commonwealth* (Va. 1932) 159 Va. 908 [166 S.E. 541, 545-46]; see also *State v. Goff* (1980) 272 S.E.2d 457, 463 [the burden never shifts to the defendant].) Hence, it is improper to give the jury the impression that the presumption of innocence continues until the jury, in its discretion, decides that it should end. (See *United States v. Payne* (9th Cir. 1990) 944 F.2d 1458, 1462-63; see also *People v. Johnson* (Ill. App. Ct. 1972) 4 Ill. App.3d 539 [281 N.E.2d 451, 453]; *People v. Attard* (N.Y. App. Div. 1973) 346 N.Y.S.2d 851; *State v. Tharp* (Wash. App. 1980) 27 Wn. App. 198 [616 P.2d 693, 700]; *Washington Pattern Jury Instructions - Criminal*, WPIC 1.01 [Advance Oral Instruction-Introductory] comment (West, 2nd ed. 1994) [words "during your deliberations" were inserted into this instruction "to avoid any suggestion that the presumption could be overcome before all the evidence is in"].) "It has been held that an instruction as to the presumption of innocence which correctly told the jury that it attends the accused throughout the trial, but which the trial court qualified by adding, 'until such time, if at all, as it is overcome by credible evidence' is erroneous, because the jury may have inferred from this that, at some stage of the trial before its conclusion, sufficient evidence had been adduced to overcome the presumption, thus shifting the burden upon

the accused. [Citations.]" (*Wisconsin Jury Instructions - Criminal, WIS-JI-Criminal* 140 [Burden Of Proof And Presumption Of Innocence] comment p. 4 (University of Wisconsin Law School, 2000).)

Hence, CALJIC 2.90 as given in the present case was deficient because it did not assure that the jury would not shift the burden to the defense at some point prior to completing its deliberations.[260] (See also Claim 32, pp.349-58, incorporated herein.)

F. CALJIC 2.90 Improperly Described The Prosecution's Burden As Continuing "Until" The Contrary Is Proved

See Claim 30, pp. 333-39, incorporated herein.

G. The Term "Burden" Should Have Been Defined

Because a "burden" in legal terms has a technical meaning it should be defined, sua sponte. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403-04.)

Hence, the jury should have been instructed as follows:

> A burden of proof draws a line. If the prosecution fails to cross that line, regardless of how close it may have come,

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[260] The jury was instructed as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge. (53 RT 10433; 6 CT 1253.)

then the prosecution has not met its burden of proof. (*People v. Mixon* (1990) 225 Cal.App.3d 1471, 1484.)

H. The Instructions Omitted An "Application Paragraph" Which Expressly Stated Exactly What The Prosecution Was Obligated To Prove Beyond A Reasonable Doubt

Neither CALJIC 2.90 nor the specific CALJIC instructions which define the elements of the charged offenses contained an "application paragraph" which expressly informed the jury exactly what must be proved before appellant could be convicted. (See e.g., 6 CT 1253; 1263; 1273-74; 1302-03; 1307-08; 1313-15.) The absence of such an "application paragraph" was reversible error. (See generally *In re Winship* (1970) 397 U.S. 358 [prosecution must prove every essential fact necessary for conviction] ; cf., *Plata v. State* (Tex. Crim. App 1996) 926 S.W.2d 300; see also see also Claim 29, pp. 323-32, incorporated herein [failure of presumption of innocence instruction to require proof of every element of the charge].)

I. The Errors Violated The Federal Constitution

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated appellant's state (Article I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship, supra,* 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v.*

Alabama (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Moreover, because appellant was arbitrarily denied his state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code, including Evidence Code sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

J. The Judgment Should Be Reversed

The giving of an instruction which dilutes the standard of proof for conviction is reversible error per se. Any error in defining reasonable doubt for a jury cannot be deemed harmless because the error goes to the very heart of our system of criminal trials and deprives the criminal defendant of his or her right to be convicted only upon a finding by the jury of guilt beyond a reasonable doubt as correctly defined. (*Sullivan v. Louisiana, supra,* 508 U.S. 275.) This Court has reached a similar conclusion. (*People v. Vann* (1974) 12 Cal.3d 220, 225-226.)

The guilt judgment should be reversed under the state harmless-error standard of prejudice. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

In the present case the error was substantial and the question of whether appellant knowingly and intentionally committed or aided and abettor robbery and murder was closely balanced. (See Claim 12 § D(2)(a), pp. 201-03, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

Moreover, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Additionally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice, because it undermined the fairness and reliability of the penalty determination. (See Claim 13 § F, pp. 213-15, and Claim 59 § G, pp.548-51, incorporated herein.)

Finally, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the other deficiencies in the burden of proof instructions (Claims 26-36, incorporated herein), it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments; California

Constitution, Article 1, sections 7 and 15; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-81; *Carella v. California* (1989) 491 U.S. 263, 265-66; *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Sandstrom v. Montana* (1979) 442 U.S. 510; *Taylor v. Kentucky* (1978) 436 U.S. 478; *In re Winship* (1970) 397 U.S. 358; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 32

THE INSTRUCTIONS WERE DEFICIENT AND MISLEADING BECAUSE THEY FAILED TO AFFIRMATIVELY INSTRUCT THAT THE DEFENSE HAD NO OBLIGATION TO PRESENT OR REFUTE EVIDENCE

A. Introduction

The instructions in the present case omitted one of the most fundamental underpinnings of the presumption of innocence: that the accused need not present any evidence for the jury to have a reasonable doubt. This omission, in light of all the other instructions, erroneously conveyed the impression that the evidence presented by the defense must raise a reasonable doubt. Accordingly, the structural integrity of the trial was undermined and the judgment should be reversed.

B. Legal Principles

The essence of the presumption of innocence is that the defense has no obligation to present evidence, refute the prosecution evidence or to prove or disprove any fact. (See *In re Winship* (1970) 397 U.S. 358; see also *People v. Hill* (1998) 17 Cal.4th 800, 831 [". . .to the extent [the DA] was claiming there must be some affirmative evidence demonstrating a reasonable doubt, she was mistaken as to the law, for the jury may simply not be persuaded by the prosecution's evidence. . ."]; see also *State v. Miller* (W. Va. 1996) 197 W. Va. 588 [476 S.E.2d 535, 557] [if requested court must instruct that defendant has no obligation to offer evidence]; *United States v. Maccini* (1st Cir. 1983) 721 F.2d 840, 843; Federal Judicial Center (1988) *Pattern Criminal Jury Instructions*, No. 22 ["[A] defendant has an absolute right not to ... offer evidence."].)

As the judge told the jury in *Maccini*:

> I take this occasion to state to the jury one of the fundamental principles of American jurisprudence, which is that the burden is upon the [prosecution] in a criminal case to prove every essential element of every alleged offense beyond a reasonable doubt. That is, the burden is upon the [prosecution] to prove guilt beyond a reasonable doubt. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce any evidence. There's no burden on [defendant] to produce any evidence. (*United States v. Maccini, supra*, 721 F.2d 840, 843.)

C. Omission Of The Required Instruction In The Present Case

The instructional language which purported to define and explain the presumption of innocence was the first paragraph of CALJIC 2.90 which provided as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. (53 RT 10433; 6 CT 1253.)

This instruction was deficient because it failed to expressly explain that there is no burden on [defendant] to produce any evidence. (*United States v. Maccini, supra*, 721 F.2d at 843; see also e.g., 5th Circuit Pattern Jury Instructions, Criminal (1997) 1.09, ¶ 3 [" . . . the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence"].) While this fundamental concept may be well known to those familiar with criminal and constitutional law, it cannot be assumed that lay jurors would fully understand its meaning and effect. Indeed, even some of those educated in the law have difficulty with the concept. (See e.g., *People v. Hill, supra*, 17 Cal.4th at 831 [prosecutor argued that there must be affirmative evidence which raises a reasonable doubt].) Hence, this

technical but crucial term should have been more fully defined for the jury.

D. Other Instructions Reinforced The Misconception That The Defendant Must Produce Evidence In Order To Raise A Reasonable Doubt[261]

When considering the instructions as a whole [as required by the instructions (6 CT 1225)] the jurors were reasonably likely to assume that the defense had the burden of producing sufficient evidence to raise a reasonable doubt. The instructions from which such an erroneous assumption would have been made included the following:

1. "RESPECTIVE DUTIES OF JUDGE AND JURY" (6 CT 1223-24 [CALJIC 1.00].)

This instruction described the jurors' duties in terms of "determin[ing] the facts" and "reach[ing] a just verdict. . . ." These descriptions implied a weighing of the evidence presented by both parties to determine what actually happened which would be consistent with the jurors' natural intuition. However, the jurors' duty under the presumption of innocence is not to determine the ultimate truth but rather to determine whether the prosecution has proved guilt beyond a reasonable doubt and, hence, this instruction was misleading. (See *In re Winship* (1970) 397 U.S. 358; *Apprendi v. New Jersey* (2000) 530 U.S. 466; see also Claim 29, pp. 323-32, incorporated herein.)

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[261] This Court has previously rejected challenges to some of the instructions discussed herein. (See *People v. Rogers* (2006) 39 Cal.4th 826, 889; see also Claims 37 and 38 seeking reconsideration of those decisions.)

However, the argument in this claim does not depend on whether or not these individual instructions are individually or collectively improper. Instead, appellant is relying on these instructions to illustrate the need for a general instruction that the defendant is not obligated to present evidence.

2. "PRODUCTION OF ALL AVAILABLE EVIDENCE NOT REQUIRED." (6 CT 1234 [CALJIC 2.11].)

> Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events. Neither side is required to produce all objects or documents mentioned or suggested by the evidence.

This "missing witness" instruction exacerbated the deficient presumption of innocence instruction by implying that the defense had the obligation to present evidence. By expressly telling the jury that neither side is required to "call . . . all" potential witnesses to an event or "produce all objects or documents . . ." the instruction suggested that the production of evidence by both sides was required. (See e.g., *Commonwealth v. Bird* (Pa. 1976) 240 Pa. Super. 587 [361 A.2d 737, 739] [reversible error to instruct jury that it could draw inference against defendant for failure to call bystander as witness even though the instruction also permitted the jury to draw an inference against the prosecution for its failure to call the same witness]; *State v. Mains* (1983) 669 P.2d 1112, 1117.)

3. "SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE GENERALLY." (6 CT 1229 [CALJIC 2.01].)

The circumstantial evidence instructions also exacerbated the deficiencies of the presumption of innocence instruction.

It is true that CALJIC 2.01, as given in the present case, specifically stated that "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." (1st sentence; 6 CT 1229.) However, this paragraph reasonably addressed only the prosecution's evidence and did nothing to explain how the defense evidence should be considered in light of the

prosecution's burden.

Moreover, the next paragraph reinforced the misconception that the defense must present evidence to prove innocence:

> Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt. (Paragraph 3, 6 CT 1229.)

This misconception was also implied in the second paragraph of CALJIC 2.02. (6 CT 1231.)

4. "SUFFICIENCY OF TESTIMONY OF A SINGLE WITNESS." (6 CT 1243 [CALJIC 2.27].)

The language of CALJIC 2.27 implied that a witness should be evaluated in terms of whether his or her testimony was "sufficient for the proof of [a] fact." (6 CT 1243.) Hence, the instruction erroneously implied, individually, and in combination with the other instructions discussed herein, that it was necessary for the defense witnesses to provide sufficient "proof" of particular facts. This violated the presumption of innocence which only requires the defense to leave the jurors with a reasonable doubt. (*In re Winship*, *supra*, 397 U.S. 358; *People v. Hill*, *supra*, 17 Cal.4th 831; see also additional authorities in § B, above.)

5. "MOTIVE." (6 CT 1244 [CALJIC 2.51])

An important defense theory was that appellant had no motive to rob and murder the victims. Defense counsel emphasized that the dispute was between Antonio Sanchez and Ramon Morales and that there was no "evidence to prove to you that [appellant] had some sort of stake in this matter." (52 RT 10268; see also 52 RT 10266:19-25 [appellant had no grudge

against anyone; no motive]; 52 RT 10266:28-10267:2 [same].) The prosecutor agreed with this assessment: "You know, Antonio really was the one that had the bone to pick here. He was the one that had it in for Ramon Morales." (52 RT 10224:19-24.) However, the judge undermined this defense theory by instructing in the language of CALJIC 2.51 which shifted the burden of proof to appellant to "show" an absence of motive in order to establish his innocence, thereby lessening the prosecution's burden of proof.[262]

6. "DEFENDANT NOT TESTIFYING – NO INFERENCE OF GUILT MAY BE DRAWN." (6 CT 1246 [CALJIC 2.60].)

This instruction was limited to the defendant's failure to testify. It did not apply to the failure to present evidence. Hence, this instruction further reinforced the misconception that the defense had the burden of producing evidence to raise a reasonable doubt.[263]

7. "DEFENDANT MAY RELY ON STATE OF EVIDENCE." (6 CT 1247 [CALJIC 2.61].)

This instruction did discuss the defendant's reliance on a failure of proof by the prosecution:

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[262] As given in the present case CALJIC 2.51 provided as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty. (6 CT 1244; 53 RT 10429-30.)

[263] When a generally applicable instruction is made specifically applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors. (See Claims 18, p 259 fn. 231 and 76 § D, p.634, fn 393, incorporated herein.)

> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any such essential element. (6 CT 1247.)

However, by making the instruction specifically applicable to "deciding whether or not to testify"[emphasis added] and by admonishing that "no lack of testimony on defendant's part will supply a failure of proof . . ." [emphasis added] the instruction, by implication, did not apply to the defendant's failure to present evidence.[264]

8. "WITNESS WILLFULLY FALSE." (6 CT 1240 [CALJIC 2.21.2].)

This instruction further implied that the defendant was required to produce evidence to raise a reasonable doubt by admonishing the jury to evaluate a witness's testimony in terms of whether "the probability of truth favors his or her testimony. . . ." (See also Claim 38 § pp. 388-89, incorporated herein.)

9. "FELONY MURDER SPECIAL CIRCUMSTANCE" (6 CT 1293-94 [CALJIC 8.80.1].)

The phrase "if you find" improperly implied that appellant had to prove that he was not the "actual killer." (See Claim 53 § C, pp.489, incorporated herein.)

In sum, the instructions as a whole perpetrated the misconception that

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[264] When a generally applicable instruction is made specifically applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors. (See Claim 18 § C, p.259, fn. 231, incorporated herein.)

the defense had the burden of raising a reasonable doubt through the presentation of evidence.

E. The Error Violated Appellant's Federal Constitutional Rights

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated appellant's state (Article I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship, supra,* 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Cruel and Unusual Punishment and Due Process Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Further, because the error arbitrarily violated appellant's state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code, including Evidence Code sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Error Was Prejudicial

The failure to properly instruct the jury on the prosecution's burden of proving guilt beyond a reasonable doubt is fundamental structural error which requires reversal per se. (*Sullivan v. Louisiana*, *supra,* 508 U.S. 275, 279-281.) In the present case the deficiencies in the burden of proof instructions individually and cumulatively require reversal because they fundamentally undermined appellant's right to presumption of innocence.

The guilt judgment should be reversed under the state harmless-error standard of prejudice. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) In the present case the error was substantial and the question of whether appellant knowingly and intentionally committed or aided and abettor robbery and murder was closely balanced. (See Claim 12 § D(2), pp. 201-03, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

Moreover, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Additionally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice, because it undermined the fairness and reliability of the penalty determination. (See Claim 10 § H(3), p. 158, and Claim 59 § G, pp. 548-51, incorporated herein.)

Finally, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the other deficiencies in the burden of proof instructions (Claims 26-36, incorporated herein), it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments; California Constitution, Article 1, sections 7 and 15; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-81; *Carella v. California* (1989) 491 U.S. 263, 265-66; *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Sandstrom v. Montana* (1979) 442 U.S. 510; *Taylor v. Kentucky* (1978) 436 U.S. 478; *In re Winship* (1970) 397 U.S. 358; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 33

THE BURDEN OF PROOF INSTRUCTION FAILED TO ADEQUATELY DEFINE THE STANDARD OF PROOF

In response to criticism of the term "moral certainty" in *Victor v. Nebraska* (1994) 511 U.S. 1, this Court suggested that CALJIC 2.90 should be modified by deleting the "moral certainty" standard, leaving only the "abiding conviction" language as the measure of reasonable doubt. (*People v. Freeman* (1994) 8 Cal.4th 450, 504.) CALJIC followed suit with its 1994 revision of 2.90. The legislature amended Penal Code § 1096 to comply with *Freeman* effective June 30, 1995.

Since then the new version of the instruction has been approved in several courts. (See *People v. Brown* (2004) 33 Cal.4th 382, 392; *People v. Hearon* (1999) 72 Cal.App.4th 1285; *Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997, 999-1000.)

Without complete briefing on the question appellant seeks reconsideration of this issue.[265]

Deletion of the "moral certainty" language from CALJIC 2.90 created an unconstitutional ambiguity because there is no longer any language which defines the degree of persuasion to which the "abiding conviction" must be held. "Abiding conviction" requires definition because, standing alone, it may reasonably be interpreted by the jury to embody a degree of persuasion equivalent to the clear and convincing evidence standard. Indeed, other state and federal jurisdictions define clear and convincing evidence in their standard pattern instructions in terms, such as a "firm belief or conviction," which are

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[265] See Claim 7, p. 105, fn. 100, incorporated herein.

difficult to distinguish from an abiding conviction.[266]

Moreover, confusion of the "abiding conviction" language of CALJIC 2.90 with the clear and convincing standard is also a danger under the common meaning of the terms. A "conviction" is commonly defined as a "strong belief" and "abiding" is defined as "enduring" or "lasting." (Webster's, *New World Dictionary* (1979 ed.) pp. 2, 138.) Under these definitions, a juror could easily conclude that an "abiding conviction," and hence, proof beyond a reasonable doubt, is equivalent to a belief which is so strong and enduring "as to leave no substantial doubt" and "to command the unhesitating assent of every reasonable mind." Yet, these are descriptions of clear and convincing evidence, not proof beyond a reasonable doubt which requires the "utmost certainty." (*In re Winship* (1970) 397 U.S. 358, 363-64.)[267]

It is true that the *Victor* opinion contains a loose phrase in which the court said: "An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden

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[266] See e.g,. *5th Circuit Pattern Jury Instructions - Civil* Inst. 2.14 (1999) ["firm belief or conviction"]; Potuto, Saltzburg, Perlman, *Federal Criminal Jury Instructions,* No. 70.02 [Insanity Defense] (Lexis, 2nd ed. 1993) [same]; *Virginia Model Jury Instructions - Civil* (Rep. ed. 1993) No. 3.110.) In fact, at least one state actually defines clear and convincing evidence as an "abiding conviction." (*New Mexico Statutes Annotated - Uniform Jury Instructions*, No. 13-1009; see also *In re Doe* (1982) 647 P.2d 400, 402 [98 N.M. 198].) Even the United States Supreme Court has had occasion to use the term "abiding conviction" in defining clear and convincing evidence: ". . . an abiding conviction that the truth of [the] factual contentions are 'highly probable.' [Citation.]" (*Colorado v. New Mexico* (1984) 467 U.S. 310, 316.

[267] See also *Jackson v. Virginia* (1979) 443 U.S. 307, 339; *Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320; *People v. Brigham* (1979) 25 Cal.3d 283, 291 ["a strong and convincing belief ... is something short of having been 'reasonably persuaded to a near certainty.' [Citation]."]

of proof." (*Victor*, 127 LEd2d at 596.) However, this statement is not accompanied by any discussion or analysis of whether other defining language is needed to replace "moral certainty." Hence, *Victor* should not be read to authorize a definition of proof beyond a reasonable doubt in terms of "abiding conviction" without (1) any added language which defines the degree of persuasion to which the "abiding conviction" must be held and (2) any definition which distinguishes "abiding conviction" from the lesser standard of clear and convincing evidence.

In sum, the error violated the federal constitution (6th, 8th and 14th Amendments) by abridging appellant's rights to due process, trial by jury and a reliable, non-arbitrary guilt and penalty trial. (*Sullivan v. Louisiana* (1993) 508 U.S. 275; *Beck v. Alabama* (1980) 447 U.S. 625; *In re Winship*, *supra*, 397 U.S. 358.)[268]

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[268] To the extent that the error arbitrarily violated state law it also violated the Due Process Clause of the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.)

CLAIM 34

THE BURDEN OF PROOF INSTRUCTION ERRONEOUSLY IMPLIED THAT REASONABLE DOUBT REQUIRES THE JURORS TO ARTICULATE REASONS FOR THEIR DOUBT

A. Introduction

Because this case presented the jurors with closely balanced factual issues to resolve, an accurate definition of reasonable doubt was critical. Therefore, the judgment should be reversed because the definition of reasonable doubt given by the judge implied that the jurors must articulate logic and reason(s) for their doubt.

B. Proceedings Below

The jury was given the then-standard instruction (CALJIC 2.90 (5th Ed. 1988)) on presumption of innocence. (6 CT 1253.) The second paragraph of that instruction defined reasonable doubt as follows:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge. (6 CT 1253.)

C. Legal Principles

"In state criminal trials, the Due Process Clause of the Fourteenth Amendment '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.' [Citations.]" (*Cage v. Louisiana* (1990) 498 U.S. 39; see also *In re Winship* (1970) 397 U.S. 358, 364.) The reasonable-doubt standard "plays a vital role in the American scheme of criminal procedure." (*Winship*, *supra*, 397 U.S. at 363; see also *Cage*, *supra*, 498 U.S. at 40.)

"Among other things, 'it is a prime instrument for reducing the risk of convictions resting on factual error.' [Citation.]" (*Ibid.*)

An essential conceptual underpinning of the presumption of innocence is that the accused bears no burden of proof whatsoever. (See *In re Winship, supra.*) It is not the obligation of the accused to "raise" or "create" any specified threshold of doubt. (See *In re Winship, supra*; see also *People v. Loggins* (1972) 23 Cal.App.3d 597, 601-04.) Nor is the jury required to "find" any particular degree or amount of doubt before it may acquit. (See *In re Winship, supra.*) Rather, the jurors must acquit under all circumstances unless they find that the prosecution has proven every fact essential to conviction beyond a reasonable doubt. (*Ibid.*)

Accordingly, it is constitutionally erroneous to expressly require the jurors to articulate concrete reasons for their doubt." (*People v. Antommarchi* (N.Y. 1992) 80 N.Y.2d 247, 252 [604 N.E.2d 95, 98]; see also *Siberry v. State* (Ind. 1893) 133 Ind. 677 [33 N.E. 681].) When jurors are required to articulate reasons for acquitting "[t]he burden . . . is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt." (*State v. Cohen* (Iowa 1899) 108 Iowa 208 [78 N.W. 857, 858].) In short, "jurors are not bound to give reasons to others for the conclusion reached. [Citations.]" (*Ibid.*)

Moreover, the essence of reasonable doubt is a failure of proof. "It is the want of information and knowledge that creates the doubt." (*Siberry v. State, supra*, 33 N.E. at 688.) Such "want of knowledge" is not necessarily capable of expression as an affirmative or logical "reason" for the doubt which is felt. This would require the juror to "prove a negative." Hence, such an instruction unconstitutionally misstates the burden of proof. "It is the lack of information and knowledge satisfying the members of the jury of the guilt of

the accused, with that degree of certainty required by the law, which constitutes a reasonable doubt, and if jurors are not satisfied of the guilt of the accused with such degree of certainty as the law requires, they must acquit, whether they are able to give a reason why they are not satisfied to that degree of certainty or not." (*Siberry v. State*, *supra*, 33 N.E. 681 at 689.)

In the present case the jurors were not expressly instructed that they must articulate reason and logic for their doubt. However, the instructional language implied as much. By requiring more than "mere possible or imaginary doubt" the instruction suggested to the jurors that the reason and logic for their doubt should first be articulated and then evaluated against the "mere possible or imaginary" standard.

In sum, as reasonably interpreted by the jurors (*Estelle v. McGuire* (1991) 502 U.S. 62), the instructions required an articulation of their doubts before such doubts could be considered sufficient to acquit.

D. The Error Violated The Federal Constitution

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated appellant's state (Article I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship*, *supra*, 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514

U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Further, because the error arbitrarily violated appellant's state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code, including Evidence Code sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

E. The Judgement Should Be Reversed

The failure to properly instruct the jury on the prosecution's burden of proving guilt beyond a reasonable doubt is fundamental structural error which requires reversal per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279-281.) In the present case the deficiencies in the burden instructions individually and cumulatively require reversal because they fundamentally undermined the presumption of innocence.

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) In the present case the error was substantial and question of whether appellant knowingly and intentionally committed or aided and abetted robbery and murder was closely balanced. (See Claim 12 § D(2)(a), pp. 201-03,

incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

Moreover, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Additionally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice, because it undermined the fairness and reliability of the penalty determination. (See Claim 10 § H(3), p. 158 and Claim 59 § G, pp. 548-51, incorporated herein.)

Finally, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the other deficiencies in the burden of proof instructions (Claims 26-36, incorporated herein), it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments; California Constitution, Article 1, sections 7 and 15; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-81; *Carella v. California* (1989) 491 U.S. 263, 265-66; *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951,

962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Sandstrom v. Montana* (1979) 442 U.S. 510; *Taylor v. Kentucky* (1978) 436 U.S. 478; *In re Winship* (1970) 397 U.S. 358; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 35

THE BURDEN OF PROOF INSTRUCTION UNCONSTITUTIONALLY ADMONISHED THE JURY THAT A POSSIBLE DOUBT IS NOT A REASONABLE DOUBT

A. Introduction

The judge gave the standard CALJIC definition of reasonable doubt which provided as follows:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge. (6 CT 1253; CALJIC 2.90 (5th Ed. 1988).)

The language admonishing the jury that "reasonable doubt . . . is not a mere possible doubt . . ." was unconstitutional because it failed to adequately limit the scope of possible doubt.

B. Legal Principles

"In state criminal trials, the Due Process Clause of the Fourteenth Amendment '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.' [Citations.]" (*Cage v. Louisiana* (1990) 498 U.S. 39; see also *In re Winship* (1970) 397 U.S. 358, 364.) The reasonable-doubt standard "plays a vital role in the American scheme of criminal procedure." (*Winship*, *supra*, 397 U.S. at 363; see also *Cage*, *supra*, 498 U.S. at 40.) "Among other things, 'it is a prime instrument for reducing the risk of convictions resting on factual error.' [Citation.]" (*Ibid.*)

C. A Possible Doubt May Be Reasonable

Unlike an imaginary doubt,[269] a possible doubt may be based on fact. When driving on a two-lane road reasonable drivers do not pass on a blind curve because it is "possible" that a car may be coming in the other lane. Cautious investors regularly eschew the higher returns and opt for the lower return of an insured bank account because it is "possible" they may lose principal in a more lucrative but riskier investment.

In other words, merely because a doubt is only possible does not make it unreasonable or insignificant. In the final analysis, the question of reasonable doubt should be measured by reasonable reliance rather than possibility. If the doubt is sufficient to cause a juror to reasonably rely on it in making important decisions then the doubt is reasonable, even if it is merely possible. (See e.g., *Victor v. Nebraska*, *supra*, 511 U.S. 1, 20-21 [hesitate to act language "gives a commonsense benchmark for just how substantial such a [reasonable] doubt must be"].) This formulation of reasonable doubt was approved in *United States v. Wilson* (1914) 232 U.S. 563, 570 and has since been endorsed by a number of state and federal courts. (See e.g., *Holland v. United States* (1954) 348 U.S. 121, 140; *Hilbish v. State* (Alaska Ct. App. 1995) 891 P.2d 841, 850-51.) The federal circuits that provide for definition of reasonable doubt and many states use the *Wilson/Holland* hesitation concept. For example, the Eighth Circuit clarifies the "possible doubt" by relating it to the notion of reliance:

> A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person

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[269] Obviously, a doubt based on imagination rather than the evidence should not be validated.

> hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

(*8th Circuit Model Jury Instructions - Criminal* 3.11 [Reasonable Doubt] (2000); see also O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions* 12:10 [Presumption Of Innocence, Burden Of Proof, And Reasonable Doubt] para. 3 (West, 5th ed. 2000).)

Other jurisdictions include similar definitions. (See e.g., *Pennsylvania Suggested Standard Criminal Jury Instructions*, Pa. SSJI (crim) 7.01, [Presumption Of Innocence: Burden Of Proof; Reasonable Doubt] ¶ 3, sent. 2 (Pennsylvania Bar Institute, PBI Press, 06/75); *South Carolina Criminal Jury Instructions* 1-14 [Reasonable Doubt Charge] (South Carolina Bar, 1995); McClung, & Carpenter, *Texas Criminal Jury Charges* 1 (II)(B)(2) [proper.chg] ¶ 4 (James Publishing, 1999); *Criminal Jury Instructions For The District of Columbia* 2.09, [Reasonable Doubt] sent. 3 (Bar Association of the District of Columbia, 4th ed. 1993); *South Dakota Pattern Jury Instructions - Criminal*, SDCL 1-6-3 [Reasonable Doubt (Alternate 2)] (State Bar of South Dakota, 2000); *Alaska Pattern Criminal Jury Instructions* 1.52 [Presumption Of Innocence, Burden Of Proof Beyond A Reasonable Doubt] para. 2 (Alaska Bar Association, 1987); *Arkansas Model Jury Instructions - Criminal*, AMCI 2d 110 [Introductory Instructions-Reasonable Doubt] (Lexis, 2nd ed. 1997); *Colorado Jury Instructions*, COLJI - Crim 3:04 [Presumption Of Innocence-Burden Of Proof Generally-Reasonable Doubt] para. 3 (West, 1983); *Connecticut Selected Jury Instructions - Criminal* 2.8 [General Jury Instructions-Reasonable Doubt] para. 1 (The Commission on Official Legal Publications - Judicial Branch, 3rd ed. 1996); *Idaho Criminal Jury*

Instructions, ICJI 103A [Reasonable Doubt (Alternative)] para. 3 (Idaho Law Foundation, Inc., 1995); *Maryland Criminal Pattern Jury Instructions*, MPJI-Cr 1.04 [Reasonable Doubt] para. 3 (Micpel, 1999); *New Mexico Uniform Jury Instructions - Criminal*, UJI Criminal 14-5060 [Presumption Of Innocence; Reasonable Doubt; Burden Of Proof] para. 2 (Lexis, 1998); *South Dakota Pattern Jury Instructions - Criminal*, SDCL 1-6-2 [Reasonable Doubt (Alternate 1)] para. 1 (State Bar of South Dakota, 2000); *South Dakota Pattern Jury Instructions - Criminal*, SDCL 1-6-3 [Reasonable Doubt (Alternate 2)] (State Bar of South Dakota, 2000); *Instructions for Virginia & West Virginia* 24-401 [Reasonable Doubt Defined Generally] para. 1 (Lexis, 4th ed. 1996); *Wisconsin Jury Instructions - Criminal*, WIS-JI-Criminal 140 [Burden Of Poof And Presumption Of Innocence] para. 5 (University of Wisconsin Law School, 2000); *6th Circuit Pattern Jury Instructions - Criminal* 1.03 [Presumption Of Innocence, Burden Of Proof, Reasonable Doubt] ¶ 5 (1991).)

Alternatively, it may be said that reasonable doubt "does not mean a captious or speculative doubt, or a doubt from mere whim, caprice, or groundless conjecture." (*Siberry v. State*, *supra*, 133 Ind. 677, 687.)

However, in the present case reasonable doubt was not defined as such. Instead, the jury was admonished that a doubt is not reasonable if it is "merely possible." Such a definition unconstitutionally allowed the jurors to reject a doubt as unreasonable even if they would reasonably have relied on a similar degree of doubt in their own important affairs.[270]

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[270] *Victor v. Nebraska*, *supra*, 511 U.S. 1 briefly addressed this issue and concluded that the "mere possible" language was used in the sense of a "fanciful doubt." (*Victor*, *supra*, 511 U.S. at 18.) The Court reached this conclusion without analysis of the actual language instead relying on the argument of counsel to provide a limiting definition of the "mere possible" (continued...)

Moreover, by stating that merely possible doubt was unreasonable, the instruction unconstitutionally implied some obligation on the part of the accused to raise a probable doubt as to his or her guilt. It is unconstitutional to require the accused to assume any burden of proof as to reasonable doubt. (See e.g., *In re Winship*, *supra*, 397 U.S. 358; Claim 32, pp. 349-58, incorporated herein.)

Yet, if doubt which is merely possible is insufficient, then the jurors could only have concluded that the doubt must be at least probable to elevate it above a mere possibility.

D. The Error Violated The Federal Constitution

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated appellant's state (Article I, sections 7 and 15) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also *Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514

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[270](...continued)
language. That is, defense counsel told the jury: "Anything can be possible . . . [A] planet could be made out of blue cheese. But that's really not in the realm of what we're talking about." (*Victor*, *supra*, 511 U.S. at 17.) In the present case, by contrast, there was no such argument by counsel. Therefore, the instruction improperly diluted the burden of proof.

U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Further, because appellant was arbitrarily denied his state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code including Evidence Code sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

E. The Error Was Prejudicial

The failure to properly instruct the jury on the prosecution's burden of proving guilt beyond a reasonable doubt is fundamental structural error which requires reversal per se. (*Sullivan v. Louisiana, supra*, 508 U.S. 275, 279-281.) In the present case the deficiencies in the burden instructions individually and cumulatively require reversal because they fundamentally undermine the presumption of innocence.

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) In the present case the error was substantial and the question of whether appellant knowingly and intentionally committed or aided and abetted robbery and murder was closely balanced. (See Claim 12 § D(2)(a), pp. 201-03,

incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

Moreover, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Additionally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice, because it undermined the fairness and reliability of the penalty determination. (See Claim 10 § H(3), p. 158 and Claim 59 § G, pp. 548-51, incorporated herein.)

Finally, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered cumulatively with the other deficiencies in the burden of proof instructions (Claims 26-36, incorporated herein), it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments; California Constitution, Article 1, sections 7 and 15; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-81; *Carella v. California* (1989) 491 U.S. 263, 265-66; *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951,

962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Sandstrom v. Montana* (1979) 442 U.S. 510; *Taylor v. Kentucky* (1978) 436 U.S. 478; *In re Winship* (1970) 397 U.S. 358; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 36

THE CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS (CALJIC 2.01 AND 2.02) UNCONSTITUTIONALLY LIGHTENED THE PROSECUTION'S BURDEN OF PROOF, AND ALSO CREATED A MANDATORY CONCLUSIVE PRESUMPTION OF GUILT, UNDER THE CIRCUMSTANCES OF THIS PARTICULAR CASE[271]

CALJIC 2.01 and 2.02, pattern instructions defining the sufficiency of circumstantial evidence, were given at the end of the guilt phase trial.[272]

A portion of these instructions undermined the accuracy of the verdicts, operated as a mandatory conclusive presumption, and misled the jury about the burden of proof on the ultimate issue of guilt or innocence, violating the Sixth, Eighth and Fourteenth Amendments. The error was prejudicial and reversible.

These instructions were worded so the jury had to decide between appellant's "guilt" and "innocence." This improperly shifted the burden of proof away from the prosecution, violating the defendant's state (Article I, sections 7, 15, 16 and 17) and federal (U.S. Const. 6th, 8th and 14th Amendments) constitutional rights to due process and trial by jury. (See generally *In re Winship*, *supra*, 397 U.S. 358.)

Moreover, these instructions required that the jury accept an indication that the evidence was incriminatory if it "appeared reasonable," i.e., a standard substantially below proof beyond a reasonable doubt they therefore unconstitutionally allowed a finding of guilt based on a degree of proof below

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[271] This Court has previously rejected this issue. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1200.) However, in this less than complete briefing appellant requests that this Court reconsider that ruling in light of the facts and circumstances of the present case and in light of appellant's briefing in support of the claim. (See Claim 7, p. 105, fn. 100, incorporated herein.)

[272] See 6 CT 1229-32.

that required by the Due Process Clause. (*Cage v. Louisiana* (1990) 498 U.S. 39, 41.)

Furthermore, these instructions also constituted an impermissible mandatory, and conclusive presumption of guilt upon a preliminary finding that evidence of guilt merely "appears reasonable." Such a presumption violates not only due process, but also appellant's right to a jury trial under the Sixth Amendment by removing fundamental questions from the jury. (*Carella v. California* (1989) 491 U.S. 263, 265.)

Furthermore, in this case, the trial court gave CALJIC 1.00, and thereby told the jury, "You must accept and follow the law as I state it to you, whether or not you agree with the law." (6 CT 1223.) A reasonable juror could have concluded that the instruction that (s)he must accept a reasonable interpretation of circumstantial evidence – if (s)he found that there was one – "was one of the 'rules of law' the juror 'must accept and follow.'" (*People v. Reyes-Martinez* (1993) 14 Cal.App.4th 1412, 1418.)[273]

In sum, these errors involved the basic standard to be applied at trial, they undermined the accuracy of the verdicts and operated as a mandatory, conclusive presumption, here violating the Fifth, Sixth, Eighth and Fourteenth Amendments. Therefore, the guilt and penalty verdicts should be reversed. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-81.)

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[273] Even if jurors might consider why they would be required to adopt a "reasonable" interpretation of circumstantial evidence (though they are not supposed to), they would presumably conclude this is simply some requirement based in law somewhere of which they have no particular understanding. They would naturally defer to the trial judge, since "it is [her] words . . . which carry an authority bordering on the irrefutable." (*United States v. Wolfson* (5th Cir. 1978) 573 F.2d 216, 221; *accord, e.g., Quercia v. United States* (1933) 289 U.S. 466, 470.)

Moreover, when the error is considered cumulatively with the other deficiencies in the burden of proof instructions (Claims 26-36, incorporated herein), it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments; California Constitution, Article 1, sections 7 and 15; *Sullivan v. Louisiana*, *supra*, 508 U.S. at 278-81; *Carella v. California, supra,* 491 U.S. at 265-66; *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Sandstrom v. Montana* (1979) 442 U.S. 510; *Taylor v. Kentucky* (1978) 436 U.S. 478; *In re Winship* (1970) 397 U.S. 358; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 37

THE BURDEN OF PROOF PRINCIPLES OF CALJIC 2.01 WERE UNCONSTITUTIONALLY LIMITED TO CIRCUMSTANTIAL EVIDENCE

A. Introduction

This case involved crucial factual issues which required the jury to evaluate and weigh direct evidence. For example, much of the testimony of the key prosecution witness, Jose Luis Ramirez, was direct evidence. Hence, the standard circumstantial evidence instructions (CALJIC 2.01 and 2.02) should have be supplemented with an instruction informing the jury that "if direct evidence is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt." The trial judge's failure to give such an instruction erroneously permitted appellant to be convicted upon direct evidence despite the existence of a reasonable interpretation of that evidence pointing to his innocence. This error prejudicially undermined the presumption of innocence and violated appellant's state (Article I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury.

B. Presumption Of Innocence Principles Apply With Equal Force To Both Direct And Circumstantial Evidence

It is axiomatic that due process "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.) This requires the state to prove "'every ingredient of an offense beyond a reasonable doubt. . . .'" (*Sandstorm v. Montana* (1979) 442 U.S. 510,

524.) Moreover, it is a violation of due process for a statutory scheme to lessen the prosecution's burden of proving every element of the charged offense. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 699.)

It has been long and widely recognized that the prosecution's burden to prove guilt beyond a reasonable doubt is equally applicable whether the evidence is direct, circumstantial or a combination of both. (See CALJIC 2.00; see also *People v. Towler* (1982) 31 Cal.3d. 105, 118 [standard of review on appeal is the same for direct and circumstantial evidence].)

Because the nature of a burden of proof is to require one party to produce more evidence than the other (see *People v. Mixon* (1990) 225 Cal.App.3d 1471, 1484), when the evidence is evenly balanced, "the party with the burden of proof loses." (*Simmons v. Blodgett* (9th Cir. 1997) 110 F.3d 39, 41-42; see also *Wilson v. Caskey* (1979) 91 Cal.App.3d 124, 129 see also generally *Nishikawa v. Dulles* (1958) 356 U.S. 129, 137 [equally probable inferences of intent from the act committed created an "evidentiary gap"]; *United States v. Ramirez-Rodriguez* (9th Cir. 1977) 552 F.2d 883, 884 citing *Turner v. United States* (1970) 396 U.S. 398.) In the context of proof beyond a reasonable doubt, this principle was long conveyed to the jury in terms of instructions such as the following:

> If the evidence in this case is susceptible of two constructions or interpretations each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

This instruction was given in *People v. Bender* (1995) 27 Cal.2d 164, 175-177 and this Court held that it was "eminently proper. . . ." (See also *People v. Naumcheff* (1952) 114 Cal.App.2d 278, 281 ["If from the evidence you can

with equal propriety draw two conclusions, the one of guilt, the other of innocence, then in such a case it is your duty to adopt the one of innocence and find the defendant not guilty"]; *People v. Foster* (1926) 198 Cal. 112, 127 [jury instructed that: "considering the evidence as a whole, if it was susceptible of two reasonable interpretations, one looking 'toward guilt and the other towards the innocence of the defendant, it was their duty to give such facts and evidence the interpretation which makes for the innocence of the defendant'"]; *People v. Barthleman* (1898) 120 Cal. 7, 10 ["if the evidence points to two conclusions, one consistent with the defendant's guilt, the other consistent with the defendant's innocence, the jury are bound to reject the one of guilt and adopt the one of innocence, and acquit the defendant"]; *People v. Haywood* (1952) 109 Cal.App.2d 867, 872 ["The testimony in this case if its weight and effect be such as two conclusions can be reasonably drawn from it, the one favoring the defendant's innocence, and the other tending to establish his guilt, law, justice and humanity alike demand that the jury shall adopt the former and find the accused not guilty"]; *People v. Carroll* (1947) 79 Cal.App.2d 146, 150 ["You are instructed that if from the evidence you can with equal propriety draw two conclusions, the one of guilt, the other of innocence, it is your duty to adopt the one of innocence and find the defendant not guilty"]; *United States v. James* (9th Cir. 1978) 576 F.2d 223, 227.)[274]

However, CALJIC has limited the applicability of this principle to

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[274] The instruction in *James* provided as follows ". . . if you view the evidence in this case as reasonably permitting either of two conclusions, one pointing to innocence and the other pointing to guilt, you must necessarily adopt the conclusion pointing to innocence, because so long as that is a reasonable conclusion and it exists, it would be impossible to find guilt beyond a reasonable doubt, because the very existence of a reasonable alternative on the other side would preclude you from finding guilt beyond a reasonable doubt."

circumstantial evidence only. Yet, *People v. Bender, supra*, upon which CALJIC relies for its circumstantial evidence instruction (CALJIC 2.01) did not limit the "two reasonable interpretations" instruction to circumstantial evidence. Hence, while the circumstantial evidence instruction itself need not be given when the prosecution does not substantially rely on circumstantial evidence (see *People v. Wiley* (1976) 18 Cal.3d. 162, 175), an instruction applying the same principles to all the evidence is "eminently proper. . ." (*People v. Bender, supra*, 27 Cal.2d at 177.)

Additionally, limitation of the CALJIC 2.01 principle is especially prejudicial because it implied to the jury that those principles do not apply to direct evidence. Such a result flows naturally and reasonably from the distinctions the instructions make between direct and circumstantial evidence and the express limitation of the "two-interpretations" rule to circumstantial evidence only. As recognized in *People v. Salas* (1976) 58 Cal.App.3d 460, 474-75, if an instruction is expressly made applicable to one element to the exclusion of another, the jury made reasonably conclude that the instruction is limited to the specified element.[275]

C. The Error Violated The Federal Constitution

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated appellant's state (Article I, sections 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498

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[275] See Claim 18 § C, pp. 259, fn. 231, incorporated herein [maxim expressio unius est exclusio alterius].

U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.) Further, because the error arbitrarily violated appellant's state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code, including Evidence Code sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

D. The Error Was Prejudicial

In the present case, the error was prejudicial because it undermined the presumption of innocence by permitting the jury to find appellant guilty based upon direct evidence for which two reasonable interpretations existed. This violated appellant's state (Article I, sections 7 and 15) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury which require the prosecution to prove every essential element beyond a reasonable doubt. (See *United States v. Gaudin* (1995) 515 U.S. 506; *In re Winship* (1970) 397 U.S. 358.) Accordingly, the error was a structural

violation and the judgment should be reversed. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. 275.)

The guilt judgment should be reversed under the state harmless-error standard[276] because the trial was closely balanced. (See Claim 12 § D(2)(a), pp. 201-03, incorporated herein.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) In the present case the error was substantial and therefore the judgment should be reversed under the *Watson* standard.

Moreover, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Additionally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice, because the penalty trial was closely balanced. (See Claim 59 § G, pp. 548-51, incorporated herein.)

Finally, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts

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[276] *People v. Watson* (1956) 46 Cal.2d 818, 836.

would still be warranted. This is so because, when the error is considered cumulatively with the other deficiencies in the burden of proof instructions (Claims 26-36, incorporated herein), it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments; California Constitution, Article 1, sections 7 and 15; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-81; *Carella v. California* (1989) 491 U.S. 263, 265-66; *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Sandstrom v. Montana* (1979) 442 U.S. 510; *Taylor v. Kentucky* (1978) 436 U.S. 478; *In re Winship* (1970) 397 U.S. 358; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Hill* (1998) 17 Cal.4th 800, 845.)

CLAIM 38

A SERIES OF GUILT-PHASE INSTRUCTIONS IMPERMISSIBLY AND UNCONSTITUTIONALLY DILUTED THE REASONABLE DOUBT STANDARD[277]

"The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.)

These constitutional principles were cumulatively abridged by the following CALJIC instructions given in appellant's trial: CALJIC 2.21.2 (6 CT 1240); CALJIC 2.22 (6 CT 1241); CALJIC 2.01 (6 CT 1229-30); CALJIC 2.02 (6 CT 1230-31); CALJIC 2.27 (6 CT 1243); CALJIC 2.51 (6 CT 1244); CALJIC 8.20 (6 CT 1276-77).

Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test,

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[277] Most of the errors asserted in this claim have been previously rejected by this Court. (See *People v. Rogers* (2006) 39 Cal.4th 826, 889; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [even if "probability of truth" language was "somewhat suspect" standing alone, as a whole the instructions were correct]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial-evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial-evidence instructions]; *People v. Beardslee* (1991) 53 Cal.3d 68, 94-95.)

Therefore, in light of *People v. Schmeck* (2005) 37 Cal. 4th 240, appellant seeks reconsideration of those issues without full briefing on them. (See Claim 7, p. 105, fn. 100, incorporated herein.)

thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana, supra*, 508 U.S. 275; *Cage v. Louisiana, supra*, 498 U.S. 39; *In re Winship, supra*, 397 U.S. 358.)

First, CALJIC 2.01 and 2.02 unconstitutionally lightened the burden of proof. (See Claim 36, pp. 376-78, incorporated herein.)

Second, CALJIC 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact, was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. CALJIC 2.27 further violated due process by using the "which you believe" language, thereby allowing proof based on mere "belief" that a single witness was telling the truth, rather than the constitutionally-required proof beyond a reasonable doubt.

Third, CALJIC 2.51 diminished the prosecution's burden of proof as to the murder charge by telling the jury that "[m]otive is not an element of the crime charged and need not be shown." (6 CT 1244.) This instruction conflicted with other instructions regarding criminal intent for finding felony-murder (CALJIC 8.21; see 6 CT 1278) by improperly suggesting to the jurors that they need not find that appellant intended to commit robbery in order to convict him of first degree murder. Even though a reasonable juror could have understood the contradictory instructions to require such specific intent, there is simply no way of knowing whether any, much less all 12, of the jurors so concluded. (See, e.g., *Francis v. Franklin* (1985) 471 U.S. 307, 322.)

Finally, the instruction defining premeditation and deliberation misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition *precluding*

the idea of deliberation. . . ." (CALJIC 8.20; 6 CT 1276-77; emphasis added.) The use of the word "precluding" could be interpreted to require the defendant to absolutely preclude the possibility of premeditation--as opposed to requiring the prosecution to prove premeditation beyond a reasonable doubt. (*See People v. Williams* (1969) 71 Cal.2d 614, 631-632.)

While recognizing the shortcomings of some of these instructions, this Court has consistently concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

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

Second, this Court's essential rationale--that the flawed instructions were "saved" by the language of CALJIC 2.90 – requires reconsideration. (See *People v. Crittenden, supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin, supra*, 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve

the infirmity."]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "'It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is *specific* and the supposedly curative instruction is *general.*'" (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395, quoting 7 Witkin, *Cal. Procedure* (3d ed. 1985) Trial, § 319, p. 364; original emphasis.)

Furthermore, nothing in the challenged instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable-doubt instruction.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Appellant's jury heard several separate instructions, each of which contained plain language that was antithetical to the reasonable-doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable-doubt standard: the oft-criticized and confusing language of CALJIC 2.90. (6 CT 1253.) This Court has admonished "'that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" (*People v. Wilson* (1992) 3 Cal.4th 926, 943; citations omitted.) Under this principle, CALJIC 2.90 was not sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable-

doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

Accordingly, the judgment should be reversed. (*Sullivan v. Louisiana* (1993) 508 U.S. 275; *Chapman v. California* (1967) 386 U.S. 18; see also Claim 12, pp. 201-03 [trial was closely balanced].)

CLAIM 39

THE BURDEN OF PROOF INSTRUCTION VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION

The jury in this case was instructed on the burden of proof in the language of CALJIC 2.90. (53 RT 10433; 6 CT 1253.) This instruction denied appellant his constitutional right to equal protection of the law because that instruction provides no adequate and uniform standard for determining the level of certainty to which the jury must be persuaded in order to assess whether the People have carried their burden of proof, thereby infringing on his fundamental constitutional interest in personal liberty. (See generally *People v. Olivas* (1976) 17 Cal.3d 236, 244-51.) The consequence of this shortcoming is that each and every jury and each and every juror sitting in California (including those in appellant's case) were and are free to apply a different standard in assessing the critical reasonable doubt issue in violation of the 14th Amendment of the federal constitution. (See *Bush v. Gore* (2000) 531 U.S. 98; see also Claim 33, pp. 359-61, incorporated herein.)

Therefore, the judgment should be reversed. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.)

CLAIMS 40-43: COURTROOM PROCEDURE ERRORS

CLAIM 40

BECAUSE THE JUDGE DENIED THE DEFENSE REQUEST TO TAPE RECORD THE TESTIMONY OF THE SPANISH-SPEAKING WITNESSES THE RECORD IS NOT SUFFICIENTLY RELIABLE TO ALLOW AFFIRMANCE OF THE GUILT AND PENALTY VERDICTS

Crucial Spanish-speaking witnesses, such as the key prosecution witness Jose Luis Ramirez, gave their testimony through an interpreter who rendered the testimony into English.[278] Due to the danger that interpretation errors would occur, the defense requested that the witnesses' Spanish testimony be memorialized by tape recording. (11 RT 2008; 2015-16; 3 CT 671-74.) The judge's denial of this request (11 RT 2031-32) was reversible error.

A complete and accurate appellate record is necessary to ensure

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[278] The Spanish-speaking witnesses during the guilt trial were: Jose Luis Ramirez [prosecution witness who accused appellant of joining in the plan to kill and rob Ramon Morales]; Francisco Javier Santoya [prosecution witness who owned the jewelry store where Arthur Perez sold the necklace taken from the Morales]; Bertha Sanchez [prosecution witness who testified that Lorenzo Nuñez had hidden the guns under the sofa in her house and had shown them to appellant, Antonio, and Joaquin, and that she had seen all of the men together in appellant's car the night of the murders]; Jesus Hernandez Zavala and Elvia Covarrubias [prosecution witnesses who testified that the night of the murders, appellant had come to their house to ask for $50 for gasoline]; Amy Arredondo [prosecution witness who saw Antonio and Joaquin at her house with the guns used on the night of the murders]; Juan Martinez Avalos [prosecution witness who testified about the truck arson].

The Spanish-speaking witnesses during the penalty trial were the following prosecution victim impact witnesses: Josephina Vicera Vasquez, Juan Martinez Gonzalez, Patricia Martinez Becerra, Magdalena Diaz, and the following defense character evidence witnesses: Moises Diaz Quintero, Luis Covarrubias, Bertha Sanchez, and Elvia Covarrubias.

appellant's rights to due process under the Fourteenth Amendment, effective assistance of counsel under Sixth and Fourteenth Amendments, meaningful appellate review as mandated by the Eighth Amendment, as well as the corollary state constitutional rights (Cal. Const., Article I, sections 7, 15, 17), and the right to have the record on appeal prepared in conformity with state statutory requirements and rules of court. (See *Marks v. Superior Court* (202) 27 Cal.4th 176; *People v. Welch* (1999) 20 Cal.4th 701; *Chessman v. Teets* (1957) 354 U.S. 156; *Evitts v. Lucey* (1985) 469 U.S. 387; *Parker v. Dugger* (1991) 498 U.S. 308, 321 [defining meaningful appellate review, in part, upon review of the full trial record]; *Gregg v. Georgia* (1976) 428 U.S. 153, 167, 198 (joint opinion of Stewart, Powell and Stevens, JJ.) [complete arbitrariness and caprice]; *Douglas v. California* (1973) 372 U.S. 353, 358 [noting the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on [client's] behalf].) Access to the entire [trial] transcript is essential for effective appellate advocacy. (*Hardy v. United States* (1964) 375 U.S. 277, 282; see *id.* At p. 288 (Goldberg, J., concurring) ["an appointed lawyer . . . needs a complete trial transcript to discharge his full responsibility. . . ."]; *People v. Barton* (1978) 21 Cal.3d 513, 518-19.) An accurate and complete record is also required by the Eighth Amendment to assure the reliability of appellant's guilt and penalty convictions. (See *Kyles v. Whitley* (1995) 514 U.S. 419; *Beck v. Alabama* (1980) 447 U.S. 625.)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044;

see also § 1093(f) [power to instruct jury]; § 1127 [same].)[279] The judge's failure to provide a tape recording of the Spanish speaking witnesses violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. This arbitrary violation of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Because there is no memorialized record of the original Spanish testimony, it is not possible to verify the accuracy and reliability of the interpreted record as it now stands. Moreover, the record suggest that interpreting mistakes were made. There are numerous examples in the record in which the English translation of a Spanish speaking witness does not convey a clear and understandable thought. The following are such examples:

> Q. Was there -- when you shot that 30/30 rifle, was there anything that was ejected from the gun, from the side of the gun? A Yes.
> Q What?
> A The casket. (40 RT 7863:6-11.)
>
> . . .
>
> Q. I would like you to take a look at the gun that I have in my hand now. Does this look at all similar to any of the guns that you saw on the evening of November 16th?
> A. Hardly looks like it. (41 RT 8010:17-21.)

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[279] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

. . .

Q. And he stayed over there by himself, right? He didn't stay there with Antonio or Joaquin, did he?
A. I do not know because I didn't sleep with him. (41 RT 8059:8-11.)

. . .

Q. Now, prior to this day, November the 16th, 994, when was the last time you were in the house of Ramon Morales?
A. That if I knew? (41 RT 8059:12-15.)

. . .

A. Yes. I was commenting – yes. There was a person there. And I made the comment that it was ridiculous for me, as a jeweler, bought that chain made out of sterling like if it was gold. (43 RT 8404:6-9.)

. . .

Q. Do you recall now how many people came in to sell you that necklace?
A. It's difficult. That day I had a lot of people. I can't recall if he went in by himself or some other people came in with him. Because if he came with someone else, I didn't know him because my business is very small. (43 RT 8406:11-15.)

. . .

Q. Were you unhappy?
A. No.
Q. It was okay with you that these guns were in the house?
A. No. No.
Q. So you were unhappy about them being there?
A. No. No. (43 RT 8416-17:27-5.)

. . .

Q. Did he have anyone with him when he came to visit?
A. Yes.
Q. Who?
A. My cousins.
Q. Which ones?
A. It's Antonio and Joaquin.
Q. Is that Antonio Sanchez?
A. Yes.
Q. And Joaquin Nunez?
A. Yes.
Q. Did they visit at your home?

A. No.
Q. Where did you see them together?
A. I didn't see them together. (43 RT 8442:2-19.)

. . .

Q. Has he done anything to try to deal with the death of his children?
A. At the beginning, no. Because he was drinking a lot. Then once he wanted junk from the fence to kill himself. (61 RT 12013:3-7.)

. . .

Q. Was he being a good brother when he brought those guns into your house?
A. He didn't take them.
Q. The guns were brought to him, weren't they?
A. No. But he didn't took {sic} them.
Q. The guns were brought to your house to Daniel.
A. Yes. (63 RT 12427:4-11.)

(See also 40 RT 7805:10-19; 7805:26-28; 7806:20-23; 7807:24-25; 7808:17-18; 7812:16-19; 7838-39:16-7; 7851:4-9; 7866-67:28-1; 41 RT 8016:23-27; 8016-17:28-1; 8017:21-24; 8020:5-8; 8026:20-27; 8029:3-11; 8032:11-12; 8032:17-22; 8034:2-5; 8034:10-19; 8036:15-19; 8040:10-11; 8052:5-7; 8052:18-20; 8057:7-10; 43 RT 8402:14-16; 8404:12-13; 8405:4-9; 8408:14-18; 8409:3-5; 8413:23-24; 8439:3-4; 60 RT 11887:5-7; 11892:21-28; 11908:24-27; 11912:2-4; 61 RT 12006:5-9; 12030:12-20; 12045:6-7; 12057:14-24; 63 RT 12403:14-16; 12404:23-28; 12408:2-4; 12422:13-15; 12422:18-19; 12431:15-17; 12432:4-5; 12433:18; 12434:20-22.)

Accordingly, the failure to record the testimony undermined the integrity, fairness and reliability of the entire trial. Thus, the error was structural the judgment should be reversed. (*Arizona v. Fulminante* (1991) 499 U.S. 279 [per se reversal is appropriate for "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards"]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281[certain

errors, "whose precise effects are unmeasurable but without which a criminal trial cannot reliably serve its function" are reversible per se]; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 177 [right to self representation is "either respected or denied; its deprivation cannot be harmless."].)

Furthermore, the error also warrants reversal under both the state (*People v. Watson, supra,* 46 Cal.2d 818) and federal (*Chapman v. California, supra*, 386 U.S. 18) standards of prejudice because the guilt trial was closely balanced and the error was substantial. (See Claim 12 § D(2)(a), pp. 201-03, incorporated herein.)

Moreover, even if the error was not prejudicial as to the guilt judgment, it was prejudicial, individually and cumulatively, as to the penalty trial which was also closely balanced. (See Claim 59 § G(2), pp. 550-51, incorporated herein.) Further, the error was prejudicial as to penalty under the state standard because there is at least a reasonable possibility that but for the error, one or more jurors would not have voted for death. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

CLAIM 41

ALLOWING THE REPORTER TO READ BACK TESTIMONY TO THE JURORS IN THE JURY ROOM VIOLATED APPELLANT'S PUBLIC TRIAL RIGHTS

A. Introduction

Because the "readback" of testimony was not conducted in open court, appellant's state and federal constitutional rights to a public trial were violated.[280]

Appellant had a constitutional right to have the testimony read back to the jury in open court pursuant to his right to a public trial. By allowing a private readback of testimony in the jury room, the judge abridged appellant's right to a public trial. Because of this error the judgment should be reversed.

B. Procedural Background

On September 2, 1998, the court received a note from the jury requesting a readback of the testimony of several guilt phase witnesses. (54 RT 10601-03; 6 CT 1196 [note]; 4 CT 957 [minute order].) During the discussion of the readback request, the jurors informed the court that they had been contacted by news reporters requesting information about the deliberations. The jurors stated that they had not responded to these inquiries and the court admonished them not to do so. (54 RT 10601-03.) The judge ordered that the requested testimony would be read to the jury in the deliberation room with only the jurors and reporter present. (54 RT 10602.)[281]

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[280] "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial. . . ." (U.S. Const. 6th Amendment.) ¶ "The defendant in a criminal case has the right to a . . . public trial. . . ." (Calif. Const. Article I, section 15.)

[281] The judge admonished the jury to ". . . please keep in mind, when the reporter comes in to read, that's all she is there to do is just to read. She (continued...)

C. The Right To Public Trial Applies To The Entire Trial And The Right Is Violated By Closure Of Any Part Of The Trial, Absent Waiver Or Compelling Necessity

The right to public trial is deeply rooted in the common law; it is "universally regarded by state and federal courts as basic and substantial," and has "long been regarded as a fundamental right of the defendant in a criminal prosecution." (*State v. Lawrence* (1969) 167 N.W.2d 912, 913, and authorities cited therein.) Modern courts recognize that an open trial is not "merely a safeguard against unfair conviction. . . ." but acts as "'a check on judicial conduct and tends to improve the performance of both parties and the judiciary.'" (*Rovinsky v. McKaskle* (5th Cir. 1984) 722 F.2d 197, 201-02; *U.S. v. Chagra* (5th Cir. 1983) 701 F.2d 354, 363.)

"The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. (*Press-Enterprise Co. v. Superior Court* (1984) 404 U.S. 501, 508.)

Because of this fundamental impact of public trial upon "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system," the closure of any criminal proceeding "must be rare and only for cause shown that outweighs the value of openness. [Footnote omitted.]" (*Press-Enterprise, supra*, at 508-09.) Moreover, the right to a public trial "may be overcome only by an overriding [state] interest" (*Press-Enterprise, supra*, at 521) and "no state interest, however compelling, can sustain the exclusion of press and public from part of a trial, absent findings of necessity articulated in the record." (*Rovinsky v. McKaskle, supra*, 722 F.2d at 200.)

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[281](...continued)
cannot respond to questions." (54 RT 10602:12-14.)

This constitutional guarantee "applies to the entire trial from the empaneling of the jury to the rendering of its verdict." (*State v. Lawrence, supra*, 167 N.W.2d at 915.) Absent waiver or a satisfactory determination of necessity, a criminal trial must be "public in all respects" (*People v. Hartman* (1984) 103 Cal. 242, 245) and "at all times." (*People v. Frutos* (1984) 158 Cal.App.3d 979, 987.)

From these principles it follows, and has been consistently held, that "exclusion of the public from a part of the trial" may violate the public trial guarantee. (*State v. Lawrence, supra*, 167 N.W.2d at 915 [instruction of jury]; see also, *U.S. v. Chagra* (5th Cir. 1983) 701 F.2d 354 [pretrial motion to reduce bail]; *U.S. v. Sorrentino* (3d Cir. 1949) 175 F.2d 721 [jury selection].) And while there appear to be few cases which have directly considered application of the public trial right to proceedings during jury deliberations (but see, *Walker v. U.S.* (D.C. Cir. 1963) 322 F.2d 434, 438 (dis. op.)), it has been firmly held that a proceeding which "is held as a part of the trial and after the jury has been sequestered, falls within the constitutional guarantee and must be conducted as a public trial." (*U.S. Ex. Rel. Bennett v. Rundle* (3rd Cir. 1969) 419 F.2d 599, 606.)

In sum, absent a strong showing of necessity articulated upon the record or waiver – neither of which occurred in the present case – it must be concluded that the public trial guarantee applies to proceedings after the jury has begun deliberations, such as the reading back of testimonial evidence.

D. The Public Trial Guarantee Applied To The Proceedings Held In The Present Case

The readback proceedings in the present case, which concerned the disposition and representation of important evidence to the jury, were no less worthy of the public trial guarantee than the various types of proceedings to

which the right has already been applied. (E.g., pretrial bail hearing, suppression of evidence motion, rendition of instructions, etc.) In fact, the public trial guarantee is particularly applicable to the proceedings at issue here because they concerned "matters advanced for the consideration of the triers of fact. . . ." (*People v. Teitelbaum* (1958) 163 Cal.App.2d 184, 206), and bore a relationship to "the merits of the charge [and] the outcome of the prosecution . . . ." (*Rovinsky v. McKaskle*, *supra*, 722 F.2d at 201.)

Additionally, in the case of the readback, the concerns about the potential for undue emphasis during the reading provide a rationale for openness analogous to that which is applicable to a jury instruction proceeding:

Publicity may also be said to discourage undue emphasis by the court when charging the jury. When instructing the jury as to the law applicable to a given case, over-emphasis by repetition or voice inflection could, of course, materially affect jury consideration of the matter, and such undue emphasis would not be reflected by the printed copy of the instructions later available to the public. (*State v. Lawrence*, *supra*, 167 N.W.2d at 914.)

In sum, the public trial guarantee was clearly applicable to the closed proceedings held in the present case.

E. The Error Violated The Federal Constitution

In the present case the private reading of testimony to the jury violated appellant's constitutional rights. "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial. . . ." (U.S. Const. 6th Amendment.) ¶ "The defendant in a criminal case has the right to a . . . public trial. . . ." (Calif. Const. Article I, section 15.) Further, because appellant was arbitrarily denied his state created right to a public trial under Article I, section 15 of the California Constitution, the error violated his right to due process under the

Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. There Was No Waiver Or Satisfactory Showing Of Necessity

1. Waiver

This Court has held that the right to public trial need not be expressly waived by the defendant. (*People v. Hines* (1964) 61 Cal.2d 164, 172.) Hence, waiver may be inferred – without any personal acknowledgment from the defendant – when a defendant who is aware of his public trial rights fails to object to the closure. (E.g., *People v. Moreland* (1970) 5 Cal.App.3d 588, 595 [co-defendant's counsel moved for closure during testimony but Moreland refused the court's invitation to object]; *Martineau v. Perrin* (1st Cir. 1979) 601 F.2d 1196 [defendant's attorney informed defendant that he had discovered the courtroom doors were locked and defendant didn't object even though attorney stated that he could do so].)

However, in the present case, appellant was never informed of his right to a public readback of the testimony. (54 RT 10601-03; 4 CT 957.) To be effective, a waiver of a public trial must be "intentional and meaningful" (Annot. 61 L.Ed.2d 1018, 1030) and the waiver of such a constitutional right is "not lightly inferred." (*Rovinsky v. McKaskle*, *supra*, 722 F.2d at 200.) Plainly stated, one cannot knowledgeably and intentionally waive a matter about which he has no knowledge. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

2. There Was No Showing Of Necessity

There certainly was no reason why all of the proceedings and judicial actions at issue here could not have been conducted in open court. Of course, while the jury could properly have been excluded from the court and counsel's

discussions of the jury's notes to the court, the readback could and should have been conducted and resolved in open court rather than by private proceeding and communication to the jury. (See, Claim 41, pp. 398-03, incorporated herein.)

In any event, even if there had been some compelling necessity for closure of the proceedings, the record fails to contain the required articulation thereof. (*Press-Enterprise*, *supra*, 464 U.S. at 510.)

G. The Denial Of The Right To Public Trial Requires Reversal

It is widely recognized that a violation of the right to a public trial is "inherently prejudicial" and requires reversal per se. (*Public Trials*, annot., 61 L.Ed.2d 1018, 1026-27.)

> . . . the right is both primary and instrumental: not merely a method to assure that nothing untoward is done clandestinely but a guarantee against the very conduct of private hearings . . . Even absent a showing of prejudice, infringement of the right to a public trial exacts reversal as the remedy. (*Rovinsky v. McKaskle*, *supra*, 722 F.2d at 202; see also, *People v. Byrnes* (1948) 84 Cal.App.2d 72, 79.)

Accordingly, appellant's convictions and sentence of death must be set aside.

CLAIM 42

THE JUDGE IMPROPERLY ALLOWED THE REPORTER TO ENTER THE JURY ROOM AND READ BACK PORTIONS OF THE TRANSCRIPT IN THE ABSENCE OF THE JUDGE, ATTORNEYS AND APPELLANT

A. Introduction

When a deliberating jury asks for specific trial testimony, the procedures used to convey the testimony to the jury are critically important. By asking for the testimony, the jurors have identified matters which could influence their ultimate verdict. Hence, it is imperative for the trial judge to closely supervise the procedure and assure both that the requested testimony is fully considered and that no undue emphasis or other prejudice results from the readback procedure.

However, in the present case, the judge erroneously and prejudicially abdicated his duty to supervise by simply sending the reporter into the jury room in lieu of having the testimony read to the jurors in open court in the presence of the judge, counsel and appellant. This procedure abridged appellant's federal constitutional rights to personal presence at trial, representation of counsel, public trial and personal presence of the judge at a critical stage of the trial. Furthermore, the judge failed to give the jurors any special directions or cautionary instructions regarding the testimony that was read back. Therefore, the judgment should be reversed.

B. Procedural Background

See Claim 41 § B, p. 398, incorporated herein.

C. The Defendant's Right To Personal Presence At Trial Is Grounded Upon Fundamental Constitutional Rights

The Due Process and Confrontation Clauses of the federal constitution (6th and 14th Amendments) guarantee a criminal defendant's right to be

present "at every stage of his trial where his absence might frustrate the fairness of the proceedings." (*U.S. v. Gagnon* (1985) 470 U.S. 522, 526-27; *Illinois v. Allen* (1970) 397 U.S. 337, 338; *Snyder v. Mass.* (1934) 291 U.S. 97, 105-06; *Sturgis v. Goldsmith* (9th Cir. 1986) 796 F.2d 1103, 1108; *U.S. v. Frazin* (9th Cir. 1986) 780 F.2d 1461, 1469; *Badger v. Cardwell* (9th Cir. 1978) 587 F.2d 968, 970; *Bustamante v. Eyeman* (9th Cir. 1972) 456 F.2d 269, 273.) Furthermore, because a readback of testimony is no less important than the original taking of the testimony,[282] all of the salutary rights associated with the testimony (e.g., due process, compulsory process, confrontation, trial by jury and representation of counsel (6th and 14th Amendments) are implicated by readback procedures which fail to assure fair, accurate and complete recitation of the testimony. (See *People v. Frye* (1998) 18 Cal.4th 894, 1007; see also generally *Crawford v. Washington* (2004) 541 U.S. 36; *Davis v. Alaska* (1974) 415 U.S. 308, 318; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Strickland v. Washington* (1984) 466 U.S. 668.)

D. The Absence Of Defense Counsel From A Critical Stage Of The Trial Violates The Accused's Constitutional Rights

A criminal defendant's right to counsel is guaranteed by the Sixth and Fourteenth Amendments to the federal constitution. (See *Perry v. Leeke* (1989) 488 U.S. 272, 278-79; *Penson v. Ohio* (1988) 488 U.S. 75, 88; *United States v. Cronic* (1984) 466 U.S. 648, 659 [the right to counsel applies to every critical stage].) "Appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." (*Mempha v. Rhay* (1967) 389 U.S. 128, 134; see also *King*

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[282] In fact, a readback may be more important than the original taking of the testimony because the readback presumably is limited to those portions upon which the jurors themselves have chosen to focus.

v. Superior Court (2003) 107 Cal.App.4th 929.) When the judge, the defendant and his counsel are absent from a critical stage of the trial, the defendant's state (Article I, section 7, 15, and 17) and federal constitutional rights to counsel are violated.

E. Private Reading Of Testimony In The Deliberation Room Violates The Federal Constitution's Public Trial Guarantee

See Claim 41, pp. 398-402, incorporated herein.

F. A Readback Proceeding Should Not Be Exempt From The 6th Amendment Right To Counsel

This Court has long held that the defendant has no constitutional right to personal presence at a readback proceeding because "defendant is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his or her opportunity to defend the charges against him, and the burden is on defendant to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial. [Citations.]" (*People v. Horton* (1995) 11 Cal. 4th 1068, 1120-112.)

Thus, in *People v. Cox* (2003) 30 Cal.4th 916, 963 this Court stated: "We have long held that the rereading of testimony is not a critical stage of the proceedings. [Citations.]"

However, the cases cited by *Cox* – and indeed all of this Court's decisions on this point – have viewed whether or not a readback proceeding is critical from the perspective of the defendant – not counsel.

Even assuming *arguendo* that absence of the defendant is not constitutional error, the absence of counsel is a different matter. There are several reasons why counsel's presence is far more necessary than the defendant's especially under the circumstances of the present case.

First, it is counsel who is charged with the duty to identify and state

objections to trial error. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1202 [trial counsel has the duty to protect the record when their client's trial interests are at stake]; *In re Horton* (1991) 54 Cal.3d 82, 95 ["'it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of "fundamental" personal rights to counsel's complete control of defense strategies and tactics.'"]; see also *People v. Hinton* (2006) 37 Cal.4th 839, 874 [same].) Thus, counsel's presence at a readback proceeding was necessary to assure that any error which occurred during the readback was properly objected to and either corrected below or preserved for appeal. (*People v. Sumstine* (1984) 36 Cal.3d 909, 917-918 [courts rely on counsel to "perform his duty as an advocate and an officer of the court to inform the accused of and take steps to protect the other rights afforded by the law . . . "].)

Second, as a person who is professionally trained to follow the testimony at trial, identify the important portions of that testimony and to remember that testimony or adequately memorialize it, counsel is in a much better position than the defendant to identify errors in the court reporter's reading of the testimony.

Third, in cases such as the present one which the defendant does not speak English, counsel would have been much better able to identify errors during the readback.

Nor can it simply be presumed that no error occurred during the readback. The fact that a reporter may make errors in reading aloud from a written transcript is well illustrated by the number of times this court has had to rely on the written instructions to cure errors by the judge in reading aloud from the written instructions. (See, e.g., *People v. Seaton* (2001) 26 Cal.4th 598, 673 [We reiterate our recommendation that in capital cases trial courts

provide juries with written instructions "to cure the inadvertent errors that may occur when the instructions are read aloud."]; see also *People v. Davis* (1995) 10 Cal.4th 463, 542 [when the jury has received an instruction in both spoken and written forms, and the two versions vary, we assume the jury was guided by the written version]; *People v. Crittenden* (1994) 9 Cal.4th 83, 138; *People v. McLain* (1988) 46 Cal.3d 97, 111, fn. 2.)

Moreover, it is a fact of life that court reporter's are human beings who can and do make mistakes in recording what was said in court. (See e.g., *People v. Huggins* (2006) 38 Cal 4th 175, 191 ["Because the court clearly was reading a standard instruction, it is far more likely that the punctuation supplied by the court reporter failed to accurately reflect the meaning conveyed by the court's oral instructions. . ."]; see also 2 SCT 425-433 [listing of stipulated court reporter errors identified during record correction].) Accordingly, it should not be assumed that the transcript from which the reporter read was correct and thus the presence of the judge, counsel and defendant is necessary to help identify such errors and correct them for the jurors.

Even when the evidence requested by the jury is a tape recording which can be mechanically replayed, the proceeding is still considered an important part of the trial "because it involves the crucial jury function of reviewing the evidence" (*U.S. v. Ku Pau* (9th Cir. 1986) 781 F.2d 74, 743.)[283] Similarly, the absence of the defendant from the replaying of a tape of the jury instructions has been held to violate a defendant's right to due process and confrontation. (*Bustamante v. Eyeman, supra*, 456 F.2d 269, 271.)

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[283] Even though *Ku Pau* analyzed the issue under Fed. Rule of Criminal Proc. 43, the reasoning also applies to the constitutional bases for the right to presence.

Moreover, it cannot be assumed that any error which did occur at the readback would ave been innocuous. When the jurors request a readback of testimony it is fair to say that such testimony is important to them. Hence, how that testimony is read to the jurors is no less important then how the testimony was presented in the first place:

> . . . [A] mistake in the reading of a shorthand symbol which defense counsel would instantly detect, an unconscious or deliberate emphasis or lack of it, an innocent attempt to explain the meaning of a word or a phrase, and many other events which might readily occur, would result in irremediable prejudice to defendant. (*Little v. U.S.* (10th Cir. 1934) 73 F.2d 861, 864.)

Finally, under established United States Supreme Court precedent, a critical stage is any "stage of a criminal proceeding where substantial rights of a criminal accused may be affected." (*Mempa v. Rhay* (1967) 389 U.S. 128, 134; *Bell v. Cone* (2002) 535 U.S. 685, 696 [defining a critical stage as "a step of a criminal proceeding, such as arraignment, that [holds] significant consequences for the accused"]; see also *Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 902.)

In sum, even if appellant's presence was not constitutionally required, the absence of counsel denied appellant's state (Article I, § 7 and 15) and federal (6th and 14th Amendments) constitutional rights to the representation of counsel at a critical stage of the proceedings.

G. Allowing The Reporter To Read The Transcripts To The Jurors Without Supervision Or Instruction And In The Absence Of The Judge Violated State Law And The Federal Constitution

In addition to the other federal constitutional rights discussed above, the procedure used in the present case violated appellant's federal constitutional rights to the presence and supervision of the trial judge at critical proceedings. "Trial by jury, in the primary and usual sense of the term at the common law

and in the American constitutions, is not merely a trial by a jury of twelve [jurors] . . . but it is a trial by a jury of twelve [jurors], in the presence and under the superintendence of a judge . . . . This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion." (*Capital Traction Co. v. Hof* (1899) 174 U.S. 1, 13.)

Hence, because the Sixth Amendment right to trial by jury extends to proceedings during jury deliberation, absence of the judge during such readback proceedings violates the federal constitution. "A judge's absence during a criminal trial, including court proceedings after a jury begins deliberations, is error of constitutional magnitude. [Citing *Peri v. State* (Fla. Dist. Ct. App. 1983) 426 So. 2d 1021, 1023-24.] The presence of a judge is at the 'very core' of the constitutional guarantee of trial by an impartial jury. [Citation.]" (*Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117, 1119.)

Moreover, due to the importance of the rights involved, Penal Code § 1138 also obliges the trial court to supervise and control a readback of testimony or a re-instruction of the jury. (See *People v. Litteral* (1978) 79 Cal.App.3d 790, 794.) Penal Code § 1138, by its terms, requires that the jury be "brought into court" and that the requested information be given in court "in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."[284] Where, as in the

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[284] Penal Code § 1138 provides:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the

(continued...)

present case, the trial judge fails to adequately supervise the reading of the trial testimony to the jury, he has not fulfilled the statutory mandate of Penal Code § 1138. Accordingly, the judge's failure to properly supervise the readback proceedings violated appellant's federal constitutional rights and was moreover, a violation of the judge's duties under Penal Code § 1138.

H. Appellant's Absence From The Readback Violated State Law And The Federal Constitution

Appellant's absence violated Penal Code § 977 and § 1043. (See generally *People v. Young* (2005) 34 Cal.4th 1149, 1214.)

Further, because appellant was arbitrarily denied his state created rights under Penal Code Sections 977, 1043 and 1138, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Moreover, for the reasons discussed in this argument, appellant's absence also violated his federal constitutional rights to due process, compulsory process and confrontation.

I. Appellant Did Not Waive His Rights

The early U.S. Supreme Court cases on the issue held that the right to presence in capital cases is so fundamental that the defendant cannot waive it. (See, *Diaz v. U.S.* (1912) 223 U.S. 442, 455; *Hopt v. Utah* (1884) 110 U.S. 574, 579; accord, *Near v. Cunningham* (3d Cir. 1963) 313 F.2d 929, 931.) More recently, cases have interpreted dictum in *Illinois v. Allen* (1970) 397

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[284](...continued)
defendant or his counsel, or after they have been called.

U.S. 337, as authorizing a limited exception to the no-waiver rule for defendants who willfully disrupt their trials. (See, *Proffitt v. Wainwright* (11th Cir. 1982) 685 F.2d 1227, 1257.) However, this exception is inapplicable in the present case as there is no evidence that appellant disrupted the trial.

Some more recent federal circuit cases have held that capital defendants can waive the right to personal presence. (*Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662; *Amaya-Ruiz v. Stewart* (9th Cir. 1997) 121 F.3d 486.) However, even if the right can be waived in a capital case, *Illinois v. Allen, supra,* supports retention of the knowing-and-voluntary waiver standard in right-to-presence cases. *Allen* authorized waiver where the defendant "has been warned by the judge that he will be removed if he continues his disruptive behavior [and] he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom." (*Illinois v. Allen*, *supra*, 397 U.S. at 343.) Moreover, *Allen* cited *Johnson v. Zerbst* (1938) 304 U.S. 458, which established the knowing-and-voluntary waiver standard. Similarly, the court's conclusion in *Drope v. Missouri* (1975) 420 U.S. 162, that there had been insufficient inquiry to afford a basis for deciding the waiver issue, was based on cases applying the knowing-and-voluntary standard for waiver. (*Id.* at 182 [citing *Westbrook v. Arizona* (1966) 384 U.S. 150]; see also, *Gardner v. Florida* (1977) 430 U.S. 349, 361 [applying knowing-and-intelligent waiver standard in similar context].)

Additionally, as set forth above, the right to personal presence is distinct and separate from the right to representation of counsel at any readback proceeding. Even if a defendant's right to personal presence could be waived by implication, it is well established that any waiver of the right to counsel must comport with the knowing, voluntary and intelligent waiver requirements

set forth by the U.S. Supreme Court. "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'" (*Johnson v. Zerbst, supra*, 304 U.S. at 464.) This Court has adopted the same view: "There is no question why at this late date we should tolerate silent records on the question of waiver of counsel, or permit people to undertake belated speculations as to the defendant's knowledge in an effort to justify a finding of implied waiver in such cases." (*In re Smiley* (1967) 66 Cal.2d 606, 624.) "Because of the policy against implied waivers of such important rights as the right to counsel, reviewing courts look to the record to ensure that a waiver of counsel was knowing and intelligent. Appellate courts look in the record for a colloquy between trial court and defendant that demonstrates such knowledge and intelligence." (*Savage v. Estelle* (9th Cir. 1988) 924 F.3d 1459, 1466; see also *In re Lopez* (1970) 2 Cal.3d 141, 147 [neither the defendant's failure to request court-appointed counsel nor his plea of guilty constitute an implied waiver of the right to counsel].)

Nor is there any record that appellant was fully informed of his right to counsel at this proceeding, which is a necessary predicate to a finding of implied waiver. (See, *In re Johnson* (1965) 62 Cal.2d 325, 333; see also, *People v. Doane* (1988) 200 Cal.App.3d 852, 859 [waiver of defendant's right to counsel was not implied from mere participation in his defense; there must be an explicit waiver of his right to counsel and advisement of the consequences of his decision to represent himself].)

Moreover, under state law, presence cannot be waived without a written waiver which was not obtained in the present case. (See *People v. Young* (2005) 34 Cal.4th 1149, 1214 [read together, Penal Code Sections 977 and

1043 permit a capital defendant to be absent from the courtroom only if (1) he has been removed by the court for disruptive behavior under section 1043 or (2) he has voluntarily waives his rights pursuant to Penal Code § 977].)

J. The Judgment Should Be Reversed

1. The Denial Of Counsel Was Reversible Error

a. Under The Federal Constitution The Denial Of Counsel Was Reversible Error Per Se

Under the federal constitution the denial of counsel at a critical stage of the trial is reversible per se. When a criminal defendant is denied counsel at a critical stage of the proceedings it constitutes a structural error which makes the trial presumptively unfair and requires automatic reversal. (See *U.S. v. Cronic* (1984) 466 U.S. 648, 659; see also *Frazer v. U.S.* (9th Cir. 1994) 18 F.3d 778, 781-82; *Johnson v. United States* (1997) 520 U.S. 461, 469.) "*Cronic* and its progeny . . . stand for the proposition that the actual or constructive denial of counsel at a critical stage of a criminal trial constitutes prejudice per se and thus invalidates a defendant's conviction." (*Curtis v. Duval* (1st Cir. 1997) 124 F.3d 1, 4; see also *Perry v. Leeke* (1989) 488 U.S. 272, 278-79; *Penson v. Ohio* (1988) 488 U.S. 75, 88.)

This applies to denials of counsel for even portions of a critical stage, as long as they are important to the trial. (See *Geders v. United States* (1976) 425 U.S. 80, 88-90 [overnight recess]; *Herring v. New York* (1975) 422 U.S. 853 [closing argument]; *Brooks v. Tennessee* (1972) 406 U.S. 605, 612-13 [nullifying counsel's ability to determine point in defense case when a single witness (defendant) would testify] [cases cited in *Perry v. Leeke, supra,* 488 U.S. at p. 280].) This follows from the long-established law that a defendant "requires the guiding hand of counsel at every step of the proceedings against him." (*Powell v. Alabama* (1932) 287 U.S. 45, 68-69 [emphasis added].)

Without it, the right to counsel is denied.

In the present case, the readback proceeding was a critical stage of the trial because it involved the "crucial jury function of reviewing the evidence." (*U.S. v. Ku Pau, supra*, 781 F.2d at 743; see also § F, pp. 406-09, [a readback of testimony is a critical stage of the trial], incorporated herein.) Therefore, the absence of counsel was reversible error.

b. The Absence Of Counsel Raised A Presumption Of Prejudice Under California Law

Under California law, denial of counsel at a critical stage of the proceedings raises a presumption of prejudice. (*People v. Horton* (1995) 11 Cal.4th 1068, 1135-37.) "Only the most compelling showing to the contrary will overcome the presumption." (*Id.* at 1137.) Hence, the denial of counsel should be reversible under the California standard.

2. Absence Of The Judge Should Be Reversible Per Se

Because the absence of the judge from the crucial readback proceedings undermined the entire structure of the trial it should be reversible error *per se*. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Riley v. Deeds, supra*, 56 F.3d 1117.)

3. Denial Of Personal Presence At The Readback Was Reversible Error

a. How Much Influence The "Readback" Had Upon The Jury Is Impossible To Determine

When an unsupervised readback of testimony is undertaken by the jury special standard-of-review problems are presented because:

> [h]ow much influence the reading of the testimony . . . may have had upon the minds of the jury ... is impossible to determine. (*Jackson v. Commonwealth* (1870) 60 Va. 656 (19 Gratt 656), cited at 50 ALR 2d 203.)

For example, without knowing how the readback was conducted, there is a danger that the reader may have given undue emphasis to certain portions of the transcript. (See e.g., *People v. Aikens* (NY 1983) 465 N.Y.S. 480.) Or, the testimony selected may not have been balanced. (See *Fisher v. Roe* (2001) 263 F.3d 906.) The reading of testimony to the jury is more than a "ministerial action" and the defendant's constitutional rights may be prejudicially implicated by "[a]n inadvertent omission of a part of the testimony, a mistake in the reading . . . or an inappropriate emphasis of voice. . . ." (*Id.* at 468; see also *Harris v. U.S.* (D.C. App. 1985) 489 A.2d 464.)

In sum, in the present case – where the judge, counsel and defendant were all absent – there simply is no way of assuring that the readback procedure was fair, accurate and complete.

b. The Error Was Structural And Reversible Per Se

Because an unsupervised readback of testimony compromises the most fundamental elements of the entire trial process, and because the impact of the error cannot normally be evaluated on the record, the error is structural and must be reversible per se:

> In [the defendant's] absence, there can be no trial. The law provides for his presence. And every step taken in his absence is void and vitiates the whole proceeding. On this point all authorities agree. And no question can be raised, as to the extent of the injury done to the prisoner, or whether any injury resulted from his not being present. [Emphasis added.] (*Jackson v. Commonwealth, supra.*)
>
> . . .
>
> In the situation that resulted from the action of the trial court in permitting, after the submission of the case, the reading of evidence to the jury, we can only speculate as to its effect upon the jury and verdict; and obviously, in a case in which the punishment inflicted by the verdict is the severest known to the

law, resort should not be had to speculation, in order to determine whether the verdict was superinduced by an error of the trial court. In the face of so grave an error as that committed by the trial court in this case, the appellate court should not stop to weigh probabilities, or try to discover from the record whether it was prejudicial to the accused, but must assume that the error amounted to such an invasion of appellant's constitutional rights as to deprive him of a fair and impartial trial. [Emphasis added.] (*Kokas v. Commonwealth* (1922 Ken.) 237 S.W. 1090, 1093.)

. . .

. . . reading evidence taken by deposition, although it was done after the jury had retired, is a part of the trial as much as any other. In favor of life, the strictest rule which has any sound reason to sustain it, will not be relaxed.

The judgment is reversed, and a new trial is ordered. [Emphasis added.] (*People v. Kohler* (1855) 5 Cal. 72; see also *Glee v. State* (Fla. 1994) 639 So.2d 1092, 1093 [if trial judge leaves the courtroom during a readback of testimony to jury, there is reversible error *per se*].)

4. If Harmless Error Analysis Is Employed There Should Be A Heavy Burden On The Prosecution To Prove The Error Harmless

Some courts have purported to evaluate errors relating to the defendant's absence from a "readback" to the jury under the harmless error standards. (See *Ware v. U.S.* (7th Cir. 1967) 376 F.2d 717, 718-19, for a comparison of the per se and harmless error cases among the various federal districts.) However, if such an analysis is used, the burden is upon the prosecution, and it is a "heavy" one. (See, *Blackwell v. Eyeman* (8th Cir. 1977) 456 F.2d 596, 599; see also *Chapman v. California* (1967) 386 U.S. 18 [prosecution has burden of proving harmless beyond a reasonable doubt]; *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied

to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].)

Moreover, because the precise impact of such an error cannot be demonstrated form the cold record, the prosecution has the burden of proving harmlessness. (See *Deck v. Missouri* (2005) 544 U.S. 622; see also Claim 9 § F(1), pp. 124-29, incorporated herein [no burden on defendant to show prejudice when impact of the error cannot be determined].)

Furthermore, it is appropriate that denial of the right to counsel and personal presence at a readback of testimony should be evaluated under an especially strict standard in capital cases:

> . . . in a case in which the punishment inflicted by the verdict is the severest known to the law, resort should not be had to speculation, in order to determine whether the verdict was superinduced by an error. . . . (*Kokas v. Commonwealth*, *supra*, 237 S.W. at 1093; see also, *People v. Kohler*, *supra*.)

Given the closeness of the case (see Claim 12 § D(2)(a), pp. 201-03, incorporated herein) and the absence of any record of the readback proceeding, the prosecution cannot meet its burden and, therefore, the judgment should be reversed under the federal harmless error standard.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty because the jurors were instructed to consider the guilt phase evidence in reaching their penalty verdict. (See 6 CT 1191.) Thus, the penalty verdict should be reversed under both the state and federal standards of prejudice because the error undermined the fairness and reliability of the penalty determination. (See Claim 10 § H(3), p. 158 and Claim 59 § G, pp. 548-51

CLAIM 43

BY ALLOWING THE PROSECUTOR TO REFER TO HERSELF AS A REPRESENTATIVE OF "THE PEOPLE" THE TRIAL JUDGE VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

During voir dire and throughout trial the prosecutor referred to the prosecution as "The People." This description was corroborated by the comments and instructions of the trial judge who also consistently referred to the prosecution as "The People." Reference to the prosecution in this manner was fundamentally unfair and contrary to the letter and spirit of the state and federal constitutions.

However, because this Court has previously rejected this issue[285] appellant seeks reconsideration of it without further briefing. (See Claim 7, p. 105, fn. 100, incorporated herein.)

Referring to the prosecution as "The People" violates criminal defendants' state and federal substantive due process rights. Both our nation's history and legal practices indicate that referring to the prosecution as "The People" violates substantive due process rights. (See generally *Washington v. Glucksberg* (1997) 521 U.S. 702, 710.)

The vast majority of jurisdictions in the United States recognize the constitutionally correct way for a jurisdiction's legal system to refer to its prosecution is not as "The People."[286] The Supreme Court has recognized that

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[285] See *People v. Lewis and Oliver* (2006) 39 Cal. 4th 970, 1068-1069.

[286] Only the states of California, Colorado, Illinois, Michigan and New York refer to the prosecution as "The People." This result is based on a Lexis search of official reporters' case titles in each jurisdiction and a review of the (continued...)

while "virtually unanimous adherence" to a standard "may not conclusively establish it as a requirement of due process," such overwhelming consensus "does reflect a profound judgment about the way in which law should be enforced and justice administered."[287] (*Id.* at 155.) The virtually unanimous adherence to this standard elsewhere indicates California's practice of calling the prosecution "The People" violates due process.

As well as violating substantive due process rights, referring to the prosecution as "The People" also violates criminal defendants' state and federal constitutional rights to a fair trial by a jury of their peers, and to the presumption of innocence.[288] Calling the prosecution "The People" necessarily blurs and confuses critical distinctions.[289]

From the beginning of the proceedings and consistently throughout trial, pitting "The People" against "the Defendant" literally suggested to appellant's jury that he was something (at worst) or someone (at best) other than the rest of us. To the extent this dichotomy suggests criminal defendants are something other than people, this clearly violates due process. To the extent this dichotomy suggests criminal defendants are someone other than the people, this violates the defendant's right to trial by jury of his or her peers

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[286](...continued)
available pattern jury instructions for all jurisdictions throughout the nation.

[287] *Duncan v. Louisiana* (1968) 391 U.S. 145, 155.

[288] U.S. Const., 6th and 14th Amendments; Calif. Const. Article I, §§ 7 and 15.

[289] It is the jury's duty as a representative of the people of defendant's community, to impartially decide if guilt has been proved. (See *J.E.B. v. Alabama ex rel. T.B.* (1993) 511 U.S. 127; *Powers v. Ohio* (1991) 499 U.S. 400; *Batson v. Kentucky* (1986) 476 U.S. 79 [establishing protections to ensure juries are not selected based on impermissible exclusionary practices].)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46.)[290]

In sum, California's reference to the prosecution as "The People" versus "the Defendant" violates both the letter and spirit of the state and federal Constitutions. The phrase "The People" impermissibly aligns two separate bodies with different functions – the prosecution and the jury – at the same time the phrase "versus the Defendant" excludes the defendant from the community of his peers who form his jury.[291]

Moreover, referring to the prosecution as "The People" represents the quintessence of structural, rather than trial, error and thus requires reversal per se.[292] A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." The error defies harmless-error analysis. The defect is structural, and thus requires

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[290] See also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.

[291] The fact that criminal cases in California have always referred to the prosecution as "The People" does not necessarily mean the behavior comports with the state and federal constitutions. For example, before the United States Supreme Court decided *Gideon v. Wainwright* (1963) 372 U.S. 335, the courts had not recognized for nearly two-hundred years that the federal constitution guaranteed indigent criminal defendants the right to counsel.

[292] In the present case the prosecution was called "The People" throughout the trial – from start to finish. This reference was especially prejudicial as to the jury instructions, which have an especially important stature in the eyes of the jury. (See e.g. *Bollenbach v. United States* (1946) 326 U.S. 607, 612.)

reversal per se.[293]

Moreover, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings.[294]

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[293] See *Arizona v. Fulminante* (1991) 499 U.S. 279, 310.

[294] *Chapman v. California* (1967) 386 U.S. 18, 23-24.

CLAIMS 44-51: ADDITIONAL ERRORS

CLAIM 44

THE MURDER CONVICTIONS SHOULD BE REVERSED BECAUSE THE JUDGE FAILED TO INSTRUCT ON THE ESSENTIAL ELEMENT OF CONCURRENCE OF ACT AND INTENT/MENTAL STATE

A. Introduction

The judge failed to instruct the jury on concurrence of act and specific intent (CALJIC 3.31) and mental state (CALJIC 3.31.5) as to the murder allegations in Counts 1, 2 and 3. Moreover, because the judge did give CALJIC 3.31 as to the other non-murder counts the instructions effectively told the jurors that concurrence of act and specific intent was *not* an element of the murder charges. Because concurrence of act and intent/mental state was unquestionably an element of the murder charges which the defense contested, the murder convictions should be reversed. (*Neder v. U.S.* (1999) 527 U.S. 1.)

B. Factual And Procedural Background

The prosecution alleged that, before entering the residence of Ramon Morales, appellant had already formed the intent to rob and murder the victims. The defense contended that appellant had no knowledge of any plan to rob or murder until he was already inside the Morales residence. Hence the evidence raised contested factual issues as to when, if at all, appellant formed the various required specific intents and mental states. [For example, the murder, robbery, burglary and conspiracy charges required intent to kill, intent to steal and/or premeditation and deliberation, depending on what theory was at issue. Additionally, the aiding and abetting and conspiracy theories of liability required knowledge as well as specific intent.]

However, while the judge did instruct on concurrence of act and

specific intent as to the non-murder counts (CT1230), no concurrence instructions were given at all as to the murder charges in Counts 1, 2 and 3.[295]

C. Concurrence Of Act And Specific Intent/Mental State Is An Essential Element Of First Degree Murder Under California Law

It is a "fundamental doctrine of criminal law" that in every crime there must be a concurrence of act and intent. (Penal Code § 20; *People v. Green* (1980) 27 Cal.3d 1, 53.) "The scienter for any crime is inextricably linked to the proscribed act or omission." (*People v. Sargent* (1999) 19 Cal.4th 1205, 1222.) The element of joint operation of act and intent requires that any specific intent or mental state required by a penal statute concur with the actus reus of the crime. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 532.) To avoid confusion the court should include the concurrence element when giving CALJIC 3.31.5. (See *People v. Cleaves* (1991) 229 Cal.App.3d 367, 381.) "No crime is committed unless the mental fault concurs with the act or omission, in the sense that the mental state actuates the act or omission." (*People v. Martinez* (1984) 150 Cal.App.3d 579, 602, citing LaFave and Scott, *Criminal Law* (1972), § 34, at 237 [emphasis added by *Martinez*].)

In the case of first degree murder based on premeditation and deliberation, felony murder, conspiracy murder and/or the natural and probable consequences of aiding and abetting there are specific intents and mental states which must concur with the act(s) alleged to have been committed by the defendant. (See e.g., CALJIC 8.20, 8.21, 8.26, 3.02.) Furthermore, when guilt is alleged vicariously under an aiding and abetting and/or conspiracy theory additional specific intents and mental states are required. (See e.g., CALJIC

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[295] As to the assault and weapons enhancements, the instructions also included the concurrence of act and general intent language of CALJIC 3.30. (6 CT 1261.)

3.01, 6.11.)

D. Failure To Instruct The Jurors On An Essential Element Of The Charge Violated State Law And The Federal Constitution

Because concurrence is an element of the charge, failure to instruct on this principle violated the defendant's federal constitutional rights to trial by jury and due process. (Fifth, Sixth and Fourteenth Amendments.)

In *People v. Alvarez* (1996) 14 Cal.4th 155, 220, this Court, without discussion, analyzed the failure to instruct on concurrence of act and intent as a violation of California law subject to evaluation under the *Watson* standard of prejudice. Such a conclusion cannot be squared with established state and federal authority.[296]

Act-intent/mental state concurrence is a fundamental element of the charged offense. (Pen. Code § 20; *People v. Green* (1980) 27 Cal.3d 1, 53; see also *Morissette v. United States* (1952) 342 U.S. 246, 250-251.) Hence, omission of this element violates the Due Process and Trial By Jury Clauses of the California Constitution (Article I, sections 7 and 15) and the federal constitution (Fifth, Sixth and Fourteenth Amendments) which require that the jury be instructed on each and every essential element of the charge. (*Apprendi v. New Jersey* (2000) 530 U.S. 466; *Neder v. United States*, *supra*, 527 U.S. 1; *U.S. v. Gaudin* (1995) 515 U.S. 506; *California v. Roy* (1996) 519

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[296] *Alvarez* overlooked the federal cases cited herein and offered no rationale for selecting the state over the federal standard of review. Its holding, therefore, has little value in the context of appellant's specific argument that the federal standard applies to the failure to instruct on the concurrence of act and intent or mental state. (See *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 65-66; *People v. Dillon* (1983) 34 Cal.3d 441, 473-474 [cases are not authority for matters not considered].)

U.S. 2, 136; *People v. Flood* (1998) 18 Cal.4th 470.)[297]

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[298] The judge's failure to instruct on the concurrence of act and intent/mental state violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. This violation of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the

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[297] As applied to California through the Incorporation Doctrine. (*Duncan v. Louisiana* (1968) 391 U.S. 145; see also *Tennessee v. Lane* (2004) 541 U.S. 509, 562.

[298] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

E. In The Present Case The Concurrence Element Was Omitted As To The Murder Counts

Not only was appellant's jury not instructed on the concurrence element, they were effectively told that concurrence was not an element of the murder charges. This is so because the judge specifically made the concurrence instruction applicable only to the non-murder charges. Thus the only conclusion to be reasonably drawn by the jurors was that there was no need to find concurrence as to the murder counts.[299]

"Although the average layperson may not be familiar with the Latin phrase inclusio unius est exclusio alterius, the deductive concept is commonly understood . . . ." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.]; see also *United States v. Crane* (9th Cir. 1992) 979 F.2d 687, 690 [maxim expressio unius est exclusio alterius "is a product of logic and common sense"].) That is how this Court reasoned in *People v. Dewberry* (1959) 51 Cal.2d 548, 557:

The failure of the trial court to instruct on the effect of a

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[299] When a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors. (*People v. Salas* (1976) 58 Cal.App.3d 460, 474; see also *United States v. Echeverri* (3rd Cir. 1988) 854 F.2d 638, 643 [giving a special unanimity instruction as to predicate acts under a RICO charge, but not as to predicate acts under a concurrent CCE (Continuing Criminal Enterprise) statute charge, violated due process, since jurors may have inferred from this discrepancy that unanimity was not required as to the CCE related predicate acts]; see also p. 259, fn. 231, incorporated herein.

> reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

Moreover, there also was no instruction whatsoever on concurrence of act and mental state. (CALJIC 3.31.5.)

In sum, the judge erroneously omitted instruction on two essential elements of the murder charges in violation of the state and federal constitutions. (*Apprendi v. New Jersey, supra*, 530 U.S. 466; *People v. Flood* (1998) 18 Cal.4th 470.)

F. The Error Was Prejudicial

"When, as here, the federal constitutional error involves the trial court's failure to instruct on a necessary element, reversal is required under the *Chapman* test when 'the defendant contested the omitted element and raised evidence sufficient to support a contrary finding' but the error is not prejudicial when it is clear 'beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence.'" (*People v. Huggins* (2006) 38 Cal.4th 175, 259 [citing and quoting *Neder v. U.S.* (1999) 527 U.S. 1, 19]; see also *People v. Davis* (2005) 36 Cal.4th 510, 564 [omission of a disputed evidentiary issues raised by the defense the error is harmless only if "there is no 'record ... evidence that could rationally lead to a contrary finding' with respect to that element."]; *People v. Sakarias* (2000) 22 Cal.4th 596; *People v. Jackson* (2003) 109 Cal.App.4th 1625, 1635.) Under this standard, harmless error is demonstrated if it is clear "beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence. . . ." (*Neder, supra*, 527 U.S. at 19; see also *People*

v. Jackson (2003) 109 Cal.App.4th 1625, 1635.)

In the present case, concurrence of appellant's alleged intent and mental states with his alleged acts was clearly a contested issue. The prosecution alleged that before entering the residence of Ramon Morales, appellant had already formed the intent to rob and murder the victims. On the other hand, the defense contended that appellant had no knowledge of any plan to rob or murder until he was already inside the Morales residence. Hence the evidence raised contested factual issues as to when, if at all, appellant formed the various required specific intents and mental states.

Moreover, the jurors indicated a concern about exactly when appellant formed the necessary criminal intent when it asked about whether a person may join a conspiracy after it has already been formed. (See Claim 14 § E, p. 220, fn. 198, incorporated herein.)

In sum, the concurrence of act and intent/mental state was a disputed issue and, therefore, withdrawal of that issue from the instructions defining the murder charges was prejudicial error. (*Neder*, 527 U.S. at 19.)

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty. This is so because the error was substantial and the penalty trial was closely balanced. (See Claim 59 § G(2), pp. 550-51[close balance of penalty trial] incorporated herein.) Therefore, the prosecution cannot demonstrate that the error was harmless beyond a reasonable doubt under the federal standard or that the error was harmless under the "any reasonable possibility" state standard. (See Claim 59 § G(1), pp.548-50 [standards of prejudice for penalty] incorporated herein.)

CLAIM 45

THE WILLFULLY FALSE INSTRUCTION IMPROPERLY FAILED TO DEFINE "MATERIAL"

The judge gave CALJIC 2.21.2 which provided as follows:

> A witness who was willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the entire testimony of a witness who willfully has testified falsely as to a material point, unless from all the evidence you believe the probability of truth favors his or her testimony in other particulars. (53 RT 10428.)

However, this instruction could not have been reliably and consistently applied by the jurors because there is no assurance that they knew a "material part" of a witness' testimony must relate to a fact which could be "determinative of the case."'

Although it has been stated that CALJIC 2.21.2 contains a correct statement of the law (*People v. Blankenship* (1959) 171 Cal.App.2d 66, 83-84), the existing case law does not set forth a definition of the term "material part." To the extent that the term appears to be one with a technical legal meaning, it should be defined for the jury. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 489-90 [court must instruct sua sponte as to those terms which have a technical meaning].)

People v. Wade (1995) 39 Cal.App.4th 1487, 1495-96 held that "material" as used in CALJIC 2.21.2 carries its ordinary meaning of "substantial, essential, relevant or pertinent" and does not require sua sponte definition. However, given the context of CALJIC 2.21.2, the proper definition of "material part" should be taken from those cases which construe the materiality element of the crime of perjury. (Penal Code § 118.) In this regard, this Court has held that the test for materiality is "whether the

statement could probably have influenced the outcome of the proceedings. . . ." (*People v. Pierce* (1967) 66 Cal.2d 53, 61.) Thus, "material part" of someone's testimony must relate to a fact which could be "determinative of the case." (*Black's Law Dictionary* (5th Ed. 1979) p. 881; definition of "material evidence.")

In sum, because this instruction affected the jury's consideration of the evidence, the error violated appellant's state (Article I, sections 7, 15, and 17) and federal (6th, 8th and 14th Amendments) constitutional rights to due process and fair trial by jury, which require that the jurors fully understand the law stated in the jury instructions and that the jury fairly and accurately apply that law. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due process implicated if jurors misunderstood instructions]; see also *United States v. Gaudin* (1995) 515 U.S. 506, 514 [it is "the jury's constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts . . ."].)

Moreover, because appellant was arbitrarily denied his state created right to definition of technical terms used in jury instructions, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

The error was prejudicial as to both guilt and penalty. This is so because the error was substantial and both phases of the trial were closely balanced. (See Claim 12 § D(2)(a), pp. 201-03[guilt trial closely balanced] incorporated herein; Claim 59 § G(2), pp.550-51[penalty trial closely balanced] incorporated herein.) Therefore, the prosecution cannot demonstrate that the error was harmless beyond a reasonable doubt under the federal standard (*Chapman v. California* (1967) 386 U.S. 18) or that the error was harmless

under the state's standards of prejudice as to the guilt trial (*People v. Watson* (1956) 46 Cal.2d 818)[300] or the penalty standard. (See Claim 59 § G(1), pp.548-50 ["any reasonable possibility" state standard of prejudice for penalty], incorporated herein.)

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[300] "In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249 [Internal citations and quote marks omitted].)

CLAIM 46

THE JUDGE ERRONEOUSLY INSTRUCTED THE JURY THAT APPELLANT'S ALLEGED FLIGHT AND FALSE STATEMENTS SHOWED CONSCIOUSNESS OF GUILT

A. Introduction

At the request of the prosecution, the trial court delivered instructions regarding acts the jury could consider as evidence of appellant's consciousness of guilt which were misleading, allowed inferences unsupported by the evidence, and constituted improper pinpoint instructions.

The trial court instructed the jury pursuant to CALJIC 2.03 and 2.52. The version of CALJIC 2.03 given to the jury read as follows:

> If you find that before this trial the defendant made a willfully false or misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that statement is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration. (6 CT 1232; 53 RT 10424-25.)

The version of CALJIC 2.52 given to the jury read as follows:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by destroying evidence or concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration. (6 CT 1245; 53 RT 10430.)

Giving these instructions was error, because they were unnecessary and improperly argumentative, and because they permitted the jury to draw irrational inferences against appellant. The instructional error deprived appellant of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and

penalty. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., Article I, § 7, 15, 16, & 17.)

B. The Consciousness Of Guilt Instructions Improperly Duplicated The Circumstantial Evidence Instructions

It was unnecessary to instruct the jury with CALJIC 2.03 and 2.52. This Court has held that trial courts should not give specific instructions relating to the consideration of evidence which simply reiterate a general principle upon which the jury has already been instructed. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 444-445.) Here, the trial court instructed the jury on circumstantial evidence with the standard CALJIC 2.00, 2.01 and 2.02. (6 CT 1228-31.) Those instructions amply informed the jury that it could draw inferences from the circumstantial evidence, i.e., that it could infer facts tending to show appellant's guilt – including his state of mind – from the circumstances of the alleged crimes. There was no need to repeat this general principle in the guise of permissive inferences of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt, nor on permissive inferences of the guilt of Antonio Sanchez, Joaquin Nuñez and Jose Luis Ramirez. (See Claim 24, pp. 301-04, and Claim 25, pp.305-09, incorporated herein.) This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [holding that state rule that defendant must reveal his alibi defense without providing for discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violated equal protection].)

C. The Consciousness Of Guilt Instructions Were Unfairly Partisan And Argumentative

The trial court must refuse to deliver argumentative instructions. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly single out and bring into prominence before the jury isolated facts favorable to one party, thereby effectively "intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as ones which "invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People v. Mincey* (1992) 2 Cal.4th 408, 437 [citations omitted].) Even neutrally phrased instructions which "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871), or which "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9), are argumentative and must be refused. (*Ibid.*)

Moreover, an instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon, supra,* 412 U.S. at p. 474), and of equal protection of the law. (*Lindsay v. Normet, supra,* 405 U.S. at p. 77.) "There should be absolute impartiality as between the People and defendant in the matter of instructions . . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatcheit* (1944) 63 Cal.App.2d 144, 158; accord *Reagan v. United States* (1895) 157 U.S. 301, 310.)

To insure fairness and equal treatment, this Court should reconsider its decisions that have found California's consciousness of guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]), and a defense instruction held to be argumentative because it "improperly implie[d] certain conclusions from specified evidence." (*People v. Wright, supra,* 45 Cal.3d at p. 1137.)

The alternate rationale this Court employed in *People v. Kelly* (1992) 1 Cal.4th. 495, 531-532, and several subsequent cases (e.g., *People v. Arias* (1996) 13 Cal.4th 92, 142), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of the consciousness of guilt instructions, noting that they tell the jury that consciousness of guilt evidence is not sufficient by itself to prove guilt. Based on that fact, the Court concluded: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly*, *supra*, at p. 532.)

However, this Court abandoned the *Kelly* rationale that consciousness of guilt instructions are protective or neutral when it held that failing to give such instructions was harmless error because those instructions "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th 598, 673.) But, the notion that such instructions have a protective aspect is weak at best, and often entirely illusory. The instructions do not specify what else is required beyond the suggested inference that the defendant feels conscious of his or her guilt before the jury can find that guilt has been

established beyond a reasonable doubt. The instructions thus permit the jury to seize upon one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use it *in combination* with the consciousness of guilt evidence to find that the defendant is guilty.

Finding that a consciousness of guilt instruction based on flight unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming held that giving such an instruction will always be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, that court joined a number of other state courts that have found similar flaws in the flight instruction. Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)

The reasoning of two of those cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing

> argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case disapproving a flight instruction (*id.* at p. 748), and extended the reasoning of that case to cover all similar consciousness of guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [holding that the reasons for disapproving flight instructions also applied to an instruction on the defendant's false statements].)

Similarly, most federal model instructions have disapproved the use of consciousness of guilt instructions. (See e.g., 7th Circuit, 3.20 Flight ["The Committee recommends that no instruction be given on this subject"]; 9th Circuit, Introductory Comment [". . .the Committee recommends against giving instructions such as those dealing with flight, resistance to arrest, missing witness, failure to produce evidence, false or inconsistent exculpatory statements, failure to respond to accusatory statements, and attempts to suppress or tamper with evidence."].)

The argumentative consciousness of guilt instructions given in the present case invaded the province of the jury, focusing the jury's attention on

evidence favorable to the prosecution and placing the trial court's imprimatur on the prosecution's theory of the case. Those instructions therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., 5th and 14th Amends.; Cal. Const. Article I, §§ 7 & 15), his right to be acquitted unless found guilty beyond a reasonable doubt by an impartial and properly-instructed jury (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; U.S. Const., 6th and 14th Amends.; Cal. Const. Article I, section 16), and his right to a fair and reliable capital trial. (U.S. Const., 8th and 14th Amends.; Cal. Const. Article I, section 17; see also Claim 24 § C, pp.301-02 [improper instructional comment by the trial judge violates the federal constitution] incorporated herein.)

D. The Consciousness Of Guilt Instructions Permitted The Jury To Draw An Irrational Permissive Inference About Appellant's Guilt

The consciousness of guilt instructions given here were also constitutionally defective because they embodied an improper permissive inference. (*Ulster County Court v. Allen* (1979) 442 U.S. 140; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 [noting that the Constitution requires "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.'"].)

This Court has previously rejected the claim that the consciousness of guilt instructions permit irrational inferences concerning the defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC 2.03 and 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC 2.03, 2.06 and 2.52]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 666-667 [CALJIC 2.03 and 2.06].) However, appellant respectfully asks this Court to reconsider and overrule these holdings, and to hold that delivering the consciousness of guilt

instructions given in this case was reversible constitutional error.

The foundation for these rulings is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833, 871, which noted that the consciousness of guilt instructions do not specifically mention mental state and concluded that:

> A reasonable juror would understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged."

However, *Crandell*'s analysis is mistaken, and inapplicable here, for three reasons. First, consciousness of guilt instructions do not speak of "consciousness of some wrongdoing;" but of "consciousness of guilt," and *Crandell* does not explain why jurors would interpret such instructions to mean something they do not say. Elsewhere in the standard instructions the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., 6 CT 1253 [CALJIC 2.90, stating that the defendant is entitled to a verdict of not guilty "in case of a reasonable doubt whether his [] guilt is satisfactorily shown"].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that appellant was entitled to a verdict of not guilty only if the jury had a reasonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship* (1970) 397 U.S. 358, 364; see *Jackson v. Virginia* (1979) 443 U.S. 307, 323-324.)

Second, although the consciousness of guilt instructions do not specifically mention the defendant's mental state, they likewise do not specifically exclude it from the purview of permitted inferences, or otherwise hint that there are any applicable limits on the jury's use of the evidence. On the contrary, the instructions suggest that the scope of the permitted inferences is very broad since they expressly advise the jurors that the "weight and

significance" of the consciousness of guilt evidence, "if any, are matters for your" determination.

Third, this Court has itself drawn the very inference that *Crandell* asserts no reasonable juror would make. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court reviewed the evidence of defendant's mental state at the time of the killing, expressly relying on consciousness of guilt evidence, among other facts, to find an intent to rob. (*Id.* at p. 608.) Since this Court considered consciousness of guilt evidence in finding substantial evidence that a defendant killed with intent to rob, it should acknowledge that lay jurors might do the same.

In sum, because the consciousness of guilt instructions permitted the jury to draw an irrational inference of guilt against appellant, giving them undermined the reasonable doubt requirement and denied appellant a fair trial and due process of law. (U.S. Const., 6th and 14th Amends.; Cal. Const., Article I, sections 7 and 15.) The instructions also violated appellant's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., 6th and 14th Amends.; Cal. Const., Article I, section 16) to present a defense (U.S. Const., 6th and 14th Amends; Cal. Const., art I, §§ 7 and 15; *Crane v. Kentucky* (1986) 476) U.S. 683, 690), which includes the right to present a partial defense (*People v. Cash* (2002) 28 Cal.4th 702, 727), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, violated appellant's right to a fair and reliable capital trial. (U.S. Const., 8th and 14th Amends.; Cal. Const., Article I, section 17.)

E. CALJIC 2.03 On Consciousness Of Guilt From False Statements, Should Not Have Been Given Because The Facts At Issue In The Instruction Could Only Be Resolved Only By The Determination Of Guilt Itself

In the present case, CALJIC 2.03 was apparently intended to draw attention to appellant's statements in his video taped statement. (See 4 SCT 1036-39.) However, for the jury to have inferred consciousness of guilt for the charged crimes from any alleged false statements in appellant's video statement, it would have first been required to find that he falsified the statements because he committed the charged offenses – a circularity that should not be permitted. This is so because CALJIC 2.03 is appropriate only when the defendant's statement encompasses collateral, circumstantial facts in the case, and does not embrace coextensively *the* central fact of guilt. (See *U.S. v. Littlefield* (1st Cir. 1988) 840 F.2dd 143, 149.)

For example, flight instructions are inappropriate when the only evidence of flight in question is the perpetrator's departure from the scene of the crime and when the identity of the perpetrator is the factual issue to be resolved. (*People v. Rhodes* (1989) 209 Cal.App.3rd 1471, 1475-1476; *People v. Batey* (1989) 213 Cal.App.3rd 582, 587; *People v. Boyd* (1990) 222 Cal.App.3rd 541, 575; *People v. Pitts* (1990) 223 Cal.App.3rd 606, 879; see also *People v. Pensinger* (1991) 52 Cal.31d 1210, 1245.) In such circumstances, flight shows consciousness of guilt only if the jury has resolved the issue of identity against the defendant, which, however, constitutes a resolution of the issue of guilt itself. (*People v. Rhodes*, *supra*, at p. 1476.) In other words, a flight instruction is proper only when "there is substantial evidence of flight by the defendant apart from his identification as the perpetrator, from which the jury could reasonably infer a consciousness of guilt." (*Rhodes*, *id.*, at p. 1476, emphasis in original.)

Similarly, instruction on motive is improper where, by raising a defense of entrapment, the central issue in the case becomes whether "the commission of the alleged criminal act [] was induced by the conduct of law enforcement agents" (CALJIC 4.60). (*People v. Martinez* (1984) 157 Cal.App.3rd 660, 669; *People v. Lee* (1990) 219 Cal.App.3rd 829, 841.) As with flight applied to the disputed identity of the perpetrator fleeing the scene, the motive instruction begs the question of guilt through the presence of an induced or independent motive in the perpetrator. (See *Martinez, ibid.*)

In sum, an inference instruction is unnecessary when the inference can only be resolved by a resolution of the ultimate question of guilt itself. (See *United States v. Perkins* (9th Cir. 1991) 937 F.2d 1397, 1403.) Beyond unnecessary, it is circular and confusing (*United States v. Littlefield* (1st Cir. 1988) 840 F.2d 143, 149), and "[t]his circularity problem recurs whenever a jury can only find [the inference at issue] if it already believes other evidence directly establishing guilt." (*United States v. Durham* (10th Cir. 1988) 139 F.3d 1325, 1332.)

Thus, in the instant case, appellant's defense was lack of, or lesser, culpability predicated on his lack of intent to rob and murder. For the jurors to draw the inference of consciousness of guilt from appellant's video statement permitted by CALJIC 2.03, the jurors would have had to resolve the ultimate question itself: whether appellant had the required intent to rob and murder. This is the circularity that is deemed disqualifying for false statement instructions. (*United States v. Littlefield, supra.*)

However, because the inference at issue was set on the very dividing line between the prosecution and the defense, it was easily understood as a suggestion by the court that the corroborative inference in support of the prosecution's case was to be preferred to the exculpatory inference that raises

a reasonable doubt in favor of the defense. In short, the instruction obscured the very crux of the defense, while suggesting endorsement of the prosecution's case.

Thus, CALJIC 2.03 "misdirected or misled [the jury] upon an issue vital to the defense"in a case in which "the evidence does not point unerringly to the guilt of the person accused." (*People v. Rogers* (1943) 22 Cal.2d 787, 807.) And the instruction also violated appellant's Eighth Amendment right to an accurate and reliable guilt determination in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625, 638; *People v. Cudjo* (1993) 6 Cal.4th 585, 623.)

F. The Errors Warrant Reversal

As set forth above, giving CALJIC 2.03 an 2.52 violated appellant's federal constitutional rights. However, because the trial was closely balanced the judgment should be reversed under both the state and federal standards of prejudice. (*Chapman v. California* (1967) 386 U.S. 18; *People v. VonVillas* (1992) 11 Cal.App.4th 175.)

Finally, even if not reversible as to guilt, the error was reversible as to penalty. By undermining appellant's mitigating claim that he was merely an accomplice – who neither intended to kill nor actually shot the victims – the error bolstered the prosecution's case for a death verdict. Therefore, given the closeness of the penalty trial the death judgment should be reversed under both the state and federal standards. (See Claim 59 § G, pp. 548-51, incorporated herein.)

CLAIM 47

CALJIC 3.02 CREATED AN UNCONSTITUTIONAL MANDATORY PRESUMPTION THAT AIDING AND ABETTING A ROBBERY IN WHICH MURDER WAS FORESEEABLE IS EQUIVALENT TO AIDING AND ABETTING MURDER, AND COMPARABLE ERROR INFECTED OTHER INSTRUCTIONS

A. Overview

One who aids and abets another's crime is guilty as a principal. (Penal Code § 31.) Thus, knowingly and intentionally soliciting, encouraging, or assisting another's commission of murder makes one guilty of first-degree murder. The trial court instructed appellant's jury on these principles. (53 RT 10434-36; 6 CT 1254-55 [CALJIC 3.00, 3.01].) But it added that if murder was a natural and probable consequence of a robbery, aiding and abetting the robbery made appellant a principal in the *murder*. (53 RT 10435; 6 CT 1256 [CALJIC 3.02].)[301] Thus, the jury was excused from finding – and effectively required to presume – intent to encourage or facilitate a murder, if it found the

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[301] "One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime or crimes, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted.

In order to find the defendant guilty of the crime of murder as charged in Counts 1, 2 and 3 on this theory, you must be satisfied beyond a reasonable doubt, that:

One, the crimes of burglary or robbery were committed;

Two, that the defendant aided and abetted those crimes – I'm sorry. That the crimes of burglary, robbery, or murder were committed;

That the defendant aided and abetted in those crimes;

That a co-principal in one of those – one or more of those crimes committed a murder.

And four, that the crime of murder was a natural and probable consequence of the commission of the crimes of robbery or burglary." (53 RT 10435.)

predicate fact that murder was a natural and probable consequence of a robbery which appellant aided and abetted. Comparable instructions were given regarding the other assaultive crimes, as charged in Count 4 (53 RT 10450-51; 6 CT 1283-84.)

Use of the mandatory presumption was a prejudicial violation of state law and the state and federal due-process clauses, as well as the right to have a jury determine each element of an offense. (U.S. Const., 6th and 14th Amends.; *Francis v. Franklin* (1985) 471 U.S. 307, 313-314; *Sandstrom v. Montana* (1979) 442 U.S. 510, 523-524; Cal. Const. Article I, sections 7 and 15.)

A similar contention was rejected in *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107.) As will become apparent, however, that case is distinguishable.

B. Accessorial Liability Based On A Natural-and-Probable-Consequences Theory Substitutes A Mandatory Presumption For The Statutory Elements Of Knowledge Of The Perpetrator's Purpose And Intent To Encourage Or Aid In That Purpose

"All persons concerned in the commission of a crime . . . [who] aid and abet in its commission . . . are principals in any crime so committed." (Penal Code § 31.) An aider and abettor "must 'act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense."' (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 560.) The rule is statutory. Although "'aid' does not imply guilty knowledge or felonious intent, . . . the definition of the word 'abet' includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime." (*People v. Dole* (1898) 122 Cal. 486, 492.)

To aid and abet a murder, therefore, one must know the perpetrator's

purpose to murder and aid or encourage *that* crime. "To be culpable, an aider and abettor must intend not only the act of encouraging and facilitating but also the additional criminal act the perpetrator commits." (*People v. Mendoza*, *supra*, 18 Cal.4th at p. 1 129.) Nothing in the Penal Code provides otherwise.

To be sure, there is ample case law authorizing submitting a natural-and-probable-consequences theory to the jury. (See *People v. Mendoza*, *supra*, 18 Cal.4th at p. 1123.) However, in the case of accessorial liability for felony murder, the natural-and-probable-consequences instruction substitutes the equivalent of a mandatory presumption for the statutory elements of (1) knowing the perpetrator's intent to murder and (2) intent to commit, encourage, or facilitate the murder.[302] The presumption is that, if murder was a foreseeable consequence of the crime actually known about and intended by the accessory,

knowledge of and intent to encourage or aid the murder are to be presumed as well.[303] (Cf. *People v. Johnson* (1980) 104 Cal.App.3d 598, 610-611 .)

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[302] The perpetrator of a felony murder need not have intended murder to be guilty of it. (*People v. Randle* (2005) 35 Cal.4th 987, 995, fn.3.) But one cannot abet a crime without knowing the perpetrator's intent to commit it. This may mean that there is no statutory liability for "aiding and abetting" an unintended felony murder, since there was no perpetrator's intent for the accomplice to know.

Alternatively, the Penal Code might only require that the accessory intended that death result from actions which the accessory encouraged or facilitated. Section 31 could be construed as making the accomplice responsible for the homicide (which the accomplice knowingly encouraged), and the felony-murder rule would make the accomplice's crime first-degree murder. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1120 [accomplice's and perpetrator's respective liabilities depend on their own mens rea, not the other's].) The question is not, however, presented in this case.

[303] However the natural-and-probable-consequences rule is formulated,

(continued...)

As noted above, mandatory presumptions that relieve the prosecution from proving an element of an offense are constitutionally barred in criminal fact-finding. They violate both due process and the jury-trial right. (*Francis v. Franklin, supra*, 471 U.S. 307, 313-314; *Sandstrom v. Montana, supra*, 442 U.S. 5 10, 523-524.) Even permissive presumptions must be rational, which the one at issue is not, since it presumes knowledge and intent from a mere finding of foreseeability. (*Francis v. Franklin, supra*, 47 1 U.S. 307, 314-315; *Leary v. United States* (1969) 395 U.S. 6, 37.) Familiar gradations in culpability in both criminal and civil law recognize the significant differences between purposeful, knowing conduct and negligent failure to avoid a foreseeable risk. (1 Witkin & Epstein, Cal. Criminal Law (3rd ed. 2000) Elements, §§ 3, 8, 20; 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 383, 453, 831.)

C. *Coffman And Marlow* Are Distinguishable

In *People v. Cofman and Marlow, supra*, 34 Cal.4th 1, this Court rejected a claim similar to that made here on the following basis:

> Notably, the jury here was also instructed with CALJIC No. 3.01, advising that an aider and abettor must act with the intent of committing, encouraging or facilitating the commission of the target crime, as well as CALJIC No. 8.81.17, which required, for a true finding on the special circumstance allegations, that defendants had the specific intent to kill the victim. These concepts fully informed the jury of applicable principles of vicarious liability in this context. (*Id.* at p. 107.)

In the present case, however, the special circumstance instruction did

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[303](...continued)
"the ultimate factual question is one of foreseeability." (*People v. Cofman and Marlow, supra*, 34 Cal.4th 1, 107.)

not require the jurors to find that appellant intended to kill or even that he was an actual killer. (See 6 CT 1293-94; see also Claim 52, pp. 483-87, incorporated herein.) Thus, *Coffman and Marlow* do not control the present case.

D. Appellant Should Not Have Been Convicted Of A Specific Intent Crime Without A Finding That He Personally Formed Such Intent

CALJIC 3.02 allowed the jury to convict appellant of murder and attempted murder – specific intent crimes – without any finding that he actually had formed the required specific intent himself. This result violated federal due process principles. (See *Sharma v. State* (Nev. 2002) 56 P.3d 868.)

E. The Error Violated The Federal Constitution

Use of the mandatory presumption was a prejudicial violation of state law and the state and federal due-process clauses, as well as the right to have a jury determine each element of an offense. (U.S. Const., 6th and 14th Amends.; *Francis v. Franklin* (1985) 471 U.S. 307, 313-314; *Sandstrom v. Montana* (1979) 442 U.S. 510, 523-524; Cal. Const. Article I, sections 7 and 15.)

Furthermore, the defects in CALJIC 3.02 identified above violated reliability requirements of the Due Process and Cruel and Unusual Punishment Clauses of the 8th and 14th Amendments to the federal constitution. The Due Process Clause requires reliability as to criminal convictions generally. (See *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].) Moreover, in capital cases even greater reliability is required in the determination of guilt, death eligibility and penalty.(See *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483

U.S. 776, 785.)

Accordingly, because CALJIC 3.02 undermined the reliability of appellant's trial, it violated his federal constitutional rights.

F. The Error Was Prejudicial

Because the verdicts failed to show that all the jurors relied on a proper theory of liability, the judgment should be reversed. (*Sandstrom v. Montana* (1979) 442 U.S. 510; see also *People v. Guiton*, *supra*, 4 Cal.4th 1116.)

CLAIM 48

THE TRIAL COURT PREJUDICIALLY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY INSTRUCTING THE JURY ON FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH MALICE MURDER

A Introduction

The information charged appellant with second-degree malice murder in violation of Penal Code § 187. (1 CT 119, 121 and 123.)

At the close of trial, however, the jury was instructed on the uncharged offense of first-degree murder in violation of Penal Code § 189.[304]

Because the information did not charge appellant with first-degree murder, his first-degree murder conviction should be reversed.[305]

B. The Trial Court Lacked Jurisdiction To Try Appellant For First-Degree Murder

Second degree murder is the unlawful killing of a human being with malice aforethought, "but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first-degree

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[304] There were four theories of first-degree murder under the instructions:

1. Premeditated and deliberate murder (6 CT 1276-77);
2. Felony murder (6 CT 1278);
3. Conspiracy murder (6 CT 1280);
4. Natural and probable consequences of aiding and abetting (6 CT 1256.)

[305] Appellant is not contending that the information was defective. On the contrary, as set forth above, Count One was an entirely correct charge of second-degree malice-murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crime of first-degree murder in violation of Penal Code section 189.

murder." (*People v. Hansen* (1994) 9 Cal.4th 300, 307; Penal Code §187.)[306] Penal Code "[section 189 defines first-degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)

Because the information charged only second degree malice-murder in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information. [Citations omitted.]" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7; see also *People v. Granice* (1875) 50 Cal. 447, 448 [defendant could not be tried for murder after grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an information charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

C. This Court Should Reconsider Its Case Law Regarding The Relationship Between Malice Murder And Felony Murder

Appellant recognizes that this Court has heard and rejected various arguments pertaining to the relationship between malice murder and felony murder (see, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 394; *People v. Pride* (1992) 3 Cal.4th 195, 249-250) but submits that this line of cases does not address what appear to be irreconcilable contradictions in the law of first-degree murder in California. (See Claim 7, p. 105, fn. 100, incorporated herein.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code

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[306] Subdivision (a) of Penal Code section 187, provides: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary. (See *People v. Witt* (1915) 170 Cal.104, 107-108 [Penal Code § 187 includes murder in the first degree and murder in the second degree.].)[307]

However, the rationale of *People v. Witt, supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon, supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt, supra*,170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes* (2002) 27 Cal.4th 287, 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt, supra*, 170 Cal. at 107.) *Dillon* held that Penal Code § 187 was not "the statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe section 189 as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon, supra*, 34 Cal.3d at 472, fn. omitted.)

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

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that"[t]here is still only 'a single statutory offense of first degree murder."' (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, quoting *People v. Pride*, *supra*, 3 Cal.4th at p. 249; accord *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first-degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder, murder during the commission of a felony, or murder while lying in wait, and *Dillon* expressly held that the first degree felony-murder rule was codified in section 189. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472.) Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first-degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[felony murder and premeditated murder are not distinct crimes . . ." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice-murder clearly are distinct crimes. (See *People v. Hart* (1999) 20 Cal.4th 546, 608-609 [discussing the differing elements of those crimes]; *People v. Bradford, supra*, 15 Cal.4th at 1344 [holding that second-degree murder is a lesser offense included within first-degree murder].)[308]

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[308] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is (continued...)

The greatest difference is between second degree malice murder and first-degree felony murder. By the express terms of section 187, second-degree malice murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, supra, 34 Cal.3d at p. 479, but malice is not an element of felony murder. (*People v. Box*, *supra*, 23Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475,476, fn. 23). In *Green v. United States* (1957) 355 US. 184, the Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189, and declared that "[i]t is immaterial whether second-degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense." (*Id.* at p.194, fn. 14).

D. Reversal Is Warranted

Regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of the fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at 476, emphasis

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[308](...continued)
simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements* for conviction. This truth was well grasped by the court in *Gomez [v. Superior Court* (1958) 50 Cal.2d 640, 645, where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, 60 Cal.2d at pp. 502-503 (dis. opn. of Schauer, J.), original emphasis.)

added.)[309]

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

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., Article I, sections 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict appellant of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., 6th and 14th Amends.; Cal. Const., Article I, sections 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 483.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th and 14th Amends.; Cal. Const., Article I, section 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

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

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

CLAIM 49

THE JUDGE ERRONEOUSLY FAILED TO INSTRUCT THE JURY REGARDING THE SELECTION, DUTIES AND POWERS OF THE FOREPERSON

The judge left the jurors entirely on their own regarding the foreperson by merely instructing:

> You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations, or you may choose a new foreperson. (68 RT 13457.)

As a result, the foreperson was permitted to exercise undue influence over the other jurors, thus undermining the fairness and reliability of the guilt and penalty deliberations. Therefore, guilt and penalty judgments should be reversed.

It is axiomatic that all 12 jurors should have equal standing in the deliberation process. However, by requiring the jury to select one juror as the "foreperson," the judge creates a danger that the foreperson will have undue influence over the deliberations. Hence, a clear admonition regarding the foreperson's duties should be given.

Moreover, the jurors should also be specifically instructed that the foreperson's vote carries no greater weight than the vote of any other juror. (*State v. Mak* (Wash. 1986) 105 Wn.2d 692, 753 [718 P.2d 407].) As the elected leader of the group, the foreperson may naturally have more influence than the other jurors. Some experts have concluded that as a general rule the chairperson of a committee tends to be "more powerful." (See e.g., *United States v. Abell* (D.C. 1982) 552 F.Supp. 316, 321.) "Given the available evidence. . .in general, one would expect the foreperson to have some more influence than any other member of the [grand] jury; which is not to say that

[in] each and every instance that will occur. But on the average [the foreperson] is more likely to have more influence than anyone else." (*Ibid.*, see also *United States v. Snell* (5th Cir. 1998) 152 F.3d 345, 346 ["the foreperson's position as jury foreman may have increased his ability to influence jury deliberations"]; *United States v. Estrada* (8th Cir. 1995) 45 F.3d 1215, 1226 [potential influence of improper statement upon the jury's deliberations "was particularly strong because [the person making the statement] was the foreman"]; *United States v. Delaney* (8th Cir. 1984) 732 F.2d 639, 643 [same].)

In sum, the lack of instruction on the foreperson's duties and powers failed to assure that the deliberations were full, fair and free of undue influence. This violated appellant's state (Cal. Const. Art I, sections 1, 7, 15, 16 and 17) and federal (6th, 8th and 14th Amendment) constitutional rights to due process, fair trial by jury and verdict reliability. The Sixth Amendment right to trial by an "impartial jury" is "fundamental to the American scheme of justice . . ." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149.) This right, and/or the Due Process Clause (14th Amendment) is abridged if any juror has been subjected to undue influence during deliberations. (See e.g., *United States v. Scheffer* (1998) 523 U.S. 303, 314 [per se rule of exclusion is permissible for evidence that "is likely to influence the jury unduly . . ."]; *Smith v. Phillips* (1982) 455 U.S. 209, 217 ["Due process means a jury capable and willing to decide the case solely on the evidence before it . . ."]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [prosecution's comment, not violating specific constitutional provision, violates due process if it unfairly influenced the jury]; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 363 [right to fair and impartial trial by jury uninfluenced by news accounts]; *Hopt v. Utah* (1884) 110 U.S. 574, 583 [accused has the right to "the judgment of

the jury upon the facts, uninfluenced by any direction from the court as to the weight of evidence"].)

Moreover, the Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Further, because the error arbitrarily denied appellant his state created rights under the California Constitution (Art I., sections 7, 15, 16 and 17) and statutory law, it violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Accordingly, structural error was committed and the judgment should be reversed without a showing of prejudice. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism, which defy analysis by "harmless-error" standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275 .)

Alternatively, under harmless error analysis, the error was prejudicial as to both guilt and penalty. This is so because the error was substantial and both phases of the trial were closely balanced. (See Claim 12 § D(2)(a), pp. 201-03[guilt trial closely balanced] incorporated herein; Claim 59 § G(2), pp. 550-51[penalty trial closely balanced] incorporated herein.) Therefore, the prosecution cannot demonstrate that the error was harmless beyond a reasonable doubt under the federal standard (*Chapman v. California* (1967) 386 U.S. 18) or that the error was harmless under the state's standards of

prejudice as to the guilt trial (*People v. Watson* (1956) 46 Cal.2d 818)[310] or the penalty standard. (See Claim 59 § G(1), pp.548-50 ["any reasonable possibility" state standard of prejudice for penalty], incorporated herein.)

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[310] "In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249 [Internal citations and quote marks omitted].)

CLAIM 50

APPELLANT'S EQUAL PROTECTION AND DUE PROCESS RIGHTS ON APPEAL HAVE BEEN PREJUDICIALLY VIOLATED BECAUSE HE WAS REQUIRED TO WAIT AN INORDINATE AMOUNT OF TIME – OVER FIVE AND A HALF YEARS – FOR THE APPOINTMENT OF APPELLATE COUNSEL

A. Introduction

Appellant was sentenced to death on October 27, 1998. (72 RT 14207-23; 6 CT 1168-76 [Commitment: Judgement of Death [11/18/1998].) His appeal is automatic and required by California law. Because he is indigent, appellant had a right to appointed counsel on appeal. Yet he was compelled to wait on Death Row until June 9, 2004 – over five and a half years – before counsel was appointed to represent him on this appeal. This delay was without any constitutionally adequate excuse or justification, and violated appellant's federal constitutional rights to equal protection and due process of law, requiring reversal of the judgment.

B. Equal Protection And Due Process Principles

This issue involves the right to counsel on appeal, and the right to a speedy appeal. While there is no federal constitutional right to an appeal, when an appeal as of right is provided, as it is in California, the state is forbidden to discriminate between appellants with the money to hire an attorney and appellants without it. (*In re Barnett* (2003) 31 Cal.4th 466, 472-473.)

A speedy trial, guaranteed to all criminal defendants by the Sixth Amendment, is a fundamental right guaranteed by the due process clause of the Fourteenth Amendment. (*Barker v. Wingo* (1972) 407 U.S. 514, 515.) An appeal that "is inordinately delayed is as much a 'meaningless ritual,' as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings." (*Harris v. Champion* (10th Cir. 1994)

15 F.3d 1538, 1558, quoting *Douglas v. California* (1963) 372 US. 353, 358.)[311]

Applying *Barker* in the appellate context, courts "examine the length of the delay, the reason for the delay, whether the petitioner asserted his or her right to a timely appeal, and whether the petitioner experienced any prejudice as a result of excessive delay." *(Harris v. Champion, supra,* 15 F.3d at pp. 1546-1547; see *United States v. Tucker* (9th Cir. 1993) 8 F.3d 673, 676 (en banc); *United States v. Antoine, supra,* 906 F.2d at 1382.)

An examination of these factors shows that the five and a half year delay in appointing counsel for appellant violated his federal constitutional rights to equal protection and due process.

C. The Length Of The Delay

In the absence of inordinate delay, no due process claim can be made. Short delays are unlikely to raise due process concerns. (See *United States v.*

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[311] Numerous federal appellate courts have found that the right to a speedy criminal appeal is compelled by the United States Supreme Court's due process jurisprudence, thereby ruling that unreasonable appellate delay violates the Fourteenth Amendment's due process clause. Among the federal courts of appeal, the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have recognized the right to a speedy appeal. (See *United States v. Pratt* (1st Cir. 1981) 645 F.2d 89, 91; *Elcock v. Henderson* (2d Cir. 1991) 947 F.2d 1004, 1007; *Cody v. Henderson* (2d Cir. 1991) 936 F.2d 715, 718-719; *Burkett v. Fulcomer* (3d Cir. 1991) 951 F.2d 1431, 1445-1446; *Burkett v. Cunningham* (3d Cir. 1987) 826 F.2d 1208, 1221-1222; *United States v. Johnson* (4th Cir. 1984) 732 F.2d 379, 381-382; *United States v. Bermea* (5th Cir. 1994) 30 F.3d 1539, 1568-1569; *Rheuark v. Shaw* (5th Cir. 1980) 628 F.2d 297, 302-304; *United States v. Smith* (6th Cir. 1996) 94 F.3d 204, 206-208; *Dozie v. Cady* (7th Cir. 1970) 430 F.2d 637, 638; *United States v. Hawkins* (8th Cir. 1996) 78 F.3d 348, 350-351; *Coe v. Thurman* (9th Cir. 1991) 922 F.2d 528, 530-533; *United States v. Antoine* (9th Cir. 1990) 906 F.2d 1379, 1382; *Harris v. Champion, supra,* 15 F.3d at pp. 1546-1547.)

Pratt, supra, 645 F.2d at 91 [nine-month appellate delay]; *United States ex rel. Harris v. Reed* (N.D. Ill. 1985) 608 F.Supp. 1369, 1376 [seven-and-one-half-month delay processing motion for post-conviction relief]; *Doescher v. Estelle* (N.D.Tex. 1978) 454 F.Supp. 943, 952 [one-year appellate delay].) However, longer delays have been found to raise due process concerns.

In *Harris v. Champion*, *supra*, 15 F.3d 1538, the Tenth Circuit concluded that the passage of two years created "a presumption of inordinate delay on appeal." (*Id.*, at 1561.) Indeed, the court found that "delay substantially beyond two years, at least in a case that does not warrant a lengthier appellate process, will reduce the burden of proof on the other three factors necessary to establish a due process violation." (*Id.* at 1562.) Other courts have found that delays of this length raise due process concerns. (*Dozie v. Cady*, *supra*, 430 F.2d 637, 638 [seventeen-month delay]; *Burkett v. Fulcorner*, *supra*, 951 F.2d at 1445 [eighteen-month delay]; *Snyder v. Kelly* (W.D.N.Y. 1991) 769 F.Supp. 108, 111 [three-year delay], affd., 972 F.2d 1328 (2d Cir. 1992); *United States ex rel. Hankins v. Wicker* (W.D. Pa. 1984) 582 F.Supp. 180, 185 [two-year delay].)

The delay of over five years for just the appointment of counsel exceeded the two-year time period identified by *Harris* as the maximum time allowed for timely resolution of an appeal in its entirety.

D. The Reason For The Delay

Appellant is indigent. Because of his indigency he has had to wait years to obtain a lawyer. If appellant had been able to pay six-figure attorney fees he would not have had to wait. He could have hired an appellate attorney immediately upon entry of judgment against him (if not sooner).

The responsibility for the timely appointment of appellate counsel for the indigent rests with the state. (*In re Barnett*, *supra*, 31 Cal.4th 466, 472-

473.) There is no constitutionally supportable justification for delay in appointing appellate counsel for a person sentenced to death.

The California Supreme Court has been unable to appoint counsel for every person sentenced to death at the time of sentence or shortly thereafter. But there are many more lawyers in California than there are Death Row inmates, and the problem is far from intrinsically insoluble; if the Legislature wished to assure that every person sentenced to death had prompt assistance of counsel, it could certainly do so.

The Legislature could choose to fund a public agency or quasi-public agency, such as the State Public Defender's Office or the California Appellate Project, so that those offices could hire and train attorneys to directly represent persons sentenced to death. And sufficient compensation, more closely resembling actual market rates for attorneys skilled in complex appellate litigation, could be instituted to attract qualified private counsel to undertake representation of inmates on appeal in greater numbers. This is simply a matter of supply and demand.

Instead, the Legislature has chosen not to take those steps necessary to insure that every capital appellant has an appeals lawyer shortly after sentence is passed. This policy must finally rest on considerations of financial impact -considerations which are insufficient to justify the failure to promptly appoint counsel for indigents on Death Row. (See *Douglas v. California*, *supra*, 372 U.S. 353, 358.)

E. Appellant's Assertion Of His Right To A Timely Appeal

The *Harris* court concluded that "absent evidence that a petitioner affirmatively sought or caused delay in the adjudication of his or her appeal, this third factor should weigh in favor of finding a due process violation." (*Harris*, *supra*, 15 F.3d at 1563.) In the present case, appellant was entitled to

an automatic appeal pursuant to state statute. (Pen. Code § 1239, subdivision (b).) He took no action to delay the appointment of counsel.

F. Appellant Was Prejudiced As A Result Of The Delay

Prejudice from appellate delay may result from, inter alia, "oppressive incarceration pending appeal" or "constitutionally cognizable anxiety awaiting resolution of the appeal." (*Harris v. Champion*, *supra*, 15 F.3d at 1563; see *United States v. Wilson* (9th Cir. 1994) 16 F.3d 1027, 1030.) Prejudice based upon oppressive incarceration "depends upon the outcome of his appeal on the merits, or subsequent retrial, if any." (*United States v. Antoine*, *supra*, 906 F.2d at 1382.) Thus, if an appellant is properly convicted, "there has been no oppressive confinement: he has merely been serving his sentence as mandated by law." (*Id.*) As discussed elsewhere in this brief, appellant's appeal is meritorious and, therefore, his excessive incarceration pending appointment of counsel has been oppressive.

In order for prejudice arising from anxiety to be cognizable, "the anxiety must relate to the period of time that the appeal was excessively delayed." (*Harris v. Champion*, *supra*, 15 F.3d at 1564.) The Ninth Circuit Court of Appeals requires a showing of "particular anxiety that would distinguish his case from that of any other prisoner awaiting the outcome of an appeal." (*United States v. Antoine*, *supra*, 906 F.2d at 1383.)

A death sentence is the state's ultimate punishment. Its imposition demands legal representation, as California law recognizes. Enforced isolation from legal representation by a qualified lawyer while on Death Row for nearly three years cannot be justified. The psychological dimensions of a death sentence are unique. They alone distinguish a death sentence from any other. Excessive time served without legal representation on Death Row induces anxiety different from that otherwise associated with prison life. Particularly

under these circumstances, deprivation of counsel is necessarily and intrinsically harmful.

G. All Four Factors Lead To The Conclusion That Appellant's Equal Protection And Due Process Rights Have Been Violated

All four factors support the same conclusion: appellant's speedy appeal rights have been violated and his conviction and sentence must be set aside. Independently, the delay in appointing appellate counsel for a condemned inmate establishes the constitutional violation. The delay not only compromised appellant's speedy appeal rights but also sacrificed his federal constitutional rights to assistance of counsel and meaningful appellate review.

The California Supreme Court has not acknowledged the well-established federal right to a speedy appeal, and has summarily rejected speedy appeal claims in other cases. (See e.g., *People v. Holt* (1997) 15 Cal.4th 619.) Moreover, rather than carefully applying the four-part balancing test of *Barker*, or articulating an alternative test, the California Supreme Court appears to have created a capital-case exception to the right to a speedy appeal. (*Id.*, at 709.)

The unique nature of capital litigation must be taken into account when applying the *Barker* criteria. Indeed, in the present argument appellant does not challenge the reasonably necessary time for record review, record correction, briefing, and court consideration in capital cases. (But see Claim 78, herein.) In the present claim, he contends that no justification exists for inordinate delay in appointing appellate counsel. Nothing in the general nature of capital litigation justifies suspending the appellate process for more then five years. Indeed, the delays inherent in capital post-conviction litigation only accentuate the need for prompt appointment of appellate counsel.

The systemic delays in appointing counsel undermine the equitable and

reasonable operation of the capital appeals process and likewise offend basic notions of constitutional fairness. Observing in 1997 that 156 of 480 death row inmates did not have lawyers, the San Francisco Chronicle editorialized that "[j]ustice is the casualty of California's inability to provide adequate legal representation for death row inmates." (*Inmates on Death Row Have Right to Lawyers*, San Francisco Chronicle (Aug. 25, 1997) p. A20.) It is a problem that has plagued the court system for many years. (See Hager, *Counsel for the Condemned* (Dec. 1993) Cal. Law., at pp. 33, 34.)

Indeed, the Chief Justice acknowledged in his 1996 State of the Judiciary address that the delay of processing death-penalty appeals "causes confusion and frustration among Californians and is unfair to everyone – victims and their families, defendants, and the public at large." (Chief Justice Ronald M. George, 1996 State of the Judiciary Address to a Joint Session of the California Legislature (May 15, 1996) p. 20.)

Once a state "has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant, 'the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." (*Evitts v. Lucey* (1985) 469 U.S. 387, 393, quoting *Griffin v. Illinois* (1956) 351 U.S. 12, 18.) California's procedures do not comport with these constitutional demands. Accordingly, the judgment should be reversed.

CLAIM 51

THE INSTRUCTIONS GIVEN IN APPELLANT'S TRIAL WERE NOT SUFFICIENTLY UNDERSTANDABLE TO SATISFY THE FEDERAL CONSTITUTION

A. Introduction

Because heightened reliability is required as to both guilt and penalty in a death penalty case, it is especially important that the jurors fully understand the instructions they are given by the judge. However, the California Judicial Council's Blue Ribbon Jury Instruction Committee and respected researchers have questioned the understandability of the CALJIC instructions given in appellant's trial. In fact, as a result of the Blue Ribbon Commission findings that the CALJIC instructions are on occasion "simply impenetrable to the ordinary juror" [preface to CALCRIM draft], the CALJIC instructions were completely replaced by the new CALCRIM instructions effective January 2006. And, as a result of numerous studies by the academic community, it has been empirically demonstrated that appellant's jurors more than likely labored under fundamental misunderstandings of the crucial precepts they were required to apply before imposing a death sentence.

Moreover, this likelihood of such confusion was demonstrated by actual juror questions in the present case.

B. The Importance Of Jury Instructions Is Beyond Dispute

"It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (*Gregg v. Georgia* (1976) 428 U.S. 153, 193 [opn. of Stewart, Powell, and Stevens, JJ.]; see also *Carter v. Kentucky* (1981) 450 U.S. 288, 302; *Bollenbach v. United States* (1946) 326 U.S. 607, 612; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.)

"Jurors are not experts in legal principles; to function effectively, and

justly, they must be accurately instructed in the law." (*Carter v. Kentucky*, *supra*, 450 U.S. at 302.) "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depend[s] on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." (*Bollenbach v. United States*, *supra*, 326 U.S. at 612.)

Hence, instructions which are confusing or difficult to understand undermine the very foundation of the right to trial by jury: "Many lawyers share the belief that instructions are given little consideration in the deliberations of jurors. While this may be true in some cases, I believe they follow them to the extent they understand them and give up only when they become bewildered." (*Werkman v. Howard Zink Corp.* (1950) 97 Cal.App.2d 418, 428, Shinn, P.J. concurring.)

C. The Judicial Council's Blue Ribbon Commission Has Found That The CALJIC Instructions Do Not Ensure Juror Understanding Of The Law

The preface to the drafts for the Proposed Judicial Council instructions provided the following description of why the Blue Ribbon Commission found that CALJIC should be "totally rewritten" –

> In December of 1995, the Judicial Council established a Blue Ribbon Commission on Jury System Improvement. The Commission's mission was to 'conduct a comprehensive evaluation of the jury system and [make] timely recommendations for improvement.' After extensive study, the commission made a number of recommendations to the Chief Justice and the Judicial Council, one of which was that the Council create a Task Force on Jury Instructions to draft more understandable instructions. The recommendation stemmed from the Commission's conclusion that 'jury instructions as presently given in California and elsewhere are, on occasion, simply impenetrable to the ordinary juror.' In light of the Commission's view that jurors could be accurately instructed on

> the law in language more easily absorbed and understood, the Judicial Council acted on the recommendation, creating the current Task Force. The Chief Justice noted the two principal goals underlying the creation of more intelligible instructions are '(1) making juror's experiences more meaningful and rewarding and (2) providing clear instructions that will improve the quality of justice by insuring that jurors understand and apply the law correctly in their deliberations.'" [Emphasis added.]

If after "extensive study" by a Blue Ribbon Commission the Judicial Council decides to embark upon a long and costly total "re-writing" of the standard jury instructions then it must be concluded that the CALJIC instructions–such as those given in the present case–were seriously defective and not able to effectively convey the necessary legal principles to the jury.

The preface to the completed CALCRIM instructions repeated the Blue Ribbon Commission's finding about the CALJIC instructions being "impenetrable" and further explained why this lack of understandability impaired the jurors' ability to "apply the law fairly and accurately."

> The reason instructions are so often impenetrable is that they are based on the language of case law and statutes written by and for a specialized legal audience and expressed in terms of art that have evolved through multiple languages, in many countries, over several centuries. We do not seek to lose either the majesty of the law or the rich language in which lawyers and judges have expressed it. However, our work reflects a belief that sound communication takes into account the audience to which it is addressed. Jurors perform an essential service in our democracy. We are absolutely dependent upon them to apply the law fairly and accurately. In order to do so, they must be able to understand the instructions they are asked to follow. (Preface to CALCRIM, paragraph 2.)

D. Empirical Studies Corroborate The Blue Ribbon Commission's Findings That The CALJIC Instructions Are "Impenetrable To The Ordinary Juror"

Empirical studies further corroborate the Blue Ribbon Commission's findings as to the inability of jurors to understand and follow the CALJIC instructions.

For example, in a study of ten separate California juries, the following findings were made: (1) Consideration of mitigating evidence – "[F]ully 8 out of the 10 California juries included persons who dismissed mitigating evidence because it did not directly lessen the defendant's responsibility for the crime itself." (2) Comprehension of Legal Crimes and Legal Terms – "Of the 30 California jurors interviewed, only 13 showed reasonably accurate comprehension of the concepts of aggravating and mitigating." (See Haney, Sontag and Costanzo, "*Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*," 50 Journal of Social Sciences No. 2 (Summer 1994).)

This study and others established that a substantial majority (almost 25%) of death-qualified jurors erroneously believed that life without parole will allow the parole or judicial system to release the defendant in less than 10 years due to overcrowding and other factors, over 75% disbelieve the literal language of life without parole. (Haney, Sontag and Costanzo, *supra*, ["Four of five death juries cited as one of their reasons for returning a death verdict, the belief that a sentence of life without parole did not really mean that the defendant would never be released from prison. . . ."]; see also *Simmons v. South Carolina* (1994) 512 U.S. 154.) Moreover, a juror's belief as to the meaning of the sentences is the single most important reason for voting for a particular verdict. (CACJ Forum (1994) Vol. 21, No. 2, p. 45.)

Other corroborative studies include the following:

James Frank and Brandon K. Applegate, *Assessing Juror Understanding of Capital Sentencing Instructions*, 44 Crime and Delinquency No. 3 (1998) – A mock jury study revealed that juror comprehension of sentencing instructions is limited, especially with regard to instructions dealing with mitigation. The defendant is typically disadvantaged by the misunderstandings. However, juror comprehension can be improved by rewriting the instructions and by giving jurors copies of the instructions.

Richard Weiner, *The Role of Declarative Knowledge in Capital Murder Sentencing*, 28 Journal of Applied Psychology, No. 2 (1998) – A mock jury study indicated that juror comprehension was low and the less the jurors understand the mitigation instructions, the more likely they are to impose the death penalty.

Marla Sandys, *Cross-Overs–Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 Indiana Law Journal 1183, 1220-1221 (1995) – The decision making process is "governed by confusion, misunderstanding and even chaos. Jurors decide life-and-death questions laboring under numerous misconceptions about the utility and operation of capital punishment– sometimes unclear about the import of certain kinds of evidence (including something as basic as whether the evidence is aggravating or mitigating), almost always confused over the meaning of the all important capital instructions, in some instances [they were] wrong about the decision rules by which they are to reach a sentencing verdict, and unclear about (or highly skeptical of) the ultimate consequences of the very alternatives between which they must choose." (*Id.* at 1225.) Furthermore, jurors who are misled by the capital instructions into believing that the judicial formulas dictate a certain outcome in their deliberations

usually have the outcome of death in their mind. (*Id.* at 1226.)

Constanzo & Constanzo, *Jury Decision Making in the Capital Penalty Phase,* 16 Law and Human Behavior, 185 (1992) – Mock jurors do not fully understand the meaning of the most critical legal terminology used in the sentencing phase instructions, especially the terms aggravation and mitigation. (*Id.* at 188.)

In sum, these studies corroborate the Blue Ribbon Commission's finding that the CALJIC instructions are "impenetrable to ordinary jurors."[312]

E. The Use Of "Impenetrable" Jury Instructions In A Criminal Prosecution Violates State Law And The Federal Constitution

Jury instructions – such as those given in the present case – which are confusing and difficult for lay jurors to understand, violate the state (Cal. Const. Article I, sections 1, 7, 15, 16 and 17) and federal constitutional rights to due process and fair trial by jury (6th and 14th Amendments) which require that the jury fully understand the law stated in the jury instructions and that the jury fairly and accurately apply that law. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due process implicated if jurors misunderstood instructions]; see also *United States v. Gaudin* (1995) 515 U.S. 506, 514 [it is "the jury's constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts . . ."]; see also Claim 86§ D, pp. 673-74, incorporated herein.)

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[312] See also Claim 86 § D, pp.673-04, incorporated herein.

F. Juror Confusion And Misunderstanding As To Jury Instructions Undermines The Reliability Of The Verdicts And Necessitates Reversal

1. The 8th And 14th Amendments Requires Heightened Reliability As To Both Guilt And Penalty

a. Death Is Different

"[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability. . . . " (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; see also *Lankford v. Idaho* (1991) 500 U.S. 110, 125-26; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Mills v. Maryland* (1988) 486 U.S. 367, 377; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329-330; *California v. Ramos* (1983) 463 U.S. 992, 998-999 fn 9.)

b. Greater Reliability Required As To Both Guilt And Penalty

Even in noncapital cases a certain standard of reliability is constitutionally required. This is so because "[r]eliability is . . . a due process concern." (*White v. Illinois* (1992) 502 U.S. 346, 363-64.) The Due Process Clauses of the federal constitution (14th Amendment) require that criminal convictions be "reliable and trustworthy." (*California v. Green* (1970) 399 U.S. 149, 164 [due process might prevent convictions where a reliable evidentiary basis is totally lacking]; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 and cases collected at fn. 22 [due process "cannot tolerate" convictions based on false evidence]; *Thompson v. City of Louisville* (1960) 362 U.S. 199, 204.)

However, an even higher standard of reliability is required under the 8th and 14th Amendments in capital cases, because death is different. The 8th and

14th Amendments require a "greater degree of accuracy" and reliability. (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) Thus when the state seeks death, courts must ensure that every safeguard designed to guarantee "fairness and accuracy" in the "process requisite to the taking of a human life" is painstakingly observed. (*Ford v. Wainright* (1986) 477 U.S. 399, 414; see also *Gardner v. Florida* (1977) 430 U.S. 349; see also *Gore v. State* (Fla. 1998) 719 So.2d 1197, 1202 [in death case "both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects"].) As a result, in a capital case heightened reliability is required as to both guilt (see *Beck v. Alabama* (1980) 447 U.S. 625, 627-46) and penalty. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; see also *Gilmore v. Taylor* (1993) 508 U.S. 333, 338-45; *Penry v. Lynaugh* (1989) 492 U.S. 302, 328; *Johnson v. Mississippi* (1988) 486 U.S. 578, 587; *Green v. Georgia* (1979) 442 U.S. 95, 96-97.)

And, this requirement of reliability extends to post-conviction review where "the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422 ["[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."].)

2. The Fourteenth Amendment Requires That The Guilt And Penalty Verdicts Be Reliable

Verdict reliability is required by the Due Process Clause (14th Amendment) of the federal constitution. (See *Beck v. Alabama, supra*; *White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

G. The Jurors' Confusion Was Exacerbated By The Extraneous Markings And Sloppy, Handwritten Notes On The Written Instructions Given To The Jurors

This Court has held that the written instructions given to the jurors during deliberations are the ones that control their deliberations. However, the written instructions in the present case were unduly confusing because they included extraneous markings, hand written comments and confusing brackets and incorrect punctuation. (See e.g., 6 CT 1230, 1231, 1235, 1256-7, 1260-62, 1271, 1273-74, 1290-94, 1296-97, 1302-06, 1316, 1317.)

_____Hence, the inherent impenetrability of the CALJIC instructions was exacerbated by the sloppy and confusing way in which they were presented to the jurors.[313]

H. The Judgment Should Be Reversed

In view of the above, both the guilt and penalty judgments in the present case should be reversed because the failure of the instructions to satisfy the most fundamental and rudimentary reliability requirements constituted structural error which infected the entire trial. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism, which defy analysis by "harmless-error" standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275 .)

The guilt judgment should also be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.'

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[313] Moreover, CALJIC 17.45, which is designed to clarify instructions – which contain handwritten markings – was not given. (Compare *People v. Bloyd* (1987) 43 Cal.3d 333.)

[Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) In the present case the error was substantial and the question of whether appellant knowingly and intentionally committed or aided and abetted robbery and murder was closely balanced. (See Claim 12 § D(2)(a), pp. 201-03, incorporated herein.) Moreover, numerous juror questions about the jury instructions demonstrated the fact that the instructions were not sufficiently understandable. (See Appendix to this Claim, pp. 480-82, incorporated herein.) Therefore the judgment should be reversed under the *Watson* standard.

Furthermore, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Because appellant's trial was closely balanced, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Additionally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice, because it undermined the fairness and reliability of the penalty determination. (See Claim 10 § H(3), p. 158 and Claim 59 § G, pp. 548-51, incorporated herein.)

Finally, even if the error identified in this claim was not individually prejudicial, reversal of the guilt, special circumstance and penalty verdicts would still be warranted. This is so because, when the error is considered

cumulatively with all the other guilt, special circumstance and penalty errors discussed in this brief, it is apparent that appellant's trial was fundamentally unfair, unreliable and in violation of state law and the federal constitution. (U.S. Constitution, 8th and 14th Amendments; California Constitution, Article 1, sections 7 & 15; *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.); *People v. Hill* (1998) 17 Cal.4th 800, 845.)

Appendix to Claim 51: Juror Questions Regarding The Jury Instructions

Date	CT	Text Of Question	RT	Disposition
9/3/98	1201	"We need definition & clarification of "a principal (was/was not) armed with a firearm, to wit, a .38 handgun and 30/30 rifle." Does this mean a principle [sic] has to be armed with both guns or one principal having one of the guns each?" [Foreperson]	56 RT 11001-02; 11006 9/8/98	Judge will instruct that it's proven if any principalis armed during offense
9/3/98	1202	"If property is taken from a place before a person arrives, is it robbery or burglary or both?" [Foreperson]	56 RT 11001-06 9/8/98	Judge will re-read R & B instructions and give "off-the-cuff" definition of robbery and burglary"[314]
9/8/98	1203	"For all charges, do we need to answer all the attached questions or can we leave one blank or unanswered"? [Foreperson]	56 RT 11007-9	Judge reads from CJ 17.50 and asks them to return (56 RT 11008-09)

[314] Defense objects to "off-the-cuff" definition and just wants judge to read instructions. (56 RT 11002-03.)

9/8/98	1204	"If people conspire [and] have intent to rob & act on the conspiracy to rob & in doing so, people are murdered, does the conspiracy now include the conspiracy to murder as well as rob? (Yes or no - answer?) We are not sure if we can ask this but feel we need to." [Foreperson]	56 RT 11009-17	Jury has CJ 8.69; judge doesn't see need to "add anything" (56 RT 11010; 11012-14) Judge formulates answer[315] which is read to jury (56 RT 11015-18)
?	1209	"Can we get more copies of the jury instructions? (Maybe 2 or 3)"	?	?
9/8/98?	1216	"1. We would like if possible more clarification of conspiracy. 2. Is a person guilty if he was <u>not one</u> of the 2 or more person(s) that made the agreement to conspire. 3. Set. 8.69 of jury instructions: Explain & give more detail on each of the following: elements that must be proved"	56 RT 11009	Court will read back appropriate instruction (CJ 6.12 & 6.19 [not given before]) (RT 56 RT 11009-10; 11011-12)

[315] This "noninstruction" was objected to by defense but overruled. (56 RT 11016.)

9/8/98	1205	"Can we have a printed copy of jury instruction 6.19?" [Foreperson]	?	CJ 6.19 given to jurors. 6 CT 1327
9/22/98	1212	"If we can't come to an agreement on a penalty, is it a mistrial or defaults to life in prison w/o parole, or does judge make decision." [Foreperson]	69 RT 13601	Tells jury not to concern itself with consequences of failure to reach verdict on penalty (69 RT 13601-02)

CLAIMS 52-57: SPECIAL CIRCUMSTANCE ERRORS

CLAIM 52

THE JURORS WERE ERRONEOUSLY PERMITTED TO FIND THE FELONY MURDER SPECIAL CIRCUMSTANCE EVEN IF APPELLANT WAS NOT THE ACTUAL KILLER AND NOT A MAJOR PARTICIPANT WHO ACTED WITH RECKLESS INDIFFERENCE TO HUMAN LIFE

A. Overview

California law and the federal constitution require a finding of one of the following as an essential element of the felony murder special circumstance enumerated in Penal Code § 190.2(a)(17):

1. The defendant was the actual killer of the victim; or

2. The defendant aided and abetted the murder with intent to kill; or

3. The defendant aided and abetted the murder with reckless indifference to human life and as a major participant. (See *Tison v. Arizona* (1987) 481 U.S. 137; *Enmund v. Florida* (1982) 458 U.S. 782; *People v. Estrada* (1995) 11 Cal.4th 568, 575-576.&

In the present case, the instruction on the felony murder special circumstance erroneously allowed the jury to find the special circumstance without finding at least one of the above elements. This is so because the instruction only required a finding of reckless indifference if the jurors were "unable to decide whether the defendant was the actual killer or . . . a co-conspirator." (53 RT 10456-7; 6 CT 1293.)[316]

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[316] Paragraph 4 of the instruction given in the present (CALJIC 8.80.1 (1997 revision)) case provided as follows:

> [If you find that a defendant was not the actual killer of a human being,
> (continued...)

Therefore, because the jurors did find that appellant was a co-conspirator by its verdict in Count 10 (4 CT 996-97), they were not required – under the express language of the special circumstance instruction – to find reckless indifference or intent to kill.[317]

Accordingly, the felony murder special circumstance verdicts violate state law and the federal constitution. In *Enmund v. Florida*, *supra*, 458 U.S. 782, 797 the United States Supreme Court held that the death penalty, imposed under the state felony-murder rule, was disproportionate under the 8th Amendment for a robber who did not himself kill, attempt to kill or intend that a killing take place or that lethal force be implied. In *Tison v. Arizona*, *supra*, 481 U.S. 137, 158, the Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.* (fn. admitted). *Tison* and

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[316](...continued)
[or if you are unable to decide whether the defendant was the actual killer or [an aider or abettor] [or] [co-conspirator],] you cannot find the special circumstance to be true [as to that defendant] unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] any actor in the commission of the murder in the first degree] [.] [, or with reckless indifference to human life and as a major participant, [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] in the commission of the crime of burglary or robbery (Penal Code, § 190.2(a)(17) crime) which resulted in the death of a human being, namely Ramon Morales, Martha Morales or Fernando Martinez.] (6 CT 1293.)

[317] The instruction also required the jurors to find reckless indifference if they found that appellant was "not the actual killer of a human being." (6 CT 1293.) However, the verdicts do not show whether or not the jurors found that appellant was an actual killer. In fact, there appeared to be juror disagreement on this issue since they could not return a verdict on the use of a firearm allegation. (See Statement Of Case § C, pp.11-12, incorporated herein.)

Enmund define the minimum conduct necessary for an individual to be death eligible. Under California law, a defendant found guilty of felony murder, but who is not the actual killer, may be subjected to capital punishment or life without parole under Penal Code § 190.2(d) only if he was a major participant in the underlying felony and acted with reckless indifference to human life. (See. e.g., *People v. Estrada, supra*, 11 Cal.4th at 575-576; *People v. Purcell* (1993) 18 Cal.App.4th 65, 72-73; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 fn. 16.)

In the present case, because the instructions failed to assure that the jurors made the findings required by *Tison*, *Enmund*, and *Estrada,* the felony murder special circumstance verdicts violated Penal Code § 190.2(d) as well as the state (Article I, section 7, 15 and 17) and federal (6th, 8th and 14th Amendments) constitutional rights to due process, trial by jury and to a reliable and non-arbitrary determination of death eligibility and penalty.[318]

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of

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[318] The Eighth Amendment requires that "death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." (*California v. Brown* (1987) 479 U.S. 538, 541, citing *Gregg v. Georgia, supra*, 428 U.S. 153 and *Furman v. Georgia* (1972) 408 U.S. 238.) If a state enacts a death penalty, it "must . . . rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." (*Spaziano v. Florida* (1984) 468 U.S. 447, 460.) Thus, a death penalty statute must, by rational and objective criteria, "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* (1983) 462 U.S. 862, 877; *Maynard v. Cartwright* (1988) 486 U.S. 356, 362-363; *Godfrey v. Georgia, supra*, 446 U.S. at 428-429; *Furman v. Georgia, supra*, 408 U.S. 238.)

guilt, death eligibility and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-363; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code §1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[319] The judge's failure to properly instruct on the elements of the felony murder special circumstance violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. This violation of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

In sum, because an essential contested element of the felony murder special circumstance allegations was removed from the jurors' consideration, the judgment should be reversed. (See *Neder v. U.S.* (1999) 527 U.S. 1; see

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[319] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

also *Cunningham v. California* (2007) _____ U.S. ____ [127 S. Ct. 856; 2007 U.S. LEXIS 1324].)

CLAIM 53

THE SPECIAL CIRCUMSTANCES INSTRUCTIONS WERE INDIVIDUALLY AND CUMULATIVELY DEFICIENT

The jury instructions on the robbery and burglary special circumstances contained multiple errors which individually and cumulatively violated appellant's rights under state law and the federal constitution. (8th and 14th Amendments.)

A. Failure To Permit Juror Consideration Of Appellant's Intoxication

As discussed above, the jurors were precluded from considering intoxication as to non-specific intent issues such as subjective knowledge. (See Claim 18, pp. 253-67, incorporated herein.) This error was also prejudicial as to the special circumstances because intoxication should have been considered by the jurors in deciding the mens rea issues of the felony murder special circumstances.[320] For example, appellant's subjective awareness and knowledge were at issue in determining reckless indifference under the special circumstance instructions. However, by precluding consideration of intoxication on such mens rea elements, the judge committed error which violated appellant's state (Article I, sections 7 and 15) and federal (6th and 14th Amendments) rights to present a defense, due process trial by jury, compulsory process and representation of counsel. (See *Holmes v. South Carolina* (2006) _____ U.S. _____ [126 S. Ct. 1727; 164 L. Ed. 2d 503]; see

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[320] The jurors were instructed:

> A defendant acts with reckless indifference to human life when that defendant knows or is aware that his acts involve a grave risk of death to an innocent human being. (53 RT 10457; 6 CT 1294.)

also Claim 10 § H(2), pp. 157-58, incorporated herein [right to present a defense].)

Accordingly, because the defense theory of intoxication was withdrawn from the jury's consideration, the felony murder special circumstances should be reversed. (See *People v. Baker* (1954) 42 Cal.2d 550, at 575-76; *People v. Rivera* (1984) 157 Cal.App.3d 736, 743; *Holmes v. South Carolina, supra,* _____ U.S. _____ [126 S. Ct. 1727; 164 L. Ed. 2d 503].) Furthermore, the error unconstitutionally undermined the reliability of the special circumstance determination in violation of the Eighth Amendment. (See *Beck v. Alabama* (1980) 447 U.S. 625; see also Claim 10 § H(3), p. 158 and Claim 59 § G, pp. 548-51, incorporated herein.)

B. Failure To Define "Actual Killer" And To Instruct On Causation

One of the alternative means of returning the felony murder special circumstance was for the jury to find that appellant "actually killed a human being. . . ." (6 CT 1293.) However, because there were multiple shooters and unresolved factual questions as to which shooters actually caused the victims' death (see Guilt Phase: Statement Of Facts § D(7) and (8), pp. 32-33, and § F, pp. 40-41, incorporated herein), the term "actual killer" should have been defined and the jurors should have been instructed on the law of causation.

Under long-settled California law, the trial court is responsible for ensuring that the jury is correctly instructed on the law. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The court must instruct sua sponte on those principles which are openly and closely connected with the evidence presented and are necessary for the jury's proper

understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Moreover, the court has a duty to sua sponte define terms which have a "technical meaning peculiar to the law." (*People v. McElheny* (1982) 137 Cal.App.3d 396, 403; *see also People v. Pitmon* (1985) 170 Cal.App.3d 38, 52.) Here, the judge failed to fulfill his duty because the term "actual killer" was clearly a technical term requiring definition and causation was clearly an issue openly and closely connected with the evidence.

Failure to provide these essential instructions violated state law and the federal constitution. In *Enmund v. Florida* (1982) 458 U.S. 782, 797 the United States Supreme Court held that the death penalty, imposed under the state felony-murder rule, was disproportionate under the 8th Amendment for a robber who did not himself kill, attempt to kill or intend that a killing take place or that lethal force be implied. In *Tison v. Arizona* (1987) 481 U.S. 137, 158, the Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." (*Id.* (fn. omitted).) *Tison* and *Enmund* define the minimum conduct necessary for an individual to be death eligible. Under California law, a defendant found guilty of felony murder, but who is not the actual killer, may be subjected to capital punishment or life without parole under Cal. Pen. Code § 190.2(d) only if he was a major participant in the underlying felony and acted with reckless indifference to human life. (See. e.g., *People v. Estrada* (1995) 11 Cal.4th 568, 575-576; *People v. Purcell* (1993) 18 Cal.App.4th 65, 72-73; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 fn. 16.)

In the present case, the jurors could not have reliably made the "actual killer" finding required by *Tison/Enmund* and *Estrada* without further instructions defining actual killer in terms of causation. (See CALCRIM 240,

Bench Notes ["If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. [Citations.]" [Emphasis by CALCRIM].)

In sum, because the instructions omitted an essential contested element of the special circumstance allegation, the special circumstance verdict should be reversed. (See *People v. Prieto* (2003) 30 Cal.4th 226, 256-57 [prosecution must prove error harmless].) Additionally, the death verdict should also be reversed. (See Claim 59 § G, pp. 548-51, incorporated herein.)

C. Use Of The Phrase "If You Find That A Defendant Was Not The Actual Killer" Unconstitutionally Shifted The Burden Of Proof

The jurors were instructed as follows: "If you find that a defendant was not the actual killer of a human being . . ." (6 CT 1293, ¶ 4, line 1.) By using the phrase "if you find" this instruction unconstitutionally implied that appellant was obligated to prove he was not the "actual killer." This was so because the instruction failed to assure the jurors understood that, except for affirmative defenses (see e.g., *People v. Lam* (2004) 122 Cal.App.4th 1297, 1301) and preliminary facts (see Evidence Code § 403), the defendant has no burden to present evidence or prove anything at trial. (See *In re Winship* (1970) 397 U.S. 358, 363; *People v. Hill* (1998) 17 Cal.4th 800, 831; *United States v. Blankenship* (11th Cir. 2004) 382 F.3d 1110, 1127.)

D. The Felony Murder Special Circumstance Erroneously Stated The Burden Of Proof In Terms Of Whether The Jurors Were "Satisfied"

CALJIC 8.80.1 as given in the present case instructed as follows:

> . . .[Y]ou cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, and counseled, commanded, induced, solicited, requested, or assisted any act during the commission of the murder in the first degree, or with reckless indifference to human life and as a

> major participant who aided, abetted, counseled, commanded, induced, solicited, requested or assisted in the commission of the crime of burglary or robbery which resulted in the death of a human being, namely, Ramon Morales, Martha Morales or Fernando Martinez. (53 RT 10457:11-24; 6 CT 1293.)

By using the phrase "unless you are satisfied" the instructions improperly defined the burden in terms of the jurors' subjective opinion. Proof beyond a reasonable doubt does not turn on whether or not the jurors subjectively believe the defendant guilty. Rather, the jurors must determine whether the prosecution has actually proved every element of the charge beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466; *In re Winship, supra*, 397 U.S. 358.)

Accordingly, because the instruction unconstitutionally defined the burden of proof, the special circumstance should be reversed. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.)

E. The Jurors Were Erroneously Permitted To Consider Consciousness Of Guilt In Deciding The Alleged Special Circumstances

In California death eligibility is established by proof beyond a reasonable doubt of "special circumstances" in addition to a first-degree murder. (Penal Code § 190.2 et seq.) The purpose of the special circumstance is to narrow the class of death-eligible individuals as required by the Eighth Amendment. (*Gregg v. Georgia* (1976) 428 U.S. 153; see also Claim 54, p. 497, incorporated herein.) Therefore, to faithfully implement the Eighth Amendment, the special circumstance must be founded on evidence which logically and reliably allows the jurors to infer that the defendant committed an act and had a mens rea which was above and beyond that required for first-degree murder. (See generally *Beck v. Alabama* (1980) 447 U.S. 625 [Eighth

Amendment requires heightened reliability as to both guilt and penalty determinations].)

However, consciousness of guilt evidence such as flight and false statements do not logically and reliably prove the commission of acts and/or mens rea above and beyond the underlying charge of murder. (See Claim 46, pp. 433-44, incorporated herein [improper inference from consciousness of guilt].)

The essence of consciousness of guilt evidence is that it shows a fear of apprehension and, hence, is probative of whether the defendant committed the crime. Fear of apprehension, however, while relevant to the issue of whether a crime was committed, does not have any logical relevance as to the nature of the crime the defendant committed.

For example, fear of apprehension may be relevant on the question of whether a criminal homicide was committed but it does not establish that the homicide was committed with malice aforethought or premeditation and deliberation. (See *People v. Anderson* (1968) 70 Cal.2d 15, 32-33; *Commonwealth v. Anderson* (Mass. 1985) 486 N.E.2d 19, 23, fn 12; see also, LaFave (1972) *Criminal Law*, § 33 at 565; *Solomon v. Commissioner* (E.D.N.Y. 1992) 786 F.Supp. 218, 225 [acts subsequent to victim's death cannot show killing was committed with "depraved indifference."].)

In other words, while consciousness of guilt evidence is "highly probative of whether defendant committed the crime, ... it does not bear upon the state of the defendant's mind at the time of the commission of the crime." (*People v. Anderson, supra*, 70 Cal.2d at 33; but see, *People v. Anderson* (1985) 38 Cal.3d 58, 62 [Dicta that post-offense conduct "may be relevant" to state of mind before crime but not considering whether such evidence can show more than simply a criminal versus a non-criminal state of mind.]; see

also *U.S. v. Felix-Gutierrez* (9th Cir. 1991) 940 F.2d 1200, 1207 [probative value of flight depends, *inter alia*, upon whether consciousness of guilt concerns the crime charged].)

In the present case the jury was given two consciousness of guilt instructions whose language permitted the jurors to consider consciousness of guilt in determining the special circumstances. (Flight – CALJIC 2.52, 6 CT 1245; False Statements – CALJIC 2.03, 6 CT 1232.) Therefore, those instructions violated the Eighth Amendment by undermining the reliability of the death eligibility and sentencing verdicts.

F. The Errors Violated State Law And The Federal Constitution

The above errors individually and cumulatively violated appellant's state (Article I, section 7 and 15) and federal constitutional rights to due process and trial by jury. The errors also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044;

see also § 1093(f) [power to instruct jury]; § 1127 [same].)[321] The judge's erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

G. The Errors Individually And Cumulatively Warrant Reversal Of The Felony Murder Special Circumstances

The above errors were prejudicial as to the robbery and burglary special circumstances because the evidence as to those charges was closely balanced. (See Claim 12 § D(2)(a), pp. 201-03, incorporated herein.) In fact, the inability of the jurors to reach a verdict as to the firearm use allegation suggests that the jurors could not agree as to whether appellant was an "actual killer."[322] Therefore, to find the felony murder special circumstance, any juror who did not find that appellant was an "actual killer," was required to find either (1) an intent to kill or (2) reckless disregard under the *Tison* (*Tison v. Arizona*, *supra*, 481 U.S. 137) standard. This question was also closely

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[321] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

[322] The jury could not reach a verdict as to whether appellant personally used a firearm. (See Guilt Statement Of Case, § C, p.11, incorporated herein.)

balanced because the only evidence that appellant knew Antonio Sanchez intended to kill Ramon Morales came from Jose Luis Ramirez, whose credibility was subject to dispute. (See Claim 10 § B(2)(a), pp.141-46, and § D, pp.147-50, incorporated herein.) And, the jurors' inability to reach a verdict as to the conspiracy to murder allegations (4 CT 996-97) suggested that one or more jurors failed to find that appellant intended to kill.

The substantial errors identified above warrant reversal of the felony murder special circumstances under both the state (*People v. Watson* (1956) 46 Cal.2d 818) and federal (*Chapman v. California* (1967) 386 U.S. 18) standards of prejudice.

As a result of this reversal, the death eligibility finding should also be reversed if the multiple murder special circumstance is also reversed as contended below. (See Claim 55, pp. 498, incorporated herein.)

However, even if the multiple murder special circumstance is not reversed, the reversal of the felony-murder special circumstances was prejudicial as to penalty. The penalty decision was closely balanced (see Claim 59 § G) and, therefore, the elimination of the two felony-murder aggravators – which the jurors were expressly instructed to consider as to penalty (6 CT 1191) – should warrant reversal of the penalty verdict.

CLAIM 54

CALIFORNIA UNCONSTITUTIONALLY ALLOWS DEATH ELIGIBILITY TO BE PREDICATED ON FELONY MURDER

Allowing felony murder to be a death eligibility factor (special circumstance) in appellant's case violated the federal constitution (8th and 14th Amendments) because the felony murder special circumstance:

1) Fails to narrow the class of felony murderers eligible for the death penalty. (See generally *Godfrey v. Georgia* (1980) 446 U.S. 420);

2) Fails to require the prosecution to prove mens rea (see *People v. Anderson* (1987) 43 Cal. 3d 1104, 1156-62, Broussard, J., dissenting; *Hopkins v. Reeves* (1995) 524 U.S. 88, 99-100);

3) Fails to require that the killing be intentional;

4) Violates equal protection by allowing execution of those who do not intend to kill while not permitting execution of one who intentionally kills with premeditation and deliberation (U.S. Const., 8th and 14th Amendments);

5) ". . . [E[rodes the relationship between criminal liability and moral culpability." (*People v. Washington* (1965) 62 Cal.2d 777, 783.)

In light of *People v. Schmeck* (2005) 37 Cal.4th 240 appellant requests reconsideration of this Court's decisions rejecting the above issues (see e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 968) without full briefing on those issues. (See Claim 7, p. 105, fn. 100, incorporated herein.)

CLAIM 55

THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL[323]

Penal Code § 190.2(a)(3) permits death eligibility based upon the defendant's commission of more than one murder. However, because this special circumstance presents a broad class, composed of persons of many different levels of culpability, it is overly broad and in violation of the Eighth Amendment of the federal constitution. This is so because the multiple murder special circumstance creates "the potential for impermissibly disparate and irrational sentencing because [it] encompass[es] a broad class of death eligible defendants without providing guidance to the sentencing jury as to how to distinguish among them. [Footnote omitted.]" (*U.S. v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1444.)

Accordingly, the multiple-murder special circumstance finding[324] and the penalty verdict should be reversed.[325]

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[323] This Court has previously rejected this issue. (See *People v. Sapp* (2003) 31 Cal.4th 240.) Therefore, in light of *People v. Schmeck* (2005) 37 Cal. 4th 240 appellant requests this Court to reconsider the issue even though the briefing on it is not complete. (See Claim 7, p. 105, fn. 100, incorporated herein.)

[324] See 4 CT 979.

[325] See Claim 89, pp. 711-12, incorporated herein [reversal of special circumstance warrants reversal of death verdict because juror consideration of even a single invalid aggravator is prejudicial in a closely balanced case].

Furthermore, if the felony murder special circumstances are also reversed, as contended in Claims 10-14, 52-54) the death eligibility determination should be reversed.

CLAIM 56

THE SPECIAL CIRCUMSTANCE VERDICTS SHOULD BE REVERSED BECAUSE THEY WERE NOT BASED ON A VALIDLY-ENACTED STATUTE[326]

Appellant's jury was allowed – based on a finding that appellant was a "major participant" in the crime who acted with "reckless indifference to human life" – to find the felony murder special circumstances without finding that appellant either intended to kill or was the actual killer. (6 CT 1293-94.) However, prior to the purported enactment of Proposition 115, an initiative measure on the ballot in the June, 1990, primary election, the jury would have had to find intent to kill, not just reckless indifference. (See generally, *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978 (*Yoshisato*).)[327]

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[326] In light of *People v. Schmeck* (2005) 37 Cal. 4th 240 appellant requests that the Court reconsider this issue even though the briefing on it is not complete. (See Claim 7, p. 105, fn. 100, incorporated herein.)

[327] Appellant submits that the *Yoshisato* Court's speculations about voter intent were unfounded, for reasons set forth in Justice Mosk's dissent. (2 Cal.4th at p. 997 (dis. opn. of Mosk, J.).) He respectfully urges reconsideration of its holding. Such reconsideration will compel reversal of the special-circumstances findings, and the death judgment, in his case.

CLAIM 57: CUMULATIVE ERROR AND PREJUDICE

CLAIM 57

THE GUILT PHASE ERRORS WERE CUMULATIVELY PREJUDICIAL

The guilt phase claims [Claims 1-51] and special circumstance claims [Claims 52-56] identified in this brief were cumulatively prejudicial when considered together with each other and with all of the other guilt, special circumstance and penalty phase errors in appellant's trial. The doctrine of establishing prejudice through the cumulative effect of multiple errors is well settled. (See *People v. Hill* (1998) 17 Cal.4th 800, 845 [numerous instances of prosecutorial misconduct and other errors at both stages of the death penalty trial were cumulatively prejudicial: the combined (aggregate) prejudicial effect of the errors was greater than the sum of the prejudice of each error standing alone]; *Delzell v. Day* (1950) 36 Cal.2d 349, 351; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Ford* (1964) 60 Cal.2d 772, 798; *Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 180; *People v. McGreen* (1980) 107 Cal.App.3d 504, 519-520.)

State law 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. (See *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

Additionally, when errors of federal constitutional magnitude combine with nonconstitutional errors, the combined effect of the errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470.)

Accordingly, this Court's review of guilt phase errors is not limited to the determination of whether a single error, by itself, constituted prejudice.

Moreover, the errors also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

These errors were prejudicial because the evidence was closely balanced. (See Claim 12 § D(2)(a), pp. 201-03, incorporated herein.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) In the present case, the error was substantial and the question of whether appellant knowingly and intentionally committed or aided and abetted robbery and murder was closely balanced. Therefore, the judgement should be reversed under the *Watson* standard.

Moreover, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the errors could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal

constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Finally, even if the errors were not prejudicial as to guilt, they were prejudicial as to penalty, under both the state and federal standards of prejudice because cumulatively they undermined the fairness and reliability of the penalty determination which was closely balanced. (See Claim 10 § H(3), p. 158 and Claim 59 § G, pp. 548-51, incorporated herein.)